Contemporary Problems in American Federalism

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Dred Scott v. Sanford
60 U.S. (19 How.) 393 (1857)

[Dred Scott was a slave in Missouri. His master took him to live in Rock Island, Illinois, a free state where slavery was illegal, and subsequently took him back to Missouri. Scott sued in a Missouri state court for his freedom. He was adjudicated to be a free man, but this decision was reversed by the Missouri Supreme Court. He then sued in federal court for his freedom. Jurisdiction in the federal court was based upon diversity of citizenship because Scott claimed to be a citizen of Missouri and his master was a citizen of New York. The decision in this case lead directly to the Civil War and greatly influenced the passage of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.]

Taney, C.J., delivered the opinion of the Court:

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There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant & citizen of New York.

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That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

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The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as salves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before

the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they though proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can be naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately cloth him with all the privileges of a citizen in every other State, and in its own courts?

The court thinks the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the

United States, and, consequently, was not entitled to sue in its courts. It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

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This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood, that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, not their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

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It would be impossible to enumerate and compress in the space usually allotted to an opinion of a court, the various laws, marking the condition of this race, which were passed from time to time after the Revolution, and before and since the adoption of the Constitution of the United States. In addition to those already referred to, it is sufficient to say, that Chancellor Kent, whose accuracy and research no one will question, states in the sixth edition of his Commentaries, (published in 1848, 2 vol., 258, note b,) that in no part of the country except Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State. It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. The right of naturalization was therefore, with one accord, surrendered by the States, and confided to the Federal Government. And this power granted to Congress to establish an uniform rule of naturalization is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class. And when we find the States guarding themselves from the indiscreet or improper admission by other States of emigrants from other countries, by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the States a much more

important power -- that is, the power of transforming into citizens a numerous class of persons, who in that character would be much more dangerous to the peace and safety of a large portion of the Union, than the few foreigners one of the States might improperly naturalize. The Constitution upon its adoption obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States any one, no matter where he was born, or what might be his character or condition; and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.

A clause similar to the one in the Constitution, in relation to the rights and immunities of citizens of one State in the other States, was contained in the Articles of Confederation. But there is a difference of language, which is worthy of note. The provision in the Articles of Confederation was, "that the free inhabitants of each of the States, paupers, vagabonds, and fugitives from justice, excepted, should be entitled to all the privileges and immunities of free citizens in the several States." It will be observed, that under this Confederation, each State had the right to decide for itself, and in its own tribunals, whom it would acknowledge as a free inhabitant of another State. The term free inhabitant, in the generality of its terms, would certainly include one of the African race who had been manumitted. But no example, we think, can be found of his admission to all the privileges of citizenship in any State of the Union after these Articles were formed, and while they continued in force. And, notwithstanding the generality of the words "free inhabitants," it is very clear that, according to their accepted meaning in that day, they did not include the African race, whether free or not: for the fifth section of the ninth article provides that Congress should have the power "to agree upon the number of land forces to be raised, and to make requisitions from each State for its quota in proportion to the number of white inhabitants in such State, which requisition should be binding."

Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject; the free and the subjugated races. The latter were not even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defence. And it cannot for moment be supposed, that a class of persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words "free inhabitants," in the preceding article, to whom privileges and immunities were so carefully secured in every State. But although this clause of the Articles of Confederation is the same in principle with that inserted in the Constitution, yet the comprehensive word inhabitant, which might be construed to include an emancipated slave, is omitted; and the privilege is confined to citizens of the State. And this alteration in words would hardly have been made, unless a different meaning was intended to be conveyed, or a possible doubt removed. The just and fair inference is, that as this privilege was about to be placed under the protection of the General Government, and the words expounded by its tribunals, and all power in relation to it taken from the State and its courts, it was deemed prudent to describe with precision and caution the persons to whom this high privilege was given -- and the word citizen was on that account substituted for the words free inhabitant. The word citizen excluded, and no doubt intended to exclude, foreigners who had not become citizens of some one of the States when the Constitution was adopted; and also every description of persons who were not fully recognized as citizens in the several States. This, upon any fair construction of the instruments to which we have referred, was evidently the object and purpose of this change of words.

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitution that we have given.

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And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

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[Justice Taney also held that the laws of Illinois prohibiting slavery could not free Scott once he returned to Missouri]

[Justice McLean dissented. He would have held that being born under the Constitution and Laws of the United States rendered one a citizen of the United States. Naturalization is required only for one of foreign birth. Justice Curtis, who also dissented, held that the Constitution left to the states the determination of what citizens born within their respective limits would be citizens of the United States; however he thought that only Congress could remove the disabilities of alienage. Both Justices would have upheld Congress' power to prohibit slavery in the territories. They also would have held that voluntarily taking a slave into a free territory manumits the slave as effectively as a deed of emancipation

Slaughter-House Cases
83 U.S. 36 (1872)

[The three consolidated cases challenged an act of the legislature of the State of Louisiana, entitled: *"*An act to protect the health of the City of New Orleans, to locate the stock landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company.'' Section 1 of the act made it unlawful to slaughter any animal, or to establish any stock- yards, slaughter-houses, or abattoirs at any point or place within the city of New Orleans or in other specified areas around New Orleans. The act provided that the 'Crescent City Stock Landing and Slaughter-House Company' may establish themselves as a stockyards or slaughter-house in this area with a sufficient capacity to accommodate all butchers, and in which to slaughter 500 animals per day. The company was given the exclusive privilege for twenty five years to slaughter therein all animals, the meat of which is destined for sale in the parishes of Orleans and Jefferson.

The State argued that this grant of exclusive right or privilege was a police regulation for the health and comfort of the people within the power of the State legislatures, unaffected by the Constitution of the United States previous to the adoption of the thirteenth and fourteenth articles of amendment. The plaintiffs argued that the statute violated the Thirteenth Amendment to the United States Constitution and the privileges and Immunities, due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.]

Mr. Justice MILLER delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State.

. . . .

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens-the whole of the butchers of the city-of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families, and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

. . . .

It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body-the supreme power of the State or municipality-to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places *and nowhere else*.

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The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details.

'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,' says Chancellor Kent, 'be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.' This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise.

In *Gibbons* v. *Ogden*,[FN16] Chief Justice Marshall, speaking of inspection laws passed by the States, says: 'They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government-all which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation.'

FN16 9 Wheaton, 203.

. . . .

It can readily be seen that the interested vigilance of the corporation created by the Louisiana legislature

will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation, is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well-guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

. . . .

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

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The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles.

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Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human

rights; additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. . . . The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

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

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

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government-a declaration designed to establish the freedom of four millions of slaves-and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

. . . .

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.
. . . .

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. . . .

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship-not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.’

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words ‘privileges and immunities' in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares ‘that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.’

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: ‘The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.’

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.[FN22]

FN22 4 Washington's Circuit Court, 371.

‘The inquiry,’ he says, ‘is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.’

. . . .

In the case of *Paul* v. *Virginia*,[FN24] the court, in expounding this clause of the Constitution, says that ‘the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens.’

FN24 8 Id. 180.

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States-such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of *Crandall* v. *Nevada*.[FN25] It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.' And quoting from the language of Chief Justice Taney in another case, it is said 'that *for all the great purposes for which the Federal government* was established, we are one people, with one common country, *we are all citizens of the United States;*' and it is, as such citizens, that their rights are supported in this court in *Crandall* v. *Nevada*.

FN25 6 Wallace, 36.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

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

jurisdiction the equal protection of its laws.'

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

'Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.'

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statement seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a

determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights-the rights of person and of property-was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are

AFFIRMED.

Mr. Justice FIELD, dissenting:

I am unable to agree with the majority of the court in these cases, and will proceed to state the reasons of my dissent from their judgment.
. . . .

The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.
. . . .

The counsel for the plaintiffs in error have contended, with great force, that the act in question is also inhibited by the thirteenth amendment.

That amendment prohibits slavery and involuntary servitude, except as a punishment for crime, ... [T]he language of the amendment is not used in a restrictive sense. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form.

. . . . The counsel of the plaintiffs in error therefore contend that 'wherever a law of a State, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others,' there involuntary servitude exists within the meaning of the thirteenth amendment.
. . . .

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the thirteenth amendment. The provisions of the fourteenth amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government. It first declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' It then declares that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'
. . . .

In the Dred Scott case this subject of citizenship of the United States was fully and elaborately discussed.
. . . .

The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the officiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the State, or by the residence of the citizen therein. They do not derive their existence from its legislation, and cannot be destroyed by its power.

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited

Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

What, then, are the privileges and immunities which are secured against abridgment by State legislation?
. . . .

The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. They are found in the second section of the fourth article, which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' and they have been the subject of frequent consideration in judicial decisions. In *Corfield* v. *Coryell*,[FN31] Mr. Justice Washington said he had 'no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign;' and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be 'all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.' This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those *which of right belong to the citizens of all free governments*. . . .

FN31 4 Washington's Circuit Court, 380.

. . . .

Now, what the clause in question does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any State. The fourteenth amendment places them under the guardianship of the National authority. . . . .

Justice BRADLEY, also dissenting:

I concur in the opinion which has just been read by Mr. Justice Field; but desire to add a few observations for the purpose of more fully illustrating my views on the important question decided in these cases, and the special grounds on which they rest.
. . . .

I think sufficient has been said to show that citizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest

importance. And to say that these rights and immunities attach only to State citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient estimate of constitutional history and the rights of men, not to say the rights of the American people.
. . . .

The amendment also prohibits any State from depriving any person (citizen or otherwise) of life, liberty, or property, without due process of law.

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.
. . . .

The Struggle over Citizenship under United States Law

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I. The Importance of Citizenship

Under most statutes and constitutional provisions in the United States the question of citizenship is irrelevant. Statutes rarely regulate on the basis of citizenship. Crimes are defined without reference to one's status as a citizen. A murder or a robbery is defined the same for everyone. Commercial laws are generally applicable without regard to one's status as a citizen. The elements of a cause of action in an automobile collision case are defined regardless of the citizenship of the parties.

The American Bill of Rights and the Due Process and Equal Protection clauses of the Fourteenth Amendment are applicable to all persons. "Persons" include citizens, aliens (even illegal aliens[1]), and corporations.[2] No one – citizen or non-citizen – can be subjected to slavery or involuntary servitude under the Thirteenth Amendment. The Writ of Habeas Corpus is available to citizen and alien alike.[3] Its availability depends more upon where you are rather than who you are.[4]

The notion that persons have rights is grounded in natural law. The Declaration of Independence did not just talk about the rights of colonial citizens; it talked about the Rights of Mankind. This principle of inclusion is reflected in most international human rights documents today, whether in the Declaration of Human Rights, the European Convention on Human Rights, or any of the other regional or national articulations of rights.

Yet citizenship does matter under American law. While most rights are personal, certain political rights are grounded on one's citizenship. The right to vote, the right to hold public office, and the right to sit on a jury are rights that under United States law are reserved for citizens. The Supreme Court has held that public employment that is "intimately related to the process of democratic self-government" can be

[1] Plyler v. Doe, 457 U.S. 202 (1982) (exclusion of undocumented school-age children from a free public education violates equal protection).
[2] Citizens United v. Federal Elections Commission, 130 S.Ct. 876 (2010) (restrictions on corporate and union campaign spending violate the free speech provision of the First Amendment).
[3] Boumediene v. Bush, 128 U.S. 2229 (2008).
[4] *Ibid*.

restricted to citizens.[5] However, a state has no power on its own to restrict aliens from government employment that has no "political function"[6] or from various occupations.[7]

The most important right of citizenship is the right to remain in the country. Similarly, citizens have the right to reenter the country once they have left.[8] Citizens cannot normally be deported, even for commission of the most heinous crime.[9] They may be incarcerated. In the United States, they may even be executed. But they cannot be sent out of the country. The horror of a citizen being permanently barred from the United States was depicted in a short story published during the Civil War by Edward Everett Hale, "A Man without a Country." [10] Deportation is reserved for non-citizens only.[11]

Also, Article IV of the United States Constitution entitles citizens of each state to all the "privileges and immunities" of citizens in the several states. This clause protects "those privileges and immunities which are, in their nature, fundamental; which belong, of right to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[12] Article IV requires that a state accord citizens of other states the same privileges and immunities that a state accords its own citizens. The Clause does not provide positive protection for any particular right.[13] The Privileges and Immunities Clause of the Fourteenth Amendment does provide positive protection, but only to those limited privileges and immunities that are particular to United States citizenship.[14]

Eligibility for some federal entitlement programs is restricted on the basis of citizenship.[15] Although the Constitution prohibits states from discriminating against aliens in their entitlement programs, they can do so when authorized by Congress.[16]

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[5] Ambach v. Norwick, 441 U.S. 68 (1978) (public school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (state police officers); Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (probation officers).

[6] Sugarman v. Dougall, 413 U.S. 634 (1973) (civil service positions).

[7] In re Griffiths, 413 U.S. 717 (1973) (law licenses); Examining Board v. Flores de Otero, 426 U.S. 572 (1976) (civil engineering); Bernal v. Fainter, 467 U.S. 216 (1984) (notaries public).

[8] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[9] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (Congress cannot expatriate someone who departed and remained outside the United States to avoid military service even in time of war or national emergency.)

[10] Hale, The Man Without a Country, The Atlantic Monthly, Vol. 12, No. 73 (December 1863).

[11] Harisiades v. Shaughnessy, 342 U.S. 580, 586-587 (1952) (aliens, unlike citizens, have no right to remain in the United States as a matter of right); Fleming v. Nester, 363 U.S. 603 (1960) (alien who was a former communist ordered deported and deprived of his social security benefits).

[12] Corfield v. Coryell, 6 F.Cas. 546, 551 (E.D. Pa. 1823).

[13] Austin v. New Hampshire, 420 U.S. 656, 660 (1975) (The Clause "establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment.")

[14] *See* Part V, *infra*.

[15] For instance, Congress substantially restricted access by aliens to federally subsidized housing in the Housing & Community Development Act of 1980. 42 USC § 1436a. Similarly, in 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, more popularly known as the Welfare Reform Act. Pub.L. No. 104-193, 110 Stat. 2105 (1996). The Act disqualifies a large number of aliens from a number of "federal public benefit" programs. 8 USC § 1611(c) (B).

[16] Compare Graham v. Richardson, 403 U.S. 365 (1971) (state restriction on welfare for aliens violated equal protection) with Mathews v. Diaz, 426 U.S. 67 (1976) (congressional authorization for a state to limit welfare for aliens). The Welfare Reform Act, *supra* n.15, provides that a state may make determinations concerning eligibility of qualified aliens for defined public assistance programs and the state shall be deemed "to have chosen the least

II. The Original Conception of Citizenship

One of the first things you would expect to find in a constitution is a definition of citizenship. This definition was sadly missing from the original Constitution adopted in 1789. Indeed, the question of citizenship was not an issue that occupied the attention of the Framers. The Preamble to the Constitution says that the Constitution is ordained and established by "We the People of the United States." Most of the references to citizenship are to state citizenship. Article I, Section 2 states that the House of Representatives shall be chosen every second year by "the People of the several States." Article III, Section 2 gives the federal courts jurisdiction in cases between "a State and Citizens of another State," between "Citizens of different States," between "Citizens of the same State claiming Lands under Grants of different States," or between "a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Article IV, Section 2 provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Where citizenship in the United States is mentioned at all in the Constitution it is in reference to holding political office. Article I, Section 2 states that a member of the House of Representatives must be "a Citizen of the United States." Article, I, Section 3 states that a Senator shall be "a Citizen of the United States" and "an Inhabitant of that State." Article II, Section 1 states that the President shall be "a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution."

Article I, Section 8 gives Congress the power "to establish an uniform Rule of Naturalization." But it does not further elaborate on that power and says nothing about those persons who were already residents of the United States.[17]

The most natural reading of the Constitution was that the Framers considered those persons who were citizens of a state at the time of the adoption of the Constitution to also be citizens of the United States. For these individuals, state citizenship preceded national citizenship. Congress also had the power to nationalize persons coming into the United States. Whether they were also citizens of a state was not defined.

III. Dred Scot Calls National Citizenship into Question

It was slavery that brought the definition of citizenship before the United States Supreme Court. *Dred Scott v. Sandford*[18] involved a suit by a slave, who resided in Missouri, for his freedom against his master, who was a citizen of New York. Dred Scott had been taken by his former master Dr. Emerson, a citizen of Missouri and a member of the United States military, first into Illinois and then into what was then the Wisconsin Territory near what is now St. Paul, Minnesota, where they resided for several years. At the end of Dr. Emerson's military duty, Dred Scott returned to Missouri with him. He then sued for his freedom in the state courts of Missouri. Dred Scott won in the trial court, but the case was reversed and remanded by the Missouri Supreme Court. Dred Scott then filed a new law suit in the federal courts.

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restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." 8 USC § 1601 (7).

[17] *See* Part VII, *infra.*

[18] 60 U.S. 393 (1856).

Dred Scott relied primarily upon the English precedent, *Somerset v. Steuart,*[19] which had held that slavery was a inconsistent with natural law and could only be recognized where the positive law permitted it. Because slavery was not permitted by positive law in England, any slave brought into England was automatically emancipated. Dred Scott argued that he was emancipated by his residence in Illinois and Minnesota, where slavery was not allowed. Indeed, Illinois was part of the old Northwest Territory and the Northwest Ordinance, originally passed by the Continental Congress prior to the adoption of the Constitution, outlawed slavery in that territory. The Missouri Compromise further outlawed slavery as a matter of federal law in Minnesota, where Dred Scott had also resided.

Dred Scott's federal lawsuit claimed jurisdiction based on diversity of citizenship under Article III of the Constitution. Scott claimed to be a citizen of Missouri. His former master had died and his new master was a citizen of New York. The United States Supreme Court in an opinion written by Chief Justice Roger Taney held that the Court did not have jurisdiction but then remarkably went on to declare that the Missouri Compromise denied slave holders their property in violation of Due Process. Justices McLean and Curtis dissented. Dred Scott lost badly.

Justice Taney's opinion for the Court opened with the question of who could be considered a citizen of the United States. Diversity jurisdiction is determined by state citizenship. But Taney held that Americans possessed two distinct citizenships: citizenship in a state and citizenship in the United States. The two citizenships were separate, and not all state citizens had to be recognized as citizens under the United States Constitution. Therefore, Taney inquired whether persons of African descent could be considered citizens under the United States Constitution regardless whether they were state citizens.

To Taney, citizenship was not dependent upon whether one was a freeman or a slave. Rather the question turned on the race of the person. Could black persons whose ancestors were brought to the United States as slaves claim membership in the political community formed by the Constitution of the United States? If they could, they then could claim that they were entitled to all the privileges and immunities guaranteed by the Constitution, including the right to travel to other states on an equal basis with the citizens of that state and the right to sue in the courts of the United States. Obviously recognizing such rights was not favored by white Southerners, who comprised a majority of the court.

Justice Taney observed that:

> [Black persons] had for more than a century before [the Constitution was framed and adopted] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually

[19] 1 Lofft's Rep. 1, 82 (1772). The judgment itself was rendered orally and there is no authoritative version of it. Wise, THOUGH THE HEAVENS MAY FALL, Chapters 16 and 17 (2005).

acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[20]

Taney distinguished African Americans from Native Americans. The latter had lived on the land before the white man arrived and now were considered to be citizens of conquered nations.

African Americans came to America involuntarily. They were not citizens, and Congress did not have the power to make them citizens of the United States. The Declaration of Independence in declaring that "All men are created equal" did not include African Americans. The Court found similar exclusions in legislation and in executive orders.

While states could confer within their own limits the rights of citizenship on any person, they could not confer the right and privilege to be recognized as a citizen of the United States or as a citizen by any other state. Thus, because a state citizen could vote in a state election did not mean that a state citizen could vote in a federal election. Similarly, because a state citizen had the right to sue in state court did not mean that he would be recognized as a state citizen who could sue in federal court.

The *Dred Scott* opinion thus revised the concept of citizenship. The United States was founded on the principle of dual citizenship. States could decide whom they would recognize as citizens, but citizenship at the federal level was more restrictive. Native Americans were not citizens, but at least they had a kind of citizenship as members of their tribes. African Americans were not and could not be recognized as citizens of the United States, even if some states made them citizens of that state. Because African Americans had no rights under the Constitution, they could never vote in federal elections or hold federal office, could not sue in the federal courts, could not travel freely from state to state, and could not be given any rights reserved for citizens by Congress.

No wonder the decision was a call to action by Abolitionists and others in the North and paved the way for a bloody civil war just four years later.

IV. Reconstruction and the Fourteenth Amendment Redefine Citizenship

The South lost the Civil War and the slaves were freed. But what was their status under the law? Did they have any rights that the white man was bound to respect? Were they citizens of the United States who could exercises the privileges and immunities of citizenship?

Congress responded with the Civil Rights Act of 1866.[21] Relying on its powers under Section 2 of the Thirteenth Amendment that abolished slavery, Congress declared that all persons born or naturalized in the United States were United States citizens. It then went on to proclaim that all citizens had the same rights as "white citizens" "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property."[22] It also provided that all citizens had the same right as "white citizens" to inherit, purchase, lease, sell, hold, and convey real and personal property."[23]

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[20] 60 U.S. at 407
[21] 14 Stat. 27 (1866).
[22] This provision is codified today in 42 U.S.C. § 1981.
[23] This provision is codified today in 42 U.S.C. § 1982.

However the ghost of *Dred Scott* still hovered. President Andrew Johnson vetoed the Act, claiming that it exceeded Congress' power under the Thirteenth Amendment. Congress passed the Act over President Johnson's veto, but was uncomfortable should a showdown occur in the Supreme Court.[24] Congress therefore constitutionalized the Civil Rights Act of 1866 by proposing the Fourteenth Amendment that was then ratified by the States. Section 1 of the Fourteenth Amendment left no doubt about the question of citizenship in the United States:

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

Corfield v. Coryell[25] had defined what were the privileges and immunities of citizenship and they included all the basic rights enumerated in the Civil Rights Act of 1866. Just to be sure of its constitutionality, Congress re-passed the Civil Rights Act of 1866 under the Fourteenth Amendment.[26]

V. Slaughterhouse Calls Citizenship into Question Again

Under United States law nothing is ever really free from doubt. This was demonstrated by the Supreme Court's first decision interpreting the Fourteenth Amendment, the *Slaughterhouse Cases*.[27] It is ironic that the first case to come before the Supreme Court involving the interpretation of the Fourteenth Amendment was not a civil rights case, but a case involving the constitutionality of a Louisiana statute that granted to a corporation the exclusive right to operate facilities in New Orleans to slaughter livestock. The Court sustained the legislation. It held that prohibiting competitors from operating slaughterhouses in New Orleans did not violate either the Thirteenth Amendment or the due process or equal protection clauses of the Fourteenth Amendment. Most significantly, however, the Court held that the right to operate a business or earn a living was not a privilege or immunity protected from state interference by the Privileges and Immunities Clause of the Fourteenth Amendment.

In doing so, the Court resurrected the idea of dual citizenship, which many thought had been buried by the Fourteenth Amendment. The Court acknowledged that the purpose of the first clause of the Fourteenth Amendment was to overturn the *Dred Scott* opinion and make persons citizens of the United States without regard to their citizenship in a particular State. The Court also noted that state citizenship was derivative of federal citizenship. Thus the Court concluded that:

> "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."[28]

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[24] It was not until over one hundred years later that the Supreme Court held that Congress actually did have power to pass the 1866 Act under the Thirteenth Amendment. Jones v. Alfred F. Meyers, 392 U.S. 409 (1968).
[25] 6 F.Cas. 546, 551 (E.D. Pa. 1823).
[26] 16 Stat. 114 (1870).
[27] 83 U.S. 36 (1872).
[28] 83 U.S. at 74.

The Court went on to declare that the privileges and immunities that adhered to state citizenship were different from the privileges and immunities of national citizenship. The rights declared in the Civil Rights Act of 1866 were privileges and immunities of state citizenship and citizens would have to look to the states and not to the national government to protect them.[29] This ignored the fact that Congress was particularly concerned about the fact that the Southern states were not protecting the rights of black persons. The opinion of the Supreme Court left the federal government powerless to protect the rights of state citizens to vote in state elections or peacefully to assemble or to protect their lives and property.[30]

The privileges and immunities of United States citizenship were narrowly defined and had little to do with the great purposes that provoked the passage of the Fourteenth Amendment. They include the right to travel interstate,[31] the right to petition the federal government,[32] the right to vote in federal elections free of racial discrimination,[33] the right to protection by the federal government when in federal custody[34] or on the high seas or within the jurisdiction of a foreign government, the right to use the navigable waterways of the United States, and rights secured by treaties with foreign nations.[35]

The Court also held that rights secured by the Thirteenth Amendment and the Equal Protection and Due Process clauses of the Fourteenth Amendment were included.[36] However, it was not until 1968 that the Supreme Court held that Congress could cure private racial discrimination through the Thirteenth Amendment.[37] The Due Process and Equal Protection clauses check only state action.[38] They do not apply to private action even when a state itself fails to intervene to protect persons against private deprivations.[39]

The Supreme Court has refused to reexamine its holding in the *Slaughter Housing Cases*. In *McDonald v. City of Chicago*,[40] the Court refused to hold that citizens had a privilege or immunity of United States citizenship to possess firearms. Instead it held that the right was a liberty protected from State interference through the Due Process Clause of the Fourteenth Amendment. The holding had the effect of continuing the emphasis on personal rights under the Due Process Clause without focusing on the rights of citizenship under the Privileges and Immunities Clause. From that perspective, the decision is more inclusive because it protects aliens and others who are not United States citizens.

VI. The Citizenship of Native Americans and Women

[29] 83 U.S. at 76-78.
[30] United States v. Harris, 106 U.S. 629 (1883) (the right to protection when in state custody); United States v. Cruikshank, 92 U.S. 542 (1876) (the right peacefully to assemble); United States v. Reese, 106 U.S. 214 (1876) (the right to vote in a state election).
[31] Crandall v. Nevada, 73 U.S. 35 (1867) (right to travel interstate); Saenz v. Roe, 526 U.S. 489 (1999) (durational residency requirements).
[32] United States v. Cruikshank, 92 U.S. 542, 552-553 (1883).
[33] United States v. Yarbrough, 110 U.S. 651 (1884) (federal election); United States v. Classic, 313 U.S. 299 (1941) (federal primary election).
[34] Logan v. United States, 144 U.S. 263 (1892).
[35] 83 U.S. at 79 -80.
[36] 83 U.S. at 80.
[37] Jones v. Alfred F. Meyers, 392 U.S. 409 (1968).
[38] Civil Rights Cases, 109 U.S. 3 (1883).
[39] DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).
[40] 130 S.Ct. 3020 (2010).

Two other decisions in the late Nineteenth Century illustrated the limited rights of citizenship conferred by the Fourteenth Amendment. They involved whether Native Americans were citizens of the United States and whether women, who clearly were citizens, could exercise the right to vote. The Supreme Court's answer to both of these questions was negative.

The Supreme Court had held in *Worchester v. Georgia*[41] that Indians were citizens of dependent nations under the protection of the federal government and, therefore, state jurisdiction did not extend onto tribal lands. Based on this precedent, Justice Taney distinguished Native Americans from African Americans in the *Dred Scott* decision. Did the Fourteenth Amendment's "born in the United States" alter this relationship and make Native Americans born in the United States citizens?

In *Elk v. Wilkins*,[42] the Court reiterated that Native Americans owed their immediate allegiance to their tribes and were not part of the People of the United States. Elk had severed his tribal allegiance and surrendered himself to the jurisdiction of the United States, but the Court, over the dissent of Justice Harlan, stated that:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.[43]

Congress did naturalize Native Americans in 1924 by statute.[44] In *Ex. Parte Greene,*[45] the Court of Appeals for the Second Circuit held that the Act conferred citizenship on non-consenting Indians and, therefore, Congress had the right to draft them into the military during World War II.

Women were constitutionally born in the United States, but that did not prevent the Supreme Court from holding that they could be denied one of the essential privileges of citizenship, the right to vote. In *Minor v. Happersett,*[46] the Court unanimously held that voting was not coterminous with citizenship. The Court held that nothing in the Constitution provided that one of the privileges or immunities of citizenship was the right of suffrage. States were free under the Constitution to define who could vote. The Court found support in its position in the Fifteenth Amendment. If the Fourteenth Amendment had guaranteed the right to vote to all citizens then the Fifteenth Amendment that prohibited the abridgement of voting "on account of race, color, or previous condition of servitude" would have been unnecessary. The Court had little difficulty in reaching its conclusion:

> Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction

[41] 31 U.S. 515 (1832).
[42] 112 U.S. 94 (1884).
[43] 112 U.S. at 102.
[44] 43 Stat. 253 (1924).
[45] 123 F.2d 862 (2d Cir. 1941), *cert denied*, 316 U.S. 668 (1942).
[46] 88 U.S. 162 (1874).

of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.[47]

Thus, it took the Nineteenth Amendment to the Constitution to give women the right to vote under federal law.

VII. Citizenship through Naturalization

Article I, section 8 gives Congress the power of naturalization and the Fourteenth Amendment specifically recognizes citizenship through naturalization. Congress' power is plenary.[48] States do not share in this power, and attempts by states to regulate the status of aliens have been struck down by the courts.[49]

Once naturalized, a citizen has the same rights as a native born citizen, except perhaps to become president. In *Afroyim v. Rusk*,[50] the Court held that a naturalized citizen could not, without more, lose his citizenship by voting in a foreign election. In *Schneider v. Rusk,*[51] the Court invalidated a law that provided that a naturalized citizen loses his citizenship if he resides abroad for three years. If citizenship is renounced, the renunciation must be voluntary.

An exception is *Rogers v. Bellei,*[52] which distinguished voluntary naturalization for which one applies and naturalization by statute. Bellei was a not born in the United States, but his mother was a United States citizen. By statute he was a United States citizen by birth, but he was required to reside in the United States for a period of years or his citizenship would be lost. The Court, over several vigorous dissents, upheld this provision as a lawful condition subsequent to his acquiring citizenship.

The government can prove renunciation of citizenship by a preponderance of the evidence and not by the stricter "clear and convincing" standard required in cases involving important rights.[53]

One can also lose one's citizenship if it is shown by clear and convincing evidence that it was procured by fraud or deceit. Thus, the government has successfully revoked the citizenship of war criminals who lied about their status on their applications as "displaced persons."[54]

VIII. Anti-Immigration Activists Want to Put Citizenship into Question Again

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[47] 88 U.S. at 177.
[48] Fiallo v. Bell, 430 U.S. 787, 792 (1977); *Cf.*, McCulloch v. Maryland, 17 U.S. 316 (1819).
[49] Hines v. Davidowitz, 312 U.S. 52 (1941) (state regulation requiring aliens to register with the state and carry a state identification card held to be preempted by federal law); Takahaski v. Fish and Game Commission, 334 U.S. 410 (1948) (state law precluding aliens from obtaining a state commercial fishing license is preempted by federal law). *Cf.*, Plyler v. Doe, 457 U.S. 202 (1982) (children of illegal immigrants cannot be excluded from the public schools under the Equal Protection clause).
[50] 387 U.S. 253 (1967).
[51] 377 U.S. 163 (1964).
[52] 401 U.S. 815 (1971).
[53] Vance v. Terrazas, 444 U.S. 252 (1980).
[54] Fedorenko v. United States, 449 U.S. 490 (1981) (upholding the denaturalization of a man who lied on his application even though he claimed his service in a concentration camp was involuntary).

Immigration is a hot topic in the United States today, as it is in many countries. The focus in the United States is mostly on the Mexican border which is perceived to be porous and allows a large number of illegal immigrants to come to the United States to work and establish residence. But the number of illegal immigrants includes persons from all continents and countries.

Once illegal immigrants arrive in the United States, they sometimes give birth to children. Under the language of the Fourteenth Amendment, these children are born in the United States and, consequently, are citizens of the United States. A dramatic example of this occurred when it was discovered that one of the detained terrorists after 2001 had actually been born in the United States and, therefore, was an American citizen.[55]

As with other controversial issues in a democracy, these developments have produced a backlash that is then taken up by politicians. Congressman John Nathan Deal of Georgia introduced a bill in Congress in 2007 to amend the Immigration and Nationality Act to clarify those classes of individuals who are nationals and citizens of the United States at birth. Only those persons born in the United States of parents one of whom is a citizen or national of the United States, or one of who is an alien lawfully admitted for permanent residence or performing active service in the military could be considered "a person born in the United States."[56] The bill was sent to committee and has not been heard from since.

Again in 2010, Senator Lindsey Graham from South Carolina proposed amending the Fourteenth Amendment to exclude from citizenship the children of illegal immigrants born in the United States.[57] While the proposal attracted wide publicity and sympathy among conservatives, it is unlikely that the long process of amending the Constitution and tampering with the Fourteenth Amendment would gain general favor.

What these measures show is that the question of citizenship is not without controversy in the United States even today. The matter becomes more potent when concerns about national security or new immigrants come to the fore. The question of citizenship does matter. The question itself can take on the dimension of a human right when someone has lived in the country a long time, has established ties to the country, and may not have a ready place to go if deported. Like all human rights, it can be easily affected by the politics of the moment and this is why the impartiality of the courts becomes so crucial. While judicial responses have been generally protective of the personal right of citizenship, as *Dred Scott* illustrates, these rights can be in danger if the courts themselves become politicized.

[55] This occurred in one of the cases that challenged United States detention policies in the Supreme Court. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[56] The Birthright Citizenship Act of 2007, H.R. 1940).
[57] New York Times, August 7, 2010, A8, c.5.

The Civil Rights Cases
109 U.S. 3 (1883)

BRADLEY, J.

These cases are all founded on the first and second sections of the act of congress known as the 'Civil Rights Act,' passed March 1, 1875, entitled 'An act to protect all citizens in their civil and legal rights.' 18 St. 335. . . .

Are these sections constitutional? . . . [I]t is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement, as are enjoyed by white citizens; and *vice versa*. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments. The power is sought, first, in the fourteenth amendment, and the views and arguments of distinguished senators, advanced while the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. . . .

The first section of the fourteenth amendment,-which is the one relied on,-after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the states. It declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the

operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in U. S. v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313, and *Ex parte Virginia*, Id. 339.

. . . .

[U]ntil some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may and should be provided in advance to meet the exigency when it arises, but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws or state action of some kind adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection. In fine, the legislation which congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which by the amendment they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals is society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the states may deprive persons of life, liberty, and property without due process of law, (and the amendment itself does suppose this,) why should not congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theaters. The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon congress to enforce the prohibition, this gives congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the tenth amendment of the constitution, which declares that powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. . . . .

In this connection it is proper to state that civil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals respect thereof. But where a subject is not

submitted to the general legislative power of congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.
. . . .

But the power of congress to adopt direct and primary, as distinguished from corrective, legislation on the subject in hand, is sought, in the second place, from the thirteenth amendment, which abolishes slavery. This amendment declares 'that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;' and it gives congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the thirteenth amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in congress to enforce the article by appropriate legislation, clothes congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United Stated; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of public amusement; the argument being that the denial of such equal accommodations and privileges is in itself a subjection to a species of servitude within the meaning of the amendment. . . . .

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges to an individual, even through the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the fourteenth amendment, is another question. But what has it to do with the question of slavery? It may be that by the black code, (as it was called,) in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of

the party's legal right as a citizen, and amenable to the prohibitions of the fourteenth amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the civil rights bill of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible from; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the thirteenth amendment alone, without the support which it afterwards received from the fourteenth amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) congress did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the thirteenth and fourteenth amendments are different: the former simply abolished slavery: the latter prohibited the states from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. . . .

The thirteenth amendment has respect, not to distinctions of race, or *class, or color, but to slavery. The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.
. . . .

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which congress has adopted, or may adopt, for counteracting the effect of state laws, or state action, prohibited by the fourteenth amendment. . . .

HARLAN, J., *dissenting*.

The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. . .
.

The court adjudges that congress is without power, under either the thirteenth or fourteenth amendment, to establish such regulations, and that the first and second sections of the statute are, in all their parts, unconstitutional and void.

. . . .

The terms of the thirteenth amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States. No race, as such, can be excluded from the benefits or rights thereby conferred. Yet it is historically true that that amendment was suggested by the condition, in this country, of that race which had been declared by this court to have had, according to the opinion entertained by the most civilized portion of the white race at the time of the adoption of the constitution, 'no rights which the white man was bound to respect,' none of the privileges or immunities secured by that instrument to citizens of the United States. It had reference, in a peculiar sense, to a people which (although the larger part of them were in slavery) had been invited by an act of congress to aid, by their strong right arms, in saving from overthrow a government which, theretofore, by all of its departments, had treated them as an inferior race, with no legal rights or privileges except such as the white race might choose to grant them.

. . . .

The thirteenth amendment, my brethren concede, did something more than to prohibit slavery as an *institution*, resting upon distinctions of race, and upheld by positive law. They admit that it established and decreed universal *civil freedom* throughout the United States. . . .

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the express power delegated to congress to enforce, by appropriate legislation, the thirteenth amendment, may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the very foundation of the civil rights act of 1866. Whether that act was fully authorized by the thirteenth amendment alone, without the support which it afterwards received from the fourteenth amendment, after the adoption of which it was re-enacted with some additions, the court, in its opinion, says it is unnecessary to inquire. But I submit, with all respect to my brethren, that its constitutionality is conclusively shown by other portions of their opinion. It is expressly conceded by them that the thirteenth amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that congress, by the act of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens; that under the thirteenth amendment congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not. These propositions being conceded, it is impossible, as it seems to me, to question the constitutional validity of

the civil rights act of 1866. I do not contend that the thirteenth amendment invests congress with authority, by legislation, to regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several states. But I do hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *on account of their race*, of any civil rights enjoyed by other freemen in the same state; and such legislation may be of a direct and primary character, operating upon states, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state.
. . . .

I am of the, opinion that such discrimination practiced [sic] by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude, the imposition of which congress may prevent under its power. By appropriate legislation, to enforce the thirteenth amendment; and consequently, without reference to its enlarged power under the fourteenth amendment, the act of March 1, 1875, is not, in my judgment, repugnant to the constitution.

It remains now to consider these cases with reference to the power congress has possessed since the adoption of the fourteenth amendment.
. . . .

The assumption that this amendment consists wholly of prohibitions upon state laws and state proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section-'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside'-is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the state in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the 'People of the United States.' They became, instantly, citizens of the United States, and of their respective states. Further, they were brought, by this supreme act of the nation, within the direct operation of that provision of the constitution which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' Article 4, § 2.

The citizenship thus acquired by that race, in virtue of an affirmative grant by the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of congress is not restricted to the enforcement of prohibitions upon state laws or state action.

. . . . [E]xemption from race discrimination, in respect of civil rights, against those to whom state citizenship was granted by the nation, is any less for the colored race a new constitutional right, derived from and secured by the national constitution, than is exemption from such discrimination in the exercise of the elective franchise. It cannot be that the latter is an attribute of national citizenship, while the other

is not essential in national citizenship, or fundamental in state citizenship.
. . . .

The opinion of the court, as I have said, proceeds upon the ground that the power of congress to legislate for the protection of the rights and privileges secured by the fourteenth amendment cannot be brought into activity except with the view, and as it may become necessary, to correct and annul state laws and state proceedings in hostility to such rights and privileges. In the absence of state laws or state action, adverse to such rights and privileges, the nation may not actively interfere for their protection and security. Such I understand to be the position of my brethren. If the grant to colored citizens of the United States of citizenship in their respective states imports exemption from race discrimination, in their states, in respect of the civil rights belonging to citizenship, then, to hold that the amendment remits that right to the states for their protection, primarily, and stays the hands of the nation, until it is assailed by state laws or state proceedings, is to adjudge that the amendment, so far from enlarging the powers of congress,-as we have heretofore said it did,-not only curtails them, but reverses the policy which the general government has pursued from its very organization. Such an interpretation of the amendment is a denial to congress of the power, by appropriate legislation, to enforce one of its provisions. . . .

It is said that any interpretation of the fourteenth amendment different from that adopted by the court, would authorize congress to enact a municipal code for all the states, covering every matter affecting the life, liberty, and property of the citizens of the several states. Not so. Prior to the adoption of that amendment the constitutions of the several states, without, perhaps, an exception, secured all *persons* against deprivation of life, liberty, or property, otherwise than by due process of law, and, in some form, recognized the right of all *persons* to the equal protection of the laws. These rights, therefore, existed before that amendment was proposed or adopted. If, by reason of that fact, it be assumed that protection in these rights of persons still rests, primarily, with the states, and that congress may not interfere except to enforce, by means of corrective legislation, the prohibitions upon state laws or state proceedings inconsistent with those rights, it does not at all follow that privileges which have been *granted by the nation* may not be protected by primary legislation upon the part of congress. The rights and immunities of persons recognized in the prohibitive clauses of the amendments were always under the protection, primarily, of the states, while rights created by or derived from the United States have always been, and, in the nature of things, should always be, primarily, under the protection of the general government. Exemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government, is, as we have seen, a new constitutional right, created by the nation, with express power in congress, by legislation, to enforce the constitutional provision from which it is derived. If, in some sense, such race discrimination is a denial of the equal protection of the laws, within the letter of the last clause of the first section, it cannot be possible that a mere prohibition upon state denial of such equal protection to persons within its jurisdiction, or a prohibition upon state laws abridging the privileges and immunities of citizens of the United States, takes from the nation the power which it has uniformly exercised of protecting, by primary direct legislation, those privileges and immunities which existed under the constitution before the adoption of the fourteenth amendment, or which have been created by that amendment in behalf of those thereby made *citizens* of their respective states.

Jones v. Alfred H. Mayer Co.
392 U.S. 409 (1968)

Stewart, J., delivered the opinion of the Court:

In this case we are called upon to determine the scope and the constitutionality of an Act of Congress, 42 U. S. C. § 1982, which provides that:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

On September 2, 1965, the petitioners filed a complaint in the District Court for the Eastern District of Missouri, alleging that the respondents had refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. Relying in part upon § 1982, the petitioners sought injunctive and other relief. The District Court sustained the respondents' motion to dismiss the complaint, and the Court of Appeals for the Eighth Circuit affirmed, concluding that § 1982 applies only to state action and does not reach private refusals to sell. We granted certiorari to consider the questions thus presented. For the reasons that follow, we reverse the judgment of the Court of Appeals. We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.

I.

At the outset, it is important to make clear precisely what this case does not involve. Whatever else it may be, 42 U. S. C. § 1982 is not a comprehensive open housing law. In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81, the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin. It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. It does not prohibit advertising or other representations that indicate discriminatory preferences. It does not refer explicitly to discrimination in financing arrangements or in the provision of brokerage services. It does not empower a federal administrative agency to assist aggrieved parties. It makes no provision for intervention by the Attorney General. And, although it can be enforced by injunction, it contains no provision expressly authorizing a federal court to order the payment of damages.

* * * *

III.

We begin with the language of the statute itself. In plain and unambiguous terms, § 1982 grants to all citizens, without regard to race or color, "the same right" to purchase and lease property "as is enjoyed by white citizens." As the Court of Appeals in this case evidently recognized, that right can be impaired as effectively by "those who place property on the market" as by the State itself. For, even if the State and its agents lend no support to those who wish to exclude persons from their communities on racial

grounds, the fact remains that, whenever property "is placed on the market for whites only, whites have a right denied to Negroes." So long as a Negro citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy "the same right . . . as is enjoyed by white citizens . . . to . . . purchase [and] lease . . . real and personal property." 42 U. S. C. § 1982. (Emphasis added.)

On its face, therefore, § 1982 appears to prohibit all discrimination against Negroes in the sale or rental of property -- discrimination by private owners as well as discrimination by public authorities. Indeed, even the respondents seem to concede that, if § 1982 "means what it says" -- to use the words of the respondents' brief -- then it must encompass every racially motivated refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing. Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982, the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said.

IV.

In its original form, 42 U. S. C. § 1982 was part of § 1 of the Civil Rights Act of 1866.

* * * *

The crucial language for our purposes was that which guaranteed all citizens "the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . . ." To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by "State or local law" but also by "custom, or prejudice." Thus, when Congress provided in § 1 of the Civil Rights Act that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citizens alike, it plainly meant to secure that right against interference from any source whatever, whether governmental or private.

* * * *

In attempting to demonstrate the contrary, the respondents rely heavily upon the fact that the Congress which approved the 1866 statute wished to eradicate the recently enacted Black Codes -- laws which had saddled Negroes with "onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value . . . ." Slaughter-House Cases, 16 Wall. 36, 70. The respondents suggest that the only evil Congress sought to eliminate was that of racially discriminatory laws in the former Confederate States. But the Civil Rights Act was drafted to apply throughout the country, and its language was far broader than would have been necessary to strike down discriminatory statutes.

That broad language, we are asked to believe, was a mere slip of the legislative pen. We disagree. For the same Congress that wanted to do away with the Black Codes also had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation. "Accounts in newspapers North and South, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced" to show that "private outrage and atrocity" were "daily inflicted on freedmen . . . ." The congressional debates are replete with references to private injustices against Negroes -- references to white employers

who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities.

Indeed, one of the most comprehensive studies then before Congress stressed the prevalence of private hostility toward Negroes and the need to protect them from the resulting persecution and discrimination. The report noted the existence of laws virtually prohibiting Negroes from owning or renting property in certain towns, but described such laws as "mere isolated cases," representing "the local outcroppings of a spirit . . . found to prevail everywhere" -- a spirit expressed, for example, by lawless acts of brutality directed against Negroes who traveled to areas where they were not wanted. The report concluded that, even if anti-Negro legislation were "repealed in all the States lately in rebellion," equal treatment for the Negro would not yet be secured.

In this setting, it would have been strange indeed if Congress had viewed its task as encompassing merely the nullification of racist laws in the former rebel States.

* * * *

President Andrew Johnson vetoed the Act on March 27, and in the brief congressional debate that followed, his supporters characterized its reach in all-embracing terms. One stressed the fact that § 1 would confer "the right . . . to purchase . . . real estate . . . without any qualification and without any restriction whatever . . . ." Another predicted, as a corollary, that the Act would preclude preferential treatment for white persons in the rental of hotel rooms and in the sale of church pews. Those observations elicited no reply. On April 6 the Senate, and on April 9 the House, overrode the President's veto by the requisite majorities, and the Civil Rights Act of 1866 became law.

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein -- including the right to purchase or lease property.

Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some two years after the ratification of the Fourteenth Amendment.

* * * *

V.

The remaining question is whether Congress has power under the Constitution to do what § 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property. Our starting point is the Thirteenth Amendment, for it was pursuant to that constitutional provision that Congress originally enacted what is now § 1982. The Amendment consists of two parts. Section 1 states:

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

Section 2 provides:

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

As its text reveals, the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Civil Rights Cases, 109 U.S. 3, 20. It has never been doubted, therefore, "that the power vested in Congress to enforce the article by appropriate legislation," ibid., includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." Id., at 23.

Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals. The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." Civil Rights Cases, 109 U.S. 3, 20. Whether or not the Amendment itself did any more than that -- a question not involved in this case -- it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Ibid. (Emphasis added.)

Those who opposed passage of the Civil Rights Act of 1866 argued in effect that the Thirteenth Amendment merely authorized Congress to dissolve the legal bond by which the Negro slave was held to his master. Yet many had earlier opposed the Thirteenth Amendment on the very ground that it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State. And the majority leaders in Congress -- who were, after all, the authors of the Thirteenth Amendment -- had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act.

* * * *

Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery -- its "burdens and disabilities" -- included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." Civil Rights Cases, 109 U.S. 3, 22. Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when

racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom -- freedom to "go and come at pleasure" and to "buy and sell when they please" -- would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

Representative Wilson of Iowa was the floor manager in the House for the Civil Rights Act of 1866. In urging that Congress had ample authority to pass the pending bill, he recalled the celebrated words of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 421:

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

"The end is legitimate," the Congressman said, "because it is defined by the Constitution itself. The end is the maintenance of freedom . . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. . . . This settles the appropriateness of this measure, and that settles its constitutionality."

We agree. The judgment is reversed.

Harlan, J., dissenting:

* * * *

I believe that the Court's construction of § 1982 as applying to purely private action is almost surely wrong, and at the least is open to serious doubt. The issues of the constitutionality of § 1982, as construed by the Court, and of liability under the Fourteenth Amendment alone, also present formidable difficulties. Moreover, the political processes of our own era have, since the date of oral argument in this case, given birth to a civil rights statute embodying "fair housing" provisions which would at the end of this year make available to others, though apparently not to the petitioners themselves, the type of relief which the petitioners now seek. It seems to me that this latter factor so diminishes the public importance of this case that by far the wisest course would be for this Court to refrain from decision and to dismiss the writ as improvidently granted.

McDonald v. City of Chicago, Illinois

[Petitioners filed federal suit against city, which was consolidated with two related actions, seeking a declaration that two Illinois cities' handgun ban and several related city ordinances violated the Second and Fourteenth Amendments.]

Justice ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, II-D, III-A, and III-B, in which THE CHIEF JUSTICE, Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, and an opinion with respect to Parts II-C, IV, and V, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY join.

Two years ago, in *District of Columbia v. Heller,* 554 U.S. ----, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

I

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Chicago enacted its handgun ban to protect its residents "from the loss of property and injury or death from firearms." See Chicago, Ill., Journal of Proceedings of the City Council, p. 10049 (Mar. 19, 1982). The Chicago petitioners and their *amici,* however, argue that the handgun ban has left them vulnerable to criminals. Chicago Police Department statistics, we are told, reveal that the City's handgun murder rate has actually increased since the ban was enacted [FN1] and that Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities.[FN2]

> FN1. See Brief for Heartland Institute as *Amicus Curiae* 6-7 (noting that handgun murder rate was 9.65 in 1983 and 13.88 in 2008).
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> FN2. Brief for Buckeye Firearms Foundation, Inc., et al. as *Amici Curiae* 8-9 ("In 2002 and again in 2008, Chicago had more murders than any other city in the U.S., including the much larger Los Angeles and New York" (internal quotation marks omitted)); see also Brief for International Law Enforcement Educators and Trainers Association et al. as *Amici Curiae* 17-21, and App. A (providing comparisons of Chicago's rates of assault, murder, and robbery to average crime rates in 24 other large cities).

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II

A

Petitioners argue that the Chicago and Oak Park laws violate the right to keep and bear arms for two reasons. Petitioners' primary submission is that this right is among the "privileges or immunities of citizens of the United States" and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases, supra,* should now be rejected. As a secondary argument, petitioners contend that the Fourteenth Amendment's Due Process Clause "incorporates" the Second Amendment right.

Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only if that right is an indispensable attribute of *any* "'civilized' " legal system. Brief for Municipal Respondents 9. If it is possible to imagine a civilized country that does not recognize the right, the municipal respondents tell us, then that right is not protected by due process. *Ibid.* And since there are civilized countries that ban or strictly regulate the private possession of handguns, the municipal respondents maintain that due process does not preclude such measures. *Id.,* at 21-23. In light of the parties' far-reaching arguments, we begin by recounting this Court's analysis over the years of the relationship between the provisions of the Bill of Rights and the States.

B

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan v. Mayor of Baltimore,* 7 Pet. 243, 8 L.Ed. 672 (1833), the Court, in an opinion by Chief Justice Marshall, explained that this question was "of great importance" but "not of much difficulty." *Id*., at 247. In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government. See also *Lessee of Livingston v. Moore,* 7 Pet. 469, 551-552, 8 L.Ed. 751 (1833) ("[I]t is now settled that those amendments [in the Bill of Rights] do not extend to the states").

The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. The provision at issue in this case, § 1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law."

Four years after the adoption of the Fourteenth Amendment, this Court was asked to interpret the Amendment's reference to "the privileges or immunities of citizens of the United States." The *Slaughter-House Cases, supra,* involved challenges to a Louisiana law permitting the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans. Justice Samuel Miller's opinion for the Court concluded that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.,* at 79. The Court held that other fundamental rights-rights that predated the creation of the Federal Government and that "the State governments were created to establish and secure"-were not protected by the Clause. *Id.,* at 76.

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Three years after the decision in the *Slaughter-House Cases,* the Court decided *Cruikshank,* the first of the three 19th-century cases on which the Seventh Circuit relied. 92 U.S. 542, 23 L.Ed. 588. In that case, the Court reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on Easter Sunday 1873. Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men. Cruikshank himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed. Ninety-seven men were indicted for participating in the massacre, but only nine went to trial. Six of the nine were acquitted of all charges; the remaining three were acquitted of murder but convicted under the Enforcement Act of 1870, 16 Stat. 140, for banding and conspiring together to deprive their victims of various constitutional rights, including the right to bear arms.

The Court reversed all of the convictions, including those relating to the deprivation of the victims' right to bear arms. *Cruikshank,* 92 U.S., at 553, 559. The Court wrote that the right of bearing arms for a lawful purpose "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence." *Id.,* at 553. "The second amendment," the Court continued, "declares that it shall not be infringed; but this ... means no more than that it shall not be infringed by Congress." *Ibid.* "Our later decisions in *Presser v. Illinois,* 116 U.S. 252, 265[, 6 S.Ct. 580, 29 L.Ed. 615] (1886), and *Miller v. Texas,* 153 U.S. 535, 538[, 14 S.Ct. 874, 38 L.Ed. 812] (1894), reaffirmed that the Second Amendment applies only to the Federal Government." *Heller,* 554 U.S., at ----, n. 23, 128 S.Ct., at 2813 n. 23.

C

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We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.

At the same time, however, this Court's decisions in *Cruikshank, Presser,* and *Miller* do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States. See *Heller,* 554 U.S., at ----, n. 23, 128 S.Ct., at 2813 n. 23. None of those cases "engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases." *Ibid.* As explained more fully below, *Cruikshank, Presser,* and *Miller* all preceded the era in which the Court began the process of "selective incorporation" under the Due Process Clause, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.

Indeed, *Cruikshank* has not prevented us from holding that other rights that were at issue in that case are binding on the States through the Due Process Clause. In *Cruikshank,* the Court held that the general "right of the people peaceably to assemble for lawful purposes," which is protected by the First Amendment, applied only against the Federal Government and not against the States. See 92 U.S., at 551-552. Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a "fundamental righ[t] ... safeguarded by the due process clause of the Fourteenth Amendment." *De Jonge*

v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937). We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause.

D

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In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. See *Hurtado v. California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884) (due process does not require grand jury indictment); *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897) (due process prohibits States from taking of private property for public use without just compensation). Five features of the approach taken during the ensuing era should be noted.

First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining v. New Jersey,* 211 U.S. 78, 99, 29 S.Ct. 14, 53 L.Ed. 97 (1908).

Second, the Court explained that the only rights protected against state infringement by the Due Process Clause were those rights "of such a nature that they are included in the conception of due process of law." *Ibid*. See also, *e.g., Adamson v. California,* 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947); *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942); *Palko v. Connecticut,* 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937); *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). While it was "possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action," the Court stated, this was "not because those rights are enumerated in the first eight Amendments." *Twining, supra,* at 99, 29 S.Ct. 14.

The Court used different formulations in describing the boundaries of due process. For example, in *Twining,* the Court referred to "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." 211 U.S., at 102, 29 S.Ct. 14 (internal quotation marks omitted). In *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court spoke of rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." And in *Palko,* the Court famously said that due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." 302 U.S., at 325, 58 S.Ct. 149.

Third, in some cases decided during this era the Court "can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection." *Duncan v. Louisiana,* 391 U.S. 145, 149, n. 14, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, B. & Q.R. Co., supra,* at 238, 17 S.Ct. 581. Similarly, the Court found that due process did not provide a right against compelled incrimination in part because this right "has no place in the

jurisprudence of civilized and free countries outside the domain of the common law." *Twining, supra,* at 113, 29 S.Ct. 14.

Fourth, the Court during this era was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause. The Court found that some such rights qualified. See, *e.g., Gitlow v. New York,* 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) (freedom of speech and press); *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) (same); *Powell, supra* (assistance of counsel in capital cases); *De Jonge, supra* (freedom of assembly); *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (free exercise of religion). But others did not. See, *e.g., Hurtado, supra* (grand jury indictment requirement); *Twining, supra* (privilege against self-incrimination).

Finally, even when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgment by the Federal Government. To give one example, in *Betts* the Court held that, although the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, the Due Process Clause required appointment of counsel in state criminal proceedings only where "want of counsel in [the] particular case ... result[ed] in a conviction lacking in ... fundamental fairness." 316 U.S., at 473, 62 S.Ct. 1252. Similarly, in *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), the Court held that the "core of the Fourth Amendment" was implicit in the concept of ordered liberty and thus "enforceable against the States through the Due Process Clause" but that the exclusionary rule, which applied in federal cases, did not apply to the States. *Id.*, at 27-28, 33, 69 S.Ct. 1359.

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An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was championed by Justice Black. This theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, *e.g., Adamson, supra,* at 71-72, 67 S.Ct. 1672 (Black, J., dissenting); *Duncan, supra,* at 166, 88 S.Ct. 1444 (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in *Barron*. *Adamson,* 332 U.S., at 72, 67 S.Ct. 1672 (dissenting opinion). Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory.

3

While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," *i.e.*, the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See, *e.g., Gideon v. Wainwright,* 372 U.S. 335, 341, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Malloy v. Hogan,* 378 U.S. 1, 5-6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Pointer v. Texas,* 380 U.S. 400, 403-404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Washington v. Texas,* 388 U.S. 14, 18, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Duncan,* 391 U.S., at 147-148, 88 S.Ct. 1444; *Benton v. Maryland,* 395 U.S. 784, 794, 89 S.Ct.

2056, 23 L.Ed.2d 707 (1969).

The decisions during this time abandoned three of the previously noted characteristics of the earlier period. The Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection." *Duncan,* 391 U.S., at 149, n. 14, 88 S.Ct. 1444. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice. *Id.*, at 149, and n. 14, 88 S.Ct. 1444; see also *id.,* at 148, 88 S.Ct. 1444 (referring to those "fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions" (emphasis added; internal quotation marks omitted)).

The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated.

Finally, the Court abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *Malloy,* 378 U.S., at 10-11, 84 S.Ct. 1489 (internal quotation marks omitted). Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.*, at 10, 84 S.Ct. 1489; see also *Mapp v. Ohio,* 367 U.S. 643, 655-656, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Ker v. California,* 374 U.S. 23, 33-34, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *Aguilar v. Texas,* 378 U.S. 108, 110, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Pointer,* 380 U.S., at 406, 85 S.Ct. 1065; *Duncan, supra,* at 149, 157-158, 88 S.Ct. 1444; *Benton,* 395 U.S., at 794-795, 89 S.Ct. 2056; *Wallace v. Jaffree,* 472 U.S. 38, 48-49, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985).
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III

With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncan,* 391 U.S., at 149, 88 S.Ct. 1444, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997) (internal quotation marks omitted).

A

Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller,* we held that individual self-defense is "the *central component* " of the Second Amendment right. 554 U.S., at ----, 128 S.Ct., at 2801-2802; see also *id.*, at ----, 128 S.Ct., at 2817 (stating that the "inherent right of self-defense has been central to the Second Amendment right"). Explaining that "the need for defense of self, family, and

property is most acute" in the home, *ibid*., we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *id*., at ----, 128 S.Ct., at 2818 (some internal quotation marks omitted); see also *id*., at ----, 128 S.Ct., at 2817 (noting that handguns are "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense); *id*., at ----, 128 S.Ct., at 2818 ("[T]he American people have considered the handgun to be the quintessential self-defense weapon"). Thus, we concluded, citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." *Id*., at ----, 128 S.Ct., at 2818.

Heller makes it clear that this right is "deeply rooted in this Nation's history and tradition." *Glucksberg, supra,* at 721, 117 S.Ct. 2302 (internal quotation marks omitted). *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, 554 U.S., at ---- - ----, 128 S.Ct., at 2797-2798, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen," *id*., at ----, 128 S.Ct., at 2798.
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IV

Municipal respondents' remaining arguments are at war with our central holding in *Heller* : that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.

Municipal respondents' main argument is nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era. Municipal respondents submit that the Due Process Clause protects only those rights "'recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice.' " Brief for Municipal Respondents 9 (quoting *Chicago, B. & Q.R. Co.,* 166 U.S., at 238, 17 S.Ct. 581). According to municipal respondents, if it is possible to imagine *any* civilized legal system that does not recognize a particular right, then the Due Process Clause does not make that right binding on the States. Brief for Municipal Respondents 9. Therefore, the municipal respondents continue, because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment. *Id*., at 21-23.

This line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases. See *Duncan,* 391 U.S., at 149, and n. 14, 88 S.Ct. 1444. And the present-day implications of municipal respondents' argument are stunning. For example, many of the rights that our Bill of Rights provides for persons accused of criminal offenses are virtually unique to this country. If *our* understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of *any* civilized country, it would follow that the United States is the only civilized Nation in the world.
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We likewise reject municipal respondents' argument that we should depart from our established incorporation methodology on the ground that making the Second Amendment binding on the States and their subdivisions is inconsistent with principles of federalism and will stifle experimentation. Municipal respondents point out-quite correctly-that conditions and problems differ from locality to locality and that citizens in different jurisdictions have divergent views on the issue of gun control. Municipal respondents therefore urge us to allow state and local governments to enact any gun control law that they deem to be reasonable, including a complete ban on the possession of handguns in the home for self-defense. Brief for Municipal Respondents 18-20, 23.

. . . . Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." Brief for State of Texas et al. as *Amici Curiae* 23.
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Municipal respondents argue, finally, that the right to keep and bear arms is unique among the rights set out in the first eight Amendments "because the reason for codifying the Second Amendment (to protect the militia) differs from the purpose (primarily, to use firearms to engage in self-defense) that is claimed to make the right implicit in the concept of ordered liberty." Brief for Municipal Respondents 36-37. Municipal respondents suggest that the Second Amendment right differs from the rights heretofore incorporated because the latter were "valued for [their] own sake." *Id*., at 33. But we have never previously suggested that incorporation of a right turns on whether it has intrinsic as opposed to instrumental value, and quite a few of the rights previously held to be incorporated-for example the right to counsel and the right to confront and subpoena witnesses-are clearly instrumental by any measure. Moreover, this contention repackages one of the chief arguments that we rejected in *Heller, i.e.,* that the scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights. In *Heller,* we recognized that the codification of this right was prompted by fear that the Federal Government would disarm and thus disable the militias, but we rejected the suggestion that the right was valued only as a means of preserving the militias. 554 U.S., at ----, 128 S.Ct., at 2801-2802. On the contrary, we stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was "the *central component* of the right itself." *Ibid*.

V
B

* * *
In *Heller,* we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan,* 391 U.S., at 149, and n. 14, 88 S.Ct. 1444. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment

right recognized in *Heller*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice THOMAS, concurring in part and concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment "fully applicable to the States." *Ante,* at 3026. I write separately because I believe there is a more straightforward path to this conclusion, one that is more faithful to the Fourteenth Amendment's text and history.

Applying what is now a well-settled test, the plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is "fundamental" to the American "scheme of ordered liberty," *ante,* at 3036 (citing *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)), and " 'deeply rooted in this Nation's history and tradition,' " *ante,* at 3036 (quoting *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997)). I agree with that description of the right. But I cannot agree that it is enforceable against the States through a clause that speaks only to "process." Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.

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In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood-just as the Framers of the Second Amendment did-that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery. There is nothing about *Cruikshank* 's contrary holding that warrants its retention.

* * *

I agree with the Court that the Second Amendment is fully applicable to the States. I do so because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship.

Justice STEVENS, dissenting.

In *District of Columbia v. Heller,* 554 U.S. ----, ----, 128 S.Ct. 2783, 2788, 171 L.Ed.2d 637 (2008), the Court answered the question whether a federal enclave's "prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." The question we should be answering in this case is whether the Constitution "guarantees individuals a fundamental right," enforceable against the States, "to possess a functional, personal firearm, including a handgun, within the

home." Complaint ¶ 34, App. 23. That is a different-and more difficult-inquiry than asking if the Fourteenth Amendment "incorporates" the Second Amendment. The so-called incorporation question was squarely and, in my view, correctly resolved in the late 19th century.[FN1]

> FN1. See *United States v. Cruikshank,* 92 U.S. 542, 553, 23 L.Ed. 588 (1876); *Presser v. Illinois,* 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886); *Miller v. Texas,* 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894). This is not to say that I agree with all other aspects of these decisions.

II

So far, I have explained that substantive due process analysis generally requires us to consider the term "liberty" in the Fourteenth Amendment, and that this inquiry may be informed by but does not depend upon the content of the Bill of Rights. How should a court go about the analysis, then? Our precedents have established, not an exact methodology, but rather a framework for decisionmaking. In this respect, too, the Court's narrative fails to capture the continuity and flexibility in our doctrine.

The basic inquiry was described by Justice Cardozo more than 70 years ago. When confronted with a substantive due process claim, we must ask whether the allegedly unlawful practice violates values "implicit in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937). If the practice in question lacks any "oppressive and arbitrary" character, if judicial enforcement of the asserted right would not materially contribute to "a fair and enlightened system of justice," then the claim is unsuitable for substantive due process protection. *Id.,* at 327, 325, 58 S.Ct. 149. Implicit in Justice Cardozo's test is a recognition that the postulates of liberty have a universal character. Liberty claims that are inseparable from the customs that prevail in a certain region, the idiosyncratic expectations of a certain group, or the personal preferences of their champions, may be valid claims in some sense; but they are not of constitutional stature. Whether conceptualized as a "rational continuum" of legal precepts, *Poe,* 367 U.S., at 543, 81 S.Ct. 1752 (Harlan, J., dissenting), or a seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and the particular.

Justice Cardozo's test undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy. In addition to other constraints I will soon discuss, see Part III, *infra,* historical and empirical data of various kinds ground the analysis. Textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the " 'traditions and conscience of our people,' " *Palko,* 302 U.S., at 325, 58 S.Ct. 149 (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934)), are critical variables. They can provide evidence about which rights really are vital to ordered liberty, as well as a spur to judicial action.

The Court errs both in its interpretation of *Palko* and in its suggestion that later cases rendered *Palko* 's methodology defunct. Echoing *Duncan,* the Court advises that Justice Cardozo's test will not be satisfied "'if a civilized system could be imagined that would not accord the particular protection.' " *Ante,* at 3032 (quoting 391 U.S., at 149, n. 14, 88 S.Ct. 1444). *Palko* does contain some language that could be read to set an inordinate bar to substantive due process recognition, reserving it for practices without which

"neither liberty nor justice would exist." 302 U.S., at 326, 58 S.Ct. 149. But in view of Justice Cardozo's broader analysis, as well as the numerous cases that have upheld liberty claims under the *Palko* standard, such readings are plainly overreadings. We have never applied *Palko* in such a draconian manner.

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V

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Finally, even apart from the States' long history of firearms regulation and its location at the core of their police powers, this is a quintessential area in which federalism ought to be allowed to flourish without this Court's meddling. Whether or not we *can* assert a plausible constitutional basis for intervening, there are powerful reasons why we *should not* do so.

Across the Nation, States and localities vary significantly in the patterns and problems of gun violence they face, as well as in the traditions and cultures of lawful gun use they claim. Cf. *post,* at 3128 - 3129. The city of Chicago, for example, faces a pressing challenge in combating criminal street gangs. Most rural areas do not. The city of Chicago has a high population density, which increases the potential for a gunman to inflict mass terror and casualties. Most rural areas do not. The city of Chicago offers little in the way of hunting opportunities. Residents of rural communities are, one presumes, much more likely to stock the dinner table with game they have personally felled.

Given that relevant background conditions diverge so much across jurisdictions, the Court ought to pay particular heed to state and local legislatures' "right to experiment." *New State Ice,* 285 U.S., at 311, 52 S.Ct. 371 (Brandeis, J., dissenting). So long as the regulatory measures they have chosen are not "arbitrary, capricious, or unreasonable," we should be allowing them to "try novel social and economic" policies. *Ibid.* It "is more in keeping ... with our status as a court in a federal system," under these circumstances, "to avoid imposing a single solution ... from the top down." *Smith v. Robbins,* 528 U.S. 259, 275, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

It is all the more unwise for this Court to limit experimentation in an area "where the best solution is far from clear." *United States v. Lopez,* 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring). Few issues of public policy are subject to such intensive and rapidly developing empirical controversy as gun control. See *Heller,* 554 U.S., at ----, 128 S.Ct., at 2857-2860 (BREYER, J., dissenting). Chicago's handgun ban, in itself, has divided researchers. Compare Brief for Professors of Criminal Justice as *Amici Curiae* (arguing that ordinance has been effective at reducing gun violence), with Brief for International Law Enforcement Educators and Trainers Association et al. as *Amici Curiae* 17-26 (arguing that ordinance has been a failure). Of course, on some matters the Constitution requires that we ignore such pragmatic considerations. But the Constitution's text, history, and structure are not so clear on the matter before us-as evidenced by the groundbreaking nature of today's fractured decision-and this Court lacks both the technical capacity and the localized expertise to assess "the wisdom, need, and propriety" of most gun-control measures. *Griswold,* 381 U.S., at 482, 85 S.Ct. 1678.

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Furthermore, and critically, the Court's imposition of a national standard is still more unwise because the

elected branches have shown themselves to be perfectly capable of safeguarding the interest in keeping and bearing arms. The strength of a liberty claim must be assessed in connection with its status in the democratic process. And in this case, no one disputes "that opponents of [gun] control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process," or that "the widespread commitment to an individual right to own guns ... operates as a safeguard against excessive or unjustified gun control laws." Sunstein, Second Amendment Minimalism: *Heller* as *Griswold,* 122 Harv. L.Rev. 246, 260 (2008). Indeed, there is a good deal of evidence to suggest that, if anything, American lawmakers tend to *under* regulate guns, relative to the policy views expressed by majorities in opinion polls. See K. Goss, Disarmed: The Missing Movement for Gun Control in America 6 (2006). If a particular State or locality has enacted some "improvident" gun-control measures, as petitioners believe Chicago has done, there is no apparent reason to infer that the mistake will not "eventually be rectified by the democratic process." *Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979).

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DeShaney v. Winnebago County DSS
489 U.S. 189 (1989)

Rehnquist, C.J., delivered the opinion of the Court.

Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.

* * * *

II

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Petitioners contend that the State deprived Joshua of his liberty interest in "free[dom] from . . . unjustified intrusions on personal security," see Ingraham v. Wright, 430 U.S. 651, 673 (1977), by failing to provide him with adequate protection against his father's violence. The claim is one invoking the substantive rather than the procedural component of the Due Process Clause; petitioners do not claim that the State denied Joshua protection without according him appropriate procedural safeguards, see Morrissey v. Brewer, 408 U.S. 471, 481 (1972), but that it was categorically obligated to protect him in these circumstances, see Youngberg v. Romeo, 457 U.S. 307, 309 (1982).

But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," Davidson v. Cannon, supra, at 348; see also Daniels v. Williams, supra, at 331 (""to secure the individual from the arbitrary exercise of the powers of government,"" and "to prevent governmental power from being 'used for purposes of oppression'") (internal citations omitted); Parratt v. Taylor, 451 U.S. 527, 549 (1981) (Powell, J., concurring in result) (to prevent the "affirmative abuse of power"). Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. See, e. g., Harris v.

McRae, 448 U.S. 297, 317-318 (1980) (no obligation to fund abortions or other medical services) (discussing Due Process Clause of Fifth Amendment); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no obligation to provide adequate housing) (discussing Due Process Clause of Fourteenth Amendment); see also Youngberg v. Romeo, supra, at 317 ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border"). As we said in Harris v. McRae: "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . ., it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." 448 U.S., at 317-318 (emphasis added). If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.[3] As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Petitioners contend, however, that even if the Due Process Clause imposes no affirmative obligation on the State to provide the general public with adequate protective services, such a duty may arise out of certain "special relationships" created or assumed by the State with respect to particular individuals. Brief for Petitioners 13-18. Petitioners argue that such a "special relationship" existed here because the State knew that Joshua faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. Id., at 18-20. Having actually undertaken to protect Joshua from this danger -- which petitioners concede the State played no part in creating -- the State acquired an affirmative "duty," enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), as to constitute a substantive due process violation. Brief for Petitioners 20.

We reject this argument. It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals. In Estelle v. Gamble, 429 U.S. 97 (1976), we recognized that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause, Robinson v. California, 370 U.S. 660 (1962), requires the State to provide adequate medical care to incarcerated prisoners. 429 U.S., at 103-104.[5] We reasoned that because the prisoner is unable "'by reason of the deprivation of his liberty [to] care for himself,'" it is only "'just'" that the State be required to care for him. Ibid., quoting Spicer v. Williamson, 191 N. C. 487, 490, 132 S. E. 291, 293 (1926).

[3] The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. See Yick Wo v. Hopkins, 118 U.S. 356 (1886). But no such argument has been made here.

[5] To make out an Eighth Amendment claim based on the failure to provide adequate medical care, a prisoner must show that the state defendants exhibited "deliberate indifference" to his "serious" medical needs; the mere negligent or inadvertent failure to provide adequate care is not enough. Estelle v. Gamble, 429 U.S., at 105-106. In Whitley v. Albers, 475 U.S. 312 (1986), we suggested that a similar state of mind is required to make out a substantive due process claim in the prison setting. Id., at 326-327.

In Youngberg v. Romeo, 457 U.S. 307 (1982), we extended this analysis beyond the Eighth Amendment setting,[6] holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others. Id., at 314-325; see id., at 315, 324 (dicta indicating that the State is also obligated to provide such individuals with "adequate food, shelter, clothing, and medical care"). As we explained: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed -- who may not be punished at all -- in unsafe conditions." Id., at 315-316; see also Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983) (holding that the Due Process Clause requires the responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by the police).

But these cases afford petitioners no help. Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See Youngberg v. Romeo, supra, at 317 ("When a person is institutionalized -- and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist").[7] The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e. g., food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. See Estelle v. Gamble, supra, at 103-104; Youngberg v. Romeo, supra, at 315-316. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. See Estelle v. Gamble, supra, at 103 ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met"). In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.[8]

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[6] The Eighth Amendment applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." Ingraham v. Wright, 430 U.S. 651, 671-672, n. 40 (1977); see also Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983); Bell v. Wolfish, 441 U.S. 520, 535, n. 16 (1979).

[7] Even in this situation, we have recognized that the State "has considerable discretion in determining the nature and scope of its responsibilities." Youngberg v. Romeo, 457 U.S., at 317.

[8] Of course, the protections of the Due Process Clause, both substantive and procedural, may be triggered when the State, by the affirmative acts of its agents, subjects an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement. See, e. g., Whitley v. Albers, supra, at 326-327 (shooting inmate); Youngberg v. Romeo, supra, at 316 (shackling involuntarily committed mental patient); Hughes v. Rowe, 449 U.S. 5, 11 (1980) (removing inmate from general prison population and confining him to administrative segregation); Vitek v. Jones, 445 U.S. 480, 491-494 (1980) (transferring inmate to mental health facility).

The Estelle-Youngberg analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger. See Restatement (Second) of Torts § 323 (1965) (one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion); see generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 56 (5th ed. 1984) (discussing "special relationships" which may give rise to affirmative duties to act under the common law of tort). But the claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation. See Daniels v. Williams, 474 U.S., at 335-336; Parratt v. Taylor, 451 U.S., at 544; Martinez v. California, 444 U.S. 277, 285 (1980); Baker v. McCollan, 443 U.S. 137, 146 (1979); Paul v. Davis, 424 U.S. 693, 701 (1976). A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not "all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment." Daniels v. Williams, supra, at 335. Because, as explained above, the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so -- though calamitous in hindsight -- simply does not constitute a violation of the Due Process Clause.

Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.

Blackmun, J., dissenting.

Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy." Ante, at 202. But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. As Justice Brennan demonstrates, the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney -- intervention that triggered a fundamental duty to aid the boy once the State learned of the severe danger to which he was exposed.

The Court fails to recognize this duty because it attempts to draw a sharp and rigid line between action and inaction. But such formalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment. Indeed, I submit that these Clauses were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence, which the late Professor Robert Cover analyzed so effectively in his significant work entitled Justice Accused (1975).

Like the antebellum judges who denied relief to fugitive slaves, see id., at 119-121, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging. Cf. A. Stone, Law, Psychiatry, and Morality 262 (1984) ("We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope, we will struggle, and our compassion may be our only guide and comfort").

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, ante, at 193, "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles -- so full of late of patriotic fervor and proud proclamations * * *.

City of Boerne v. P.F. Flores
521 U.S. 509 (2004)

Justice KENNEDY delivered the opinion of the Court.[FN*]

A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA or Act), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power.

II

Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). There we considered a Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote. Their practice was to ingest peyote for sacramental purposes, and they challenged an Oregon statute of general applicability which made use of the drug criminal. In evaluating the claim, we declined to apply the balancing test set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest. We stated:

> "[G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct ... cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' ... contradicts both constitutional tradition and common sense." 494 U.S., at 885, 110 S.Ct., at 1603 (internal quotation marks and citations omitted).

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The *Smith* decision acknowledged the Court had employed the *Sherbert* test in considering free exercise challenges to state unemployment compensation rules on three occasions where the balance had tipped in favor of the individual. See *Sherbert, supra; Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987). Those cases, the Court explained, stand for "the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." 494 U.S., at 884, 110 S.Ct., at 1603 (internal quotation marks omitted). By contrast, where a general prohibition, such as Oregon's, is at issue, "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to [free exercise] challenges." *Id.,* at 885, 110 S.Ct., at 1603. *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.

Four Members of the Court disagreed. They argued the law placed a substantial burden on the Native American Church members so that it could be upheld only if the law served a compelling state interest and was narrowly tailored to achieve that end. *Id.,* at 894, 110 S.Ct., at 1608. Justice O'CONNOR concluded Oregon had satisfied the test, while Justice Blackmun, joined by Justice Brennan and Justice Marshall, could see no compelling interest justifying the law's application to the members.

These points of constitutional interpretation were debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA. Congress announced:

> "(1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
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> "(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
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> "(3) governments should not substantially burden religious exercise without compelling justification;
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> "(4) in *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> "(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a).

The Act's stated purposes are:

> "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> "(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." § 2000bb(b).

RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb-1. The Act's mandate applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or ... subdivision of a State." § 2000bb-2(1). The Act's universal coverage is confirmed in § 2000bb-3(a), under which RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]." In accordance with RFRA's usage of the term, we shall use "state law" to include local and

municipal ordinances.

III

A

Under our Constitution, the Federal Government is one of enumerated powers. *M'Culloch v. Maryland,* 4 Wheat. 316, 405, 4 L.Ed. 579 (1819); see also The Federalist No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison). The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 60 (1803).

Congress relied on its Fourteenth Amendment enforcement power in enacting the most far-reaching and substantial of RFRA's provisions, those which impose its requirements on the States. See Religious Freedom Restoration Act of 1993, S.Rep. No. 103-111, pp. 13-14 (1993) (Senate Report); H.R.Rep. No. 103-88, p. 9 (1993) (House Report). The Fourteenth Amendment provides, in relevant part:

> "Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
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> . . . . .
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> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The parties disagree over whether RFRA is a proper exercise of Congress' § 5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."
. . . .

All must acknowledge that § 5 is "a positive grant of legislative power" to Congress, *Katzenbach v. Morgan,* 384 U.S. 641, 651, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828 (1966). In *Ex parte Virginia,* 100 U.S. 339, 345-346, 25 L.Ed. 676 (1879), we explained the scope of Congress' § 5 power in the following broad terms:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not ***518** prohibited, is brought within the domain of congressional power."

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzer,*

427 U.S. 445, 455, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, see U.S. Const., Amdt. 15, § 2, as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966), despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. *South Carolina v. Katzenbach, supra* (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach v. Morgan, supra* (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome v. United States,* 446 U.S. 156, 161, 100 S.Ct. 1548, 1553, 64 L.Ed.2d 119 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a " 'standard, practice, or procedure with respect to voting' "); see also *James Everard's Breweries v. Day,* 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174 (1924) (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes).

It is also true, however, that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell, supra,* at 128, 91 S.Ct., at 266 (opinion of Black, J.). In assessing the breadth of § 5's enforcement power, we begin with its text. Congress has been given the power "to enforce" the "provisions of this article." We agree with respondent, of course, that Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion. The "provisions of this article," to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress' power to enforce the Free Exercise Clause follows from our holding in *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment." See also *United States v. Price,* 383 U.S. 787, 789, 86 S.Ct. 1152, 1154, 16 L.Ed.2d 267 (1966) (there is "no doubt of the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment" (internal quotation marks and citation omitted)).

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina v. Katzenbach, supra,* at 326, 86 S.Ct., at 817-818. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

While the line between measures that remedy or prevent unconstitutional actions and measures that make

a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

2

The remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment. In the *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), the Court invalidated sections of the Civil Rights Act of 1875 which prescribed criminal penalties for denying to any person "the full enjoyment of" public accommodations and conveyances, on the grounds that it exceeded Congress' power by seeking to regulate private conduct. The Enforcement Clause, the Court said, did not authorize Congress to pass "general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing...." *Id.,* at 13-14, 3 S.Ct., at 23. The power to "legislate generally upon" life, liberty, and property, as opposed to the "power to provide modes of redress" against offensive state action, was "repugnant" to the Constitution. *Id.,* at 15, 3 S.Ct., at 24. See also *United States v. Reese,* 92 U.S. 214, 218, 23 L.Ed. 563 (1875); *United States v. Harris,* 106 U.S. 629, 639, 1 S.Ct. 601, 609-610, 27 L.Ed. 290 (1883); *James v. Bowman,* 190 U.S. 127, 139, 23 S.Ct. 678, 679-680, 47 L.Ed. 979 (1903). Although the specific holdings of these early cases might have been superseded or modified, see, *e.g., Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *United States v. Guest,* 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966), their treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned.

Recent cases have continued to revolve around the question whether § 5 legislation can be considered remedial. In *South Carolina v. Katzenbach, supra,* we emphasized that "[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience ... it reflects." 383 U.S., at 308, 86 S.Ct., at 808. There we upheld various provisions of the Voting Rights Act of 1965, finding them to be "remedies aimed at areas where voting discrimination has been most flagrant," *id.,* at 315, 86 S.Ct., at 811, and necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century," *id.,* at 308, 86 S.Ct., at 808. We noted evidence in the record reflecting the subsisting and pervasive discriminatory-and therefore unconstitutional-use of literacy tests. *Id.,* at 333-334, 86 S.Ct., at 821-822. The Act's new remedies, which used the administrative resources of the Federal Government, included the suspension of both literacy tests and, pending federal review, all new voting regulations in covered jurisdictions, as well as the assignment of federal examiners to list qualified applicants enabling those listed to vote. The new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, see *id.,* at 313-315, 86 S.Ct., at 810-812, and the slow, costly character of case-by-case litigation, *id.,* at 328, 86 S.Ct., at 818-819.

After *South Carolina v. Katzenbach,* the Court continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of

constitutional rights resulting from this country's history of racial discrimination. . . .

3

Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law. In *Oregon v. Mitchell, supra,* at 112, 91 S.Ct., at 333, a majority of the Court concluded Congress had exceeded its enforcement powers by enacting legislation lowering the minimum age of voters from 21 to 18 in state and local elections. The five Members of the Court who reached this conclusion explained that the legislation intruded into an area reserved by the Constitution to the States. See 400 U.S., at 125, 91 S.Ct., at 265 (concluding that the legislation was unconstitutional because the Constitution "reserves to the States the power to set voter qualifications in state and local elections") (opinion of Black, J.); *id.,* at 154, 91 S.Ct., at 280 (explaining that the "Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit") (opinion of Harlan, J.); *id.,* at 294, 91 S.Ct., at 349 (concluding that States, not Congress, have the power "to establish a qualification for voting based on age") (opinion of Stewart, J., joined by Burger, C. J., and Blackmun, J.). Four of these five were explicit in rejecting the position that § 5 endowed Congress with the power to establish the meaning of constitutional provisions. See *id.,* at 209, 91 S.Ct., at 307-308 (opinion of Harlan, J.); *id.,* at 296, 91 S.Ct., at 350 (opinion of Stewart, J.). Justice Black's rejection of this position might be inferred from his disagreement with Congress' interpretation of the Equal Protection Clause. See *id.,* at 125, 91 S.Ct., at 265.
. . . .

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it." *Marbury v. Madison,* 1 Cranch, at 177, 2 L.Ed. 60. Under this approach, it is difficult to conceive of a principle that would limit congressional power. See Van Alstyne, The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment, 46 Duke L.J. 291, 292-303 (1996). Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

We now turn to consider whether RFRA can be considered enforcement legislation under § 5 of the Fourteenth Amendment.

B

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith.* It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 533, 113 S.Ct. 2217, 2227, 124 L.Ed.2d 472 (1993) ("[A] law targeting religious beliefs as such is never permissible"). To avoid the difficulty of proving such violations, it is said, Congress can simply invalidate any law which imposes a substantialburden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest. If Congress can prohibit laws with discriminatory effects

in order to prevent racial discrimination in violation of the Equal Protection Clause, see *Fullilove v. Klutznick,* 448 U.S. 448, 477, 100 S.Ct. 2758, 2774, 65 L.Ed.2d 902 (1980) (plurality opinion); *City of Rome,* 446 U.S., at 177, 100 S.Ct., at 1561-1562, then it can do the same, respondent argues, to promote religious liberty.

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. See *South Carolina v. Katzenbach,* 383 U.S., at 308, 86 S.Ct., at 808. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. *Id.,* at 334, 86 S.Ct., at 821-822.

A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. . . . The absence of more recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country." House Hearings 334 (statement of Douglas Laycock). See also House Report 2 ("[L]aws directly targeting religious practices have become increasingly rare"). Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. . . . . It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation. . . . This lack of support in the legislative record, however, is not RFRA's most serious shortcoming. *Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." *Oregon v. Mitchell,* 400 U.S., at 207, 91 S.Ct., at 306-308 (opinion of Harlan, J.). As a general matter, it is for Congress to determine the method by which it will reach a decision.

Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is 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. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. See *City of Rome,* 446 U.S., at 177, 100 S.Ct., at 1562 (since "jurisdictions with a demonstrable history of intentional racial discrimination ... create the risk of purposeful discrimination," Congress could "prohibit changes that have a discriminatory impact" in those jurisdictions). Remedial legislation under § 5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." *Civil Rights Cases,* 109 U.S., at 13, 3 S.Ct., at 23.

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local

Governments. 42 U.S.C. § 2000bb-2(1). RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. § 2000bb-3(a). RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power, even in the area of voting rights. In *South Carolina v. Katzenbach,* the challenged provisions were confined to those regions of the country where voting discrimination had been most flagrant, see 383 U.S., at 315, 86 S.Ct., at 811-812, and affected a discrete class of state laws, *i.e.,* state voting laws. Furthermore, to ensure that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth), the coverage under the Act would terminate "at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years." *Id.,* at 331, 86 S.Ct., at 820. The provisions restricting and banning literacy tests, upheld in *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), and *Oregon v. Mitchell, supra,* attacked a particular type of voting qualification, one with a long history as a "notorious means to deny and abridge voting rights on racial grounds." *South Carolina v. Katzenbach,* 383 U.S., at 355, 86 S.Ct., at 832 (Black, J., concurring and dissenting). In *City of Rome, supra,* the Court rejected a challenge to the constitutionality of a Voting Rights Act provision which required certain jurisdictions to submit changes in electoral practices to the Department of Justice for preimplementation review. The requirement was placed only on jurisdictions with a history of intentional racial discrimination in voting. *Id.,* at 177, 100 S.Ct., at 1561-1562. Like the provisions at issue in *South Carolina v. Katzenbach,* this provision permitted a covered jurisdiction to avoid preclearance requirements under certain conditions and, moreover, lapsed in seven years. This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. . . . Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If " 'compelling interest' really means what it says ..., many laws will not meet the test.... [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.,* at 888, 110 S.Ct., at 1605. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. . . . .

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith.* Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their

treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.

Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison,* 1 Cranch, at 177, 2 L.Ed. 60. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis,* and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

* * *

It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. *Katzenbach v. Morgan,* 384 U.S., at 651, 86 S.Ct., at 1723-1724. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison,* to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

It is so ordered.

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), 104 Stat. 337, 42 U.S.C. §§ 12131-12165, 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." § 12132. The question presented in this case is whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment.

I

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.

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." 42 U.S.C. § 12101(a)(7).

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." §§ 12101(b)(1), (b)(4). 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, §§ 12131-12134, 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. § 12131(1). 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." § 12131(2). Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, as added, 29 U.S.C. § 794a, which authorizes private citizens to bring suits for money damages. 42 U.S.C. § 12133.

III

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. *Garrett,* 531 U.S., at 363, 121 S.Ct. 955; *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 72-73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). 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." *Id.,* at 73, 120 S.Ct. 631.

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." 42 U.S.C. § 12202. As in *Garrett,* see 531 U.S., at 363-364, 121 S.Ct. 955, no party disputes the adequacy of that expression of Congress' intent to abrogate the States' Eleventh Amendment immunity. The question, then, is whether Congress had the power to give effect to its intent.

In *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), 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. *Id.,* at 456, 96 S.Ct. 2666. This enforcement power, as we have often acknowledged, is a "broad power indeed." *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 732, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), citing *Ex parte Virginia,* 100 U.S. 339, 346, 25 L.Ed. 676 (1880). 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." *Kimel,* 528 U.S., at 81, 120 S.Ct. 631. 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." *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 727-728, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). See also *City of Boerne v. Flores,* 521 U.S. 507, 518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).[FN4] The most recent affirmation of the breadth of Congress' § 5 power came in *Hibbs,* in which we considered whether a male state employee could recover money damages against the State for its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 107 Stat. 6, 29 U.S.C. § 2601 *et seq.* We upheld the FMLA as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under the rule of *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 1979). 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,* 521 U.S., at 519, 117 S.Ct. 2157. 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." *Id.,* at 519-520, 117 S.Ct. 2157. 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." *Id.,* at 520, 117 S.Ct. 2157.

In *Boerne,* we held that Congress had exceeded its § 5 authority when it enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* We began by noting that Congress enacted RFRA "in direct response" to our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), for the stated purpose of "restor[ing]" a constitutional rule that *Smith* had rejected. 521 U.S., at 512, 515, 117 S.Ct. 2157 (internal quotation marks omitted). Though the respondent attempted to defend the statute as a reasonable means of enforcing the Free Exercise Clause as interpreted in *Smith,* we concluded that RFRA was "so out of proportion" to that objective that it could be understood only as an attempt to work a "substantive change in constitutional protections." 521 U.S., at 529, 532, 117 S.Ct. 2157. Indeed, that was the very purpose of the law.

This Court further defined the contours of *Boerne's* "congruence and proportionality" test in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). At issue in that case was the validity of the Patent and Plant Variety Protection Remedy Clarification Act (hereinafter Patent Remedy Act), a statutory amendment Congress enacted in the wake of our decision in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), to clarify its intent to abrogate state sovereign immunity from patent infringement suits. *Florida Prepaid,* 527 U.S., at 631-632, 119 S.Ct. 2199. Noting the virtually complete absence of a history of unconstitutional patent infringement on the part of the States, as well as the Act's expansive

coverage, the Court concluded that the Patent Remedy Act's apparent aim was to serve the Article I concerns of "provid[ing] a uniform remedy for patent infringement and ... plac[ing] States on the same footing as private parties under that regime," and not to enforce the guarantees of the Fourteenth Amendment. *Id.,* at 647-648, 119 S.Ct. 2199. See also *Kimel,* 528 U.S. 62, 120 S.Ct. 631 (finding that the Age Discrimination in Employment Act exceeded Congress' § 5 powers under *Boerne*); *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (Violence Against Women Act).

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. As in *Florida Prepaid,* we concluded Congress' exercise of its prophylactic § 5 power was unsupported by a relevant history and pattern of constitutional violations. 531 U.S., at 368, 374, 121 S.Ct. 955. Although the dissent pointed out that Congress had before it a great deal of evidence of discrimination by the States against persons with disabilities, *id.,* at 379, 121 S.Ct. 955 (opinion of BREYER, J.), 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, *id.,* at 371, n. 7, 121 S.Ct. 955. 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. We emphasized that the House and Senate Committee Reports on the ADA focused on " '[d]iscrimination [in] ... *employment in the private sector,*' " and made no mention of discrimination in public employment. *Id.,* at 371-372, 121 S.Ct. 955 (quoting S.Rep. No. 101-116, p. 6 (1989), and H.R.Rep. No. 101-485, pt. 2, p. 28 (1990), U.S.Code Cong. & Admin.News 1990, pp. 303, 310) (emphasis in *Garrett*). 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. 531 U.S., at 372-374, 121 S.Ct. 955.

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.

IV

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. *Garrett,* 531 U.S., at 365, 121 S.Ct. 955. 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." *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). As we observed, classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose. *Garrett,* 531 U.S., at 366, 121 S.Ct. 955 (citing *Cleburne,* 473 U.S., at 446, 105 S.Ct. 3249).

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. See, *e.g., Dunn v. Blumstein,* 405 U.S. 330, 336-337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson,* 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). 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." *Faretta v. California,* 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). 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. *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *M.L.B. v. S.L. J.,* 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). 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." *Taylor v. Louisiana,* 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment. *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside,* 478 U.S. 1, 8-15, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).

Whether Title II validly enforces these constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). See also *Florida Prepaid,* 527 U.S., at 639-640, 119 S.Ct. 2199; *Boerne,* 521 U.S., at 530, 117 S.Ct. 2157. 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. "Difficult and intractable problems often require powerful remedies," *Kimel,* 528 U.S., at 88, 120 S.Ct. 631, but it is also true that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one," *Boerne,* 521 U.S., at 530, 117 S.Ct. 2157.

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, "[a]s 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, *e.g., Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); the abuse and neglect of persons committed to state mental health hospitals, *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); [FN10] and irrational discrimination in zoning decisions, *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). 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." S.Rep. No. 101-116, at 18. See also H.R.Rep. No. 101-485, pt. 2, at 47, U.S.Code Cong. & Admin.News 1990, pp. 303, 329. 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. See *Garrett,* 531 U.S., at 379, 121 S.Ct. 955 (BREYER, J., dissenting). See also *id.,* at 391, 121 S.Ct. 955 (App. C to opinion of BREYER, J., dissenting). As the Court's opinion in *Garrett* observed, the "overwhelming majority" of these examples concerned discrimination in the administration of public programs and services. *Id.,* at 371, n. 7, 121 S.Ct. 955; Government's Lodging in *Garrett*, O.T.2000, No. 99-1240 (available in Clerk of Court's case file).

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. . . .
. . . .

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.*" 42 U.S.C. § 12101(a)(3) (emphasis added). 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.

V

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 RFRA, the Patent Remedy Act, and 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. See *United States v. Raines,* 362 U.S. 17, 26, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).

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It is so ordered.

Justice GINSBURG, with whom Justice SOUTER and Justice BREYER join, concurring.

For the reasons stated by the Court, and mindful of Congress' objective in enacting the Americans with Disabilities Act-the elimination or reduction of physical and social structures that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation's social, economic, and civic life-I join the Court's opinion.

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Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived. It seems to me not conducive to a harmonious federal system to require Congress, before it exercises authority under § 5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities. But see *post,* at 2012 (SCALIA, J., dissenting) ("Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."); *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 743, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SCALIA, J., dissenting) (to be controlled by § 5 legislation, State "can demand that *it* be shown to have been acting in violation of the Fourteenth Amendment" (emphasis in original)). Members of Congress are understandably reluctant to condemn their own States as constitutional violators, complicit in maintaining the isolated and unequal status of persons with disabilities. I would not disarm a National Legislature for resisting an adversarial approach to lawmaking better suited to the courtroom.

As the Court's opinion documents, see *ante,* at 1989-1992, Congress considered a body of evidence showing that in diverse parts of our Nation, and at various levels of government, persons with disabilities encounter access barriers to public facilities and services. That record, the Court rightly holds, at least as it bears on access to courts, sufficed to warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order.

Justice SCALIA, dissenting.

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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. As I wrote for the Court in an earlier case, "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 239, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995).

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. U.S. Const., Amdt. 14 (emphasis added). . . . . 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." *Id.,* at 396. 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.

[Katzanback v.] 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." 384 U.S., at 648-649, 86 S.Ct. 1717. . . . .

Literally, 'to enforce' means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state's constitutional duty." Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L.Rev. 91, 110-111 (1966).

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. . . .

When congressional regulation has not been targeted at racial discrimination, we have given narrower scope to § 5. . . .

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. See *Hibbs,* 538 U.S., at 741-743, 123 S.Ct. 1972 (SCALIA, J., dissenting); *Morrison,* 529 U.S., at 626-627, 120 S.Ct. 1740; *Morgan,* 384 U.S., at 666-667, 669, 670-671, 86 S.Ct. 1717 (Harlan, J., dissenting).[FN4] 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, supra,* at 625-626, 120 S.Ct. 1740. 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.

Northwest Austin Municipal Utility District Number One v. Holder
129 S.Ct. 2504 (2009)

Chief Justice ROBERTS delivered the opinion of the Court.

The plaintiff in this case is a small utility district raising a big question-the constitutionality of § 5 of the Voting Rights Act. The district has an elected board, and is required by § 5 to seek preclearance from federal authorities in Washington, D.C., before it can change anything about those elections. This is required even though there has never been any evidence of racial discrimination in voting in the district.

The district filed suit seeking relief from these preclearance obligations under the "bailout" provision of the Voting Rights Act. That provision allows the release of a "political subdivision" from the preclearance requirements if certain rigorous conditions are met. The court below denied relief, concluding that bailout was unavailable to a political subdivision like the utility district that did not register its own voters. The district appealed, arguing that the Act imposes no such limitation on bailout, and that if it does, the preclearance requirements are unconstitutional.

That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of § 5.

I

A

The Fifteenth Amendment promises that the "right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude." U.S. Const., Amdt. 15, § 1. In addition to that self-executing right, the Amendment also gives Congress the "power to enforce this article by appropriate legislation." § 2. The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure. Early enforcement Acts were inconsistently applied and repealed with the rise of Jim Crow. *South Carolina v. Katzenbach,* 383 U.S. 301, 310, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); A. Keyssar, The Right to Vote 105-111 (2000). Another series of enforcement statutes in the 1950s and 1960s depended on individual lawsuits filed by the Department of Justice. But litigation is slow and expensive, and the States were creative in "contriving new rules" to continue violating the Fifteenth Amendment "in the face of adverse federal court decrees." *Katzenbach, supra,* at 335, 86 S.Ct. 803; *Riley v. Kennedy,* 553 U.S. ----, ----, 128 S.Ct. 1970, 1976-1977, 170 L.Ed.2d 837 (2008).

Congress responded with the Voting Rights Act. Section 2 of the Act operates nationwide; as it exists today, that provision forbids any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Section 2 is not at issue in this case.

The remainder of the Act constitutes a "scheme of stringent remedies aimed at areas where voting

discrimination has been most flagrant." *Katzenbach, supra,* at 315, 86 S.Ct. 803. Rather than continuing to depend on case-by-case litigation, the Act directly pre-empted the most powerful tools of black disenfranchisement in the covered areas. All literacy tests and similar voting qualifications were abolished by § 4 of the Act. Voting Rights Act of 1965, §§ 4(a)-(d), 79 Stat. 438-439. Although such tests may have been facially neutral, they were easily manipulated to keep blacks from voting. The Act also empowered federal examiners to override state determinations about who was eligible to vote. §§ 6, 7, 9, 13, *id.,* at 439-442, 444-445.

These two remedies were bolstered by § 5, which suspended all changes in state election procedure until they were submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General. *Id.,* at 439, codified as amended at 42 U.S.C. § 1973c(a). Such preclearance is granted only if the change neither "has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *Ibid.* We have interpreted the requirements of § 5 to apply not only to the ballot-access rights guaranteed by § 4, but to drawing district lines as well. *Allen v. State Bd. of Elections,* 393 U.S. 544, 564-565, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

To confine these remedies to areas of flagrant disenfranchisement, the Act applied them only to States that had used a forbidden test or device in November 1964, and had less than 50% voter registration or turnout in the 1964 Presidential election. § 4(b), 79 Stat. 438. Congress recognized that the coverage formula it had adopted "might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices." *Briscoe v. Bell,* 432 U.S. 404, 411, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977). It therefore "afforded such jurisdictions immediately available protection in the form of ... [a] 'bailout' suit." *Ibid.*

To bail out under the current provision, a jurisdiction must seek a declaratory judgment from a three-judge District Court in Washington, D.C. 42 U.S.C. §§ 1973b(a)(1), 1973c(a). It must show that for the previous 10 years it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations; it must also show that it has "engaged in constructive efforts to eliminate intimidation and harassment" of voters, and similar measures. §§ 1973b(a)(1)(A)-(F). The Attorney General can consent to entry of judgment in favor of bailout if the evidence warrants it, though other interested parties are allowed to intervene in the declaratory judgment action. § 1973b(a)(9). There are other restrictions: To bail out, a covered jurisdiction must show that every jurisdiction in its territory has complied with all of these requirements. § 1973b(a)(3). The District Court also retains continuing jurisdiction over a successful bailout suit for 10 years, and may reinstate coverage if any violation is found. § 1973b(a)(5).

As enacted, §§ 4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years. § 4(a), 79 Stat. 438. We upheld the temporary Voting Rights Act of 1965 as an appropriate exercise of congressional power in *Katzenbach,* explaining that "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects." 383 U.S., at 308, 86 S.Ct. 803. We concluded that the problems Congress faced when it passed the Act were so dire that "exceptional conditions [could] justify legislative measures not otherwise appropriate." *Id.,* at 334-335, 86 S.Ct. 803 (citing *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398,

54 S.Ct. 231, 78 L.Ed. 413 (1934), and *Wilson v. New,* 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755 (1917)).

Congress reauthorized the Act in 1970 (for 5 years), 1975 (for 7 years), and 1982 (for 25 years). The coverage formula remained the same, based on the use of voting-eligibility tests and the rate of registration and turnout among all voters, but the pertinent dates for assessing these criteria moved from 1964 to include 1968 and eventually 1972. 42 U.S.C. § 1973b(b). We upheld each of these reauthorizations against constitutional challenges, finding that circumstances continued to justify the provisions. *Georgia v. United States,* 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); *City of Rome v. United States,* 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980); *Lopez v. Monterey County,* 525 U.S. 266, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999). Most recently, in 2006, Congress extended § 5 for yet another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577. The 2006 Act retained 1972 as the last baseline year for triggering coverage under § 5. It is that latest extension that is now before us.

B

Northwest Austin Municipal Utility District Number One was created in 1987 to deliver city services to residents of a portion of Travis County, Texas. It is governed by a board of five members, elected to staggered terms of four years. The district does not register voters but is responsible for its own elections; for administrative reasons, those elections are run by Travis County. Because the district is located in Texas, it is subject to the obligations of § 5, although there is no evidence that it has ever discriminated on the basis of race.

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II

The historic accomplishments of the Voting Rights Act are undeniable. When it was first passed, unconstitutional discrimination was rampant and the "registration of voting-age whites ran roughly 50 percentage points or more ahead" of black registration in many covered States. *Katzenbach, supra,* at 313, 86 S.Ct. 803; H.R.Rep. No. 109-478, p. 12 (2006). Today, the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites. *Id.,* at 12-13. Similar dramatic improvements have occurred for other racial minorities. *Id.,* at 18-20. "[M]any of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated." *Id.,* at 12; *Bartlett v. Strickland,* 556 U.S. 1, ----, 129 S.Ct. 1231, 1240-1241, 173 L.Ed.2d 173 (2009) (plurality opinion) ("Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote").

At the same time, § 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs.' " *Lopez, supra,* at 282, 119 S.Ct. 693 (quoting *Miller v. Johnson,* 515 U.S. 900, 926, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995)). These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of § 5.

Katzenbach, 383 U.S., at 358-362, 86 S.Ct. 803 (Black, J., concurring and dissenting); *Allen,* 393 U.S., at 586, n. 4, 89 S.Ct. 817 (Harlan, J., concurring in part and dissenting in part); *Georgia, supra,* at 545, 93 S.Ct. 1702 (Powell, J., dissenting); *City of Rome,* 446 U.S., at 209-221, 100 S.Ct. 1548 (Rehnquist, J., dissenting); *id.,* at 200-206, 100 S.Ct. 1548 (Powell, J., dissenting); *Lopez,* 525 U.S., at 293-298, 119 S.Ct. 693 (THOMAS, J., dissenting); *id.,* at 288, 119 S.Ct. 693 (KENNEDY, J., concurring in judgment).

Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law-however innocuous-until they have been precleared by federal authorities in Washington, D.C. The preclearance requirement applies broadly, *NAACP v. Hampton County Election Comm'n,* 470 U.S. 166, 175-176, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985), and in particular to every political subdivision in a covered State, no matter how small, *United States v. Sheffield Bd. of Comm'rs,* 435 U.S. 110, 117-118, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978).

Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. See generally H.R.Rep. No. 109-478, at 12-18.

These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements. See Issacharoff, Is Section 5 of the Voting Rights Act a Victim of Its Own Success? 104 Colum. L.Rev. 1710 (2004). It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.

The Act also differentiates between the States, despite our historic tradition that all the States enjoy "equal sovereignty." *United States v. Louisiana,* 363 U.S. 1, 16, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960) (citing *Lessee of Pollard v. Hagan,* 3 How. 212, 223, 11 L.Ed. 565 (1845)); see also *Texas v. White,* 7 Wall. 700, 725-726, 19 L.Ed. 227 (1869). Distinctions can be justified in some cases. "The doctrine of the equality of States ... does not bar ... remedies for *local* evils which have subsequently appeared." *Katzenbach, supra,* at 328-329, 86 S.Ct. 803 (emphasis added). But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.

These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. See *Georgia v. Ashcroft,* 539 U.S. 461, 491-492, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003) (KENNEDY, J., concurring) ("Race cannot be the predominant factor in redistricting under our decision in *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5"). Additional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere.

The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for

preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide. E. Blum & L. Campbell, Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act 3-6 (American Enterprise Institute, 2006). Congress heard warnings from supporters of extending § 5 that the evidence in the record did not address "systematic differences between the covered and the non-covered areas of the United States[,] ... and, in fact, the evidence that is in the record suggests that there is more similarity than difference." The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., 10 (2006) (statement of Richard H. Pildes); see also Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 208 (2007) ("The most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would ... disrupt settled expectations").

The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. The district argues that " '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,' " Brief for Appellant 31, quoting *City of Boerne v. Flores,* 521 U.S. 507, 520, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); the Federal Government asserts that it is enough that the legislation be a " 'rational means to effectuate the constitutional prohibition,' " Brief for Federal Appellee 6, quoting *Katzenbach, supra,* at 324, 86 S.Ct. 803. That question has been extensively briefed in this case, but we need not resolve it. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test.

In assessing those questions, we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden,* 275 U.S. 142, 147-148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Rostker v. Goldberg,* 453 U.S. 57, 64, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). The Fifteenth Amendment empowers "Congress," not the Court, to determine in the first instance what legislation is needed to enforce it. Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the District Court determined "document[ed] contemporary racial discrimination in covered states." 573 F.Supp.2d, at 265. The District Court also found that the record "demonstrat[ed] that section 5 prevents discriminatory voting changes" by "quietly but effectively deterring discriminatory changes." *Id.,* at 264.

We will not shrink from our duty "as the bulwar[k] of a limited constitution against legislative encroachments," The Federalist No. 78, p. 526 (J. Cooke ed. 1961) (A.Hamilton), but "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case," *Escambia County v. McMillan,* 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*). Here, the district also raises a statutory claim that it is eligible to bail out under §§ 4 and 5.

III

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More than 40 years ago, this Court concluded that "exceptional conditions" prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. *Katzenbach,* 383 U.S., at 334, 86 S.Ct. 803. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements.

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Federalism and the Regulation of Commerce in the United States

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The drafters of the United States Constitution established a federal system where power was to be shared between the States and the federal government. Therefore, what government, state or federal, has power to regulate a particular activity is always a concern under the American Constitution. The best example of how federalism works in the United States is to look at the Commerce Clause in Article 1, Section 8 of the United States Constitution. The clause is characteristically vague. It gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." It does not define the words "regulate" or "commerce." It does not prescribe any limits. Nor does it state anything about the powers of the states over commerce. Many of the difficult questions regarding the interpretation and implementation of this constitutional provision have been worked out by the courts during the past two hundred years, but because new problems and situations are constantly arising and because each generation looks at things from a slightly different perspective, the issues are constantly under review.

I. The Power of Congress to Regulate Commerce With Foreign Nations, and Among the Several States, and With the Indian Tribes.

In H.P. Hood & Sons v. DuMond, 336 U.S. 525, 533-34 (1949), Justice Jackson explained the motivation behind the Commerce Clause:

> When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. ". . . each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." This came "to threaten at once the peace and safety of the Union." . . . The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was "to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony" . . .
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> The necessity of centralized regulation of commerce among the states was so obvious and so fully recognized that the few words of the Commerce Clause were little illuminated by debate.

In the first case to interpret the Commerce Clause, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice John Marshall broadly interpreted the words "to regulate commerce among the several States." Commerce was interpreted to mean "intercourse" --"It describes the commercial intercourse between

nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Id. at 189 -90.

"Among the several States" was interpreted to mean:

> The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior. Id. at 194.
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> . . . .
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> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then may be considered as reserved for the State itself. Id. at 195.

The power to "regulate" was delineated as:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. Id. at 196 - 97.

The power to regulate commerce was not used extensively by Congress until the end of the Nineteenth Century, when Congress passed the Sherman Anti-trust Act and created the Interstate Commerce Commission to regulate railroad rates and charges. These initiatives ushered in other attempts by Congress in the early Twentieth Century to regulate child labor, strikes by workers, working conditions in mines and factories, and the transportation of drugs and even prostitutes and kidnapped persons across state lines. Conservative justices who strongly believed in *laissez faire* economics and who tried to rein in the federal power dominated the United States Supreme Court from 1890 until 1936. Their efforts to articulate a sound rational justification for their rulings that limited federal power were largely unsuccessful.

The Supreme Court tried to distinguish between activities that have a direct rather than an indirect effect on interstate commerce. For instance, the Court held that manufacturing was not commerce so Congress had no power to apply the Sherman Anti-trust Act to manufacturing concerns, United States v. E.C. Knight Co., 156 U.S. 1 (1895), or to regulate child labor. Hammer v. Dagenhart, 247 U.S. 251 (1918). Early "New Deal" legislation supported by President Franklin D. Roosevelt to counter the Great Depression in the early 1930's met a similar fate, and Roosevelt threatened legislation to reconstitute the Supreme Court if it did not shape up. Roosevelt's plan to reconstitute the Court was not passed by Congress, but the Court took note and expanded its view on the extent of Congressional power.

In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Supreme Court upheld federal legislation that required employers, including manufacturers, to bargain collectively with their employees. The Court articulated a new standard to judge the constitutionality of federal legislation (actually a standard very close to that articulated by Justice Marshall in Gibbons v. Ogden):

> The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for its "protection and advancement" . . .; to adopt measures "to promote its growth and insure its safety" . . . "to foster, protect, control, and restrain." . . . That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control Id. at 36 - 37.

In United States v. Darby, 312 U.S. 100 (1941), the Supreme Court upheld the Fair Labor Standards Act of 1938, which prescribed maximum hours and minimum wages in manufacturing companies that produced goods for shipment in interstate commerce. And in Wickard v. Filburn, 317 U.S. 111 (1942), the Court upheld the Agricultural Adjustment Act of 1938, which prescribed limits on the acreage for crops what could be raised on individual farms. In the 1960's, Congress passed Title II of the Civil Rights Act or 1964, which prohibited racial discrimination in hotels, restaurants, and other places of public accommodation, and the Supreme Court upheld Congress' power to do so. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 348 (1964); Katzenback v. McClung, 379 U.S. 294 (1964),

In the last several years a more conservative Supreme Court has tried to put limits on what might be considered a very broad Congressional power to regulate commerce among the several States. In United States v. Lopez, 514 U.S. 549 (1995), the Court held that Congress did not have power to pass the Gun-Free Zones Act of 1990, which made it unlawful "for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe, is a school zone" because Congress was not regulating a commercial activity or requiring that the possession be connected in any way to interstate commerce. The government argued that possession of a firearm does substantially affect interstate commerce because the costs of violent crime are substantial and because violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Justice Rehnquist rejected this argument:

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.
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> . . . .
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> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.

Similarly, in United States v. Morrison, 529 U.S. 598 (2000), the Supreme Court held that the Violence Against Women Act of 1994, 42 U.S.C. section 13981, was unconstitutional. The statute made crimes of

violence committed because of gender or on the basis of gender due, at least in part, to an animus based on the victim's gender a federal crime. Congress made explicit findings regarding the serious impact that gender-motivated violence had on victims and their families and the substantial affect that these crimes had on interstate commerce. Nonetheless, the Court stated that to accept this reasoning "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption." The Court concluded: "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."

Also, Seminole Tribe v. Florida, 517 U.S. 44 (1996), the Supreme Court held that the Commerce Clause could not be used by Congress to authorize private parties to bring suit in federal court against a State. Normally a State cannot be sued in federal court without its consent because of the operation of the Eleventh Amendment, but the Supreme Court had held in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), that the Commerce Clause granted Congress power to abrogate a State's sovereign immunity. In Seminole Tribe, the Court overturned Union Gas, stating: "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."

The Court has used Seminole to invalidate a number of attempts to allow suits directly against States. The Court has held that Congress could not subject States to suit in federal court in damage actions for infringement of trademarks and patents. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999). Similarly, it has held that Congress had no power to subject State agencies to damage suits for violating the Age Discrimination in Employment Act, Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), or the employment discrimination provisions of Title I of the Americans with Disabilities Act of 1990. University of Alabama v. Garrett, 531 U.S. 356 (2001).

The Court has also extended the doctrine of sovereign immunity to prevent States from being sued without their consent in state courts under federal statutes, Alden v. Maine, 527 U.S. 706 (1999), and in federal administrative agencies. Federal Maritime Commission v. South Carolina State Ports Authority, 122 S. Ct. 1864 (2002). However, in Nevada Department of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003), the Supreme Court upheld the Family and Medical Leave Act, which abrogated state sovereign immunity in suits for damages based on gender discrimination in family leave policies. The Court held that Congress had power to pass the Act under Section 5 of the 14th Amendment based on Congress' findings of a pattern of state reliance on invalid gender stereotypes in the administration of state leave benefits programs. The Court distinguished Kimel and Garrett on the ground that there was no proof in those cases that there was pattern or practice of discrimination based on age or disability as there was relating to gender in state leave benefits.

Critics of these recent opinions argue that the Court is again trying to draw lines where none exist and turn an essentially political question into a question of law. If indeed this is what the Court is embarking upon, there is no reason to think that the Court today will be any more successful in defining limits than it was during the early part of the Twentieth Century. The Court itself has reminded us of the narrowness of these more limiting decisions.

In Gonzales v. Raich, 543 U.S. 1 (2005), the Supreme Court invalidated a California law authorizing the use of marijuana for medicinal purposes on the ground that it conflicted with the Federal Comprehensive Drug Abuse Prevention and Control Act. In discussing the scope of the federal law, the Court emphasized "Congress' power to regulate purely local activities that are part of an economic 'class of activities' have a substantial effect on interstate commerce…."

The Court cautioned that Lopez and Morrison should not be read too broadly. The Court found that the regulation of marijuana was "quintessentially economic" and that it did not require any extended economic analysis to conclude "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 the extraordinarily popular substance….."

II. The Power of the States to Regulate Commercial Activities

In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), in addition to discussing the federal power to regulate commerce Justice Marshall put limits on the States in their ability to regulate commercial activities. While Congress has plenary power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," the States retain power to regulate their own purely internal affairs. Justice Marshall noted:

> Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of [the State], as expounded by the highest tribunal of that State, have in their application come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of [the State] must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . . Id. at 209 - 210.

Whenever a State law conflicts with an Act of Congress it will be struck down. This is expressly required by the Supremacy Clause of the Constitution. Article VI, Section 2. Sometimes Congress will state expressly that its legislation is exclusive of State power, but this is rare. More often Congress will not say anything, and the Courts are left to wrestle with the question whether Congress intended the field to be governed by a uniform national rule or whether Congress intended that the States could exercise power concurrently so long as no direct conflict occurs.

State laws may also be struck down by the courts even in instances where Congress has not legislated but where a State has legislated on a matter of purely national concern. In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the Supreme Court held that a State law requiring local pilots to be aboard vessels coming into or leaving the Port of Philadelphia did not conflict with existing federal legislation. However, the Court spoke more broadly about the relationship between state and federal legislative

powers: "[w]hatever subjects of [the Commerce Power] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

Any state attempt to legislate on a subject of national concern will be struck down by the courts even if Congress has not passed legislation regulating the activity. For instance, the Supreme Court invalidated a State law that regulated the length of trains, which the State contended was a safety measure, on the ground that the State was regulating a matter of national concern that required uniform legislation throughout the United States. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). However, the Supreme Court has regularly upheld state attempts to regulate highway safety. For instance, the Court upheld a South Carolina statute that regulated the width and weight of motor trucks on state highways as a local police regulation. South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. 177 (1938).

State regulations on matters of local concern will be struck down if they substantially burden or discriminate against interstate commerce. In deciding this question the courts will carefully weight the burden the State regulation imposes against the purported safety or other concern identified by the State. For instance, the Court invalidated an Iowa statute that prohibited the use of certain large trucks on interstate highways in Iowa because the statute impermissibly burdened interstate commerce. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981). Iowa had failed to produce persuasive evidence that the longer trucks were less safe than other trucks and the industry presented evidence of a significant burden on interstate traffic because the law produced inefficiency and increased costs and may have actually aggravated the problem of highway accidents.

In deciding whether a State has imposed an undue burden on interstate or foreign commerce the courts do not sit as legislators, and "[w]hen the action of a Legislature is in the scope of its power," the courts will defer to the legislative judgment on "fairly debatable questions as to [a law's] reasonableness, wisdom, and propriety." South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. 177, 190 - 91. For the most part, it can be said that the United States Supreme Court has done an excellent job in reconciling local concerns under the police power against the national concern of allowing commerce to flow freely among the States.

States generally have power to pass quarantine and inspection laws that have a valid health or safety concern. When the purpose is to protect a local industry against out-of-state competition then the legislation will be struck down. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951), is an example where an ordinance of the City of Madison, Wisconsin regulating the sale of milk unless it was pasteurized within a five mile limit of the City was invalidated because it in practical effect excluded milk produced in Illinois and thus erected "an economic barrier protecting a major local industry against competition from without the State." The City argued that the law was based upon legitimate health and safety concerns, but the Supreme Court held that reasonable and adequate alternatives that had a less discriminatory impact on interstate commerce were available to protect that interest.

Similarly, in Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978), New Jersey prohibited the importation of most solid or liquid wastes into New Jersey. The owners of private landfills in New Jersey and several cities in other States challenged the law. New Jersey argued that it was a small State and that it had limited landfills available for the disposal of waste or garbage and that these should be make

available solely for New Jersey garbage. The Supreme Court found that New Jersey was discriminating against waste coming from outside the State: "[w]hat is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." The law was not a proper quarantine law because New Jersey did not identify any particular health concern posed by foreign, as distinguished from domestic, garbage. The Court took a longer view and noted that tomorrow New Jersey may find it expedient to ship its garbage outside its borders and the Commerce Clause will protect New Jersey from the isolationist impulses of other States.

In CTS Corp v. Dynamics Corp., 481 U.S. 69 (1987), the State of Indiana amended its Business Corporation Law to condition the acquisition of control of any Indiana corporation on the approval of a majority of pre-existing disinterested shareholders. This provision made it more difficult for corporations to merge or for outsiders to gain control of corporations incorporated in Indiana. Dynamics, an out-of-state corporation, made a tender offer to acquire a controlling share of CTS Corporation, an Indiana Corporation, and then filed suit to have the Indiana restriction declared unconstitutional. The Supreme Court upheld the Indiana law. It was first found not to conflict with any act passed by Congress. The law was not discriminatory because it imposed no greater burden on out-of-state offerors than it did on similarly situated Indiana offerors. It did not subject offerors to inconsistent regulations because Indiana only regulated the voting rights in the corporations it alone had created, and therefore each corporation was subject only to the law of its state of incorporation. The fact that the law had the potential to hinder tender offers was held to be immaterial:

> It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs. Id. at 91.

III. Some Observations about Federalism in the United States

The powers of federal government in the United States are not all equal. The power to tax is shared equally between the states and the federal government, with only those limitations spelled out in the Constitution. The war power and the power over foreign affairs are examples of powers that are lodged exclusively in the federal government. As we have seen, Congress has the exclusive power to regulate foreign and interstate commerce, but the states still retain their general police powers, which frequently overlap with the national power.

Despite the claim of some political conservatives that the Twentieth Century has concentrated excessive power in the federal government, most commercial activities, with the exception of bankruptcy, are still regulated by the States. Corporations are chartered under state, not federal, law. Contract law is largely defined by the States, not by the federal government. Insurance is regulated under state, not federal, law. Products liability and most business related torts are defined by state, not federal, law. Criminal laws, with certain notable exceptions such as mail fraud and racketeering, are promulgated and enforced by the states.

Potentially this could be a problem for multi-state and foreign businesses that have to know and comply with the laws of each of the fifty States. Practically, however, this is not a serious problem. The basic

provisions of most state laws are quite similar. The Uniform Commercial Code, now in effect in most of the States, is perhaps the most notable example of attempts to harmonize state laws without preempting it through federal legislation. When there is a need for uniform federal legislation, as in the banking area, the federal government has responded.

The experience of the United States with a federal system can be relevant to a world that is trying to establish free trade both regionally and globally. The elimination of borders between the States has fostered the prosperity of the United States and lessened tensions between the States because of the unequal distribution of resources. The "we must all sink or swim together" attitude this has fostered has generally been healthy.

In the early part of the Twentieth Century, the Supreme Court ruled that Congress had no power to regulate “local” concerns such as child labor or the wages employers pay their employees. As a result of these decisions, States that enacted minimum wage and hour laws and prohibited child labor found that their products could not successfully compete with the products of companies in States without such laws. This provided States with a disincentive to enact social legislation. After 1936, when the Supreme Court enlarged its interpretation of the federal power under the Commerce Clause, Congress could enact laws to provide social benefits to workers and to regulate their wages and hours. These measures leveled the playing field.

Similar examples can be cited in the environmental field. If a State allows its corporations to pollute the air and water, it is giving its corporations a competitive advantage over corporations in States that require companies to comply with strict environmental regulations. The result is that all States will feel pressure to relax their environmental laws in order to remain competitive. The United States Congress has power to prevent this from happening, thereby eliminating the pressure on States to engage in economic warfare by seeking to bar goods produced in another State, which would likewise be illegal.

We see this dynamic being played out over and over again internationally. American companies leave the United States looking for cheap labor and then use free trade to import their products back into the United States. American labor unions support legislation to keep these goods out of the United States, but they are not always successful in doing so. Rather than providing good work for impoverished workers around the world and thereby raising the living standard for everyone, more likely the result is that workers in the more prosperous countries will lose their high paying jobs while workers in the poorer countries will be crowded into sweat shops with little improvement in their economic and social situations. The only winners are the large multi-national corporations.

Supra-national or international regulations and a judiciary that has power to enforce these regulations is often the only effective mechanism to deal with these concerns. This requires States to sacrifice at least some of their sovereignty to these supra-national or international bodies.

Europe has been struggling with this problem, as are many other regions of the world. The United States offers one model to structure these concerns.

Heart of Atlanta Motel v. United States
379 U.S. 241 (1964)

Mr. Justice CLARK delivered the opinion of the Court

This is a declaratory judgment action, 28 U.S.C. s 2201 and s 2202 (1958 ed.) attacking the constitutionality of Title II of the Civil Rights Act of 1964, 78 Stat. 241, 24. In addition to declaratory relief the complaint sought an injunction restraining the enforcement of the Act and damages against appellees based on allegedly resulting injury in the event compliance was required. Appellees counterclaimed for enforcement under s 206(a) of the Act and asked for a three-judge district court under s 206(b). A three-judge court, empaneled under s 206(b) as well as 28 U.S.C. s 2282 (1958 ed.) sustained the validity of the Act and issued a permanent injunction on appellees' counterclaim restraining appellant from continuing to violate the Act which remains in effect on order of Mr. Justice BLACK, 85 S.Ct. 1. We affirm the judgment.

1. The Factual Background and Contentions of the Parties.

The case comes here on admissions and stipulated facts. Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under Art. I, s 8, cl. 3, of the Constitution of the United States; that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation; and, finally, that by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints; that the Fifth Amendment does not forbid reasonable regulation and that consequential damage does not constitute a 'taking' within the meaning of that amendment; that the Thirteenth Amendment claim fails because it is entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations, beyond the reach of both federal and state law.

2. The History of the Act.

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866. There followed four Acts, with a fifth, the Civil Rights Act of March 1, 1875, culminating the series. In 1883 this Court struck down the public accommodations sections of the 1875 Act in the

Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835. No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957 became law. It was followed by the Civil Rights Act of 1960. Three years later, on June 19, 1963, the late President Kennedy called for civil rights legislation in a message to Congress to which he attached a proposed bill. Its stated purpose was

'to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in * * * public accommodations through the exercise by Congress of the powers conferred upon it * * * to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.' H.R.Doc.No. 124, 88th Cong., 1st Sess., at 14.

Bills were introduced in each House of the Congress, embodying the President's suggestion, one in the Senate being S. 173, and one in the House, H.R. 7152. However, it was not until July 2, 1964, upon the recommendation of President Johnson, that the Civil Rights Act of 1964, here under attack, was finally passed.

3. Title II of the Act.

This Title is divided into seven sections beginning with s 201(a) which provides that:

'All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.'

There are listed in s 201(b) four classes of business establishments, each of which 'serves the public' and 'is a place of public accommodation' within the meaning of s 201(a) 'if its operations affect commerce, or if discrimination or segregation by it is supported by State action.' The covered establishments are:

'(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
. . . .

Section 201(c) defines the phrase 'affect commerce' as applied to the above establishments. It first declares that 'any inn, hotel, motel, or other establishment which provides lodging to transient guests' affects commerce per se. . . .

4. Application of Title II to Heart of Atlanta Motel.

It is admitted that the operation of the motel brings it within the provisions of s 201(a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on s 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, s 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' At the same time, however, it noted that such an objective has been and could be readily

achieved 'by congressional action based on the commerce power of the Constitution.' S.Rep. No. 872, supra, at 16-17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. . . .

6. The Basis of Congressional Action.

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. See Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S.Rep. No. 872, supra; Hearings before Senate Committee on the Judiciary on S. 1731, 88th Cong., 1st Sess.; Hearings before House Subcommittee No. 5 of the Committee on the Judiciary on miscellaneous proposals regarding Civil Rights, 88th Cong., 1st Sess., ser. 4; H.R.Rep. No. 914, supra. This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight, S.Rep. No. 872, supra, at 14-22; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself 'dramatic testimony to the difficulties' Negroes encounter in travel. Senate Commerce Committee Hearings, supra, at 692-694. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is 'no question that this discrimination in the North still exists to a large degree' and in the West and Midwest as well. Id., at 735, 744. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. Id., at 744. This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate Commerce Committee that it was his 'belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.' Id., at 12-13. We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

7. The Power of Congress Over Interstate Travel.

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great Chief Justice John Marshall in Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23 (1824), in these words:

'The subject to be regulated is commerce; and * * * to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities * * * but it is something more: it is intercourse * * * between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. (At 189-190.)

. . . .

That the 'intercourse' of which the Chief Justice spoke included the movement of persons through more States than one was settled as early as 1849, in the Passenger Cases (Smith v. Turner), 7 How. 283, 12 L.Ed. 702, where Mr. Justice McLean stated: 'That the transportation of passengers is a part of commerce

is not now an open question.' At 401. Again in 1913 Mr. Justice McKenna, speaking for the Court, said: 'Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and porperty.' Hoke v. United States, 227 U.S. 308, 320, 33 S.Ct. 281, 283, 57 L.Ed. 523. And only four years later in 1917 in Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, Mr. Justice Day held for the Court:

'The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.' At 491, 37 S.Ct. at 197.

Nor does it make any difference whether the transportation is commercial in character. Id., at 484-486, 37 S.Ct. at 194-195. . . .

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling . . .; to criminal enterprises . . . ; to deceptive practices in the sale of products . . .; to fraudulent security transactions . . . ; to misbranding of drugs . . . ; to wages and hours . . .; to members of labor unions . . .; to crop control . . .; to discrimination against shippers . . .; to the protection of small business from injurious price cutting . . .; to resale price maintenance . . .; to professional football . . . ,; and to racial discrimination by owners and managers of terminal restaurants . . . .

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, '(i)f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805 (1949). . . .

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed-what means are to be employed-is within the sound and exclusive discretion of the Congress. It is subject only to one caveat-that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

United States v. Morrison
529 U.S. 598 (2000)

Chief Justice REHNQUIST delivered the opinion of the Court.

In these cases we consider the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down § 13981 because it concluded that Congress lacked constitutional authority to enact the section's civil remedy. Believing that these cases are controlled by our decisions in *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), *United States v. Harris,* 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883), and the *In re Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), we affirm.

I

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. . . .

[Virginia Tech refused to take any disciplinary action against the respondents.] In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that Morrison's and Crawford's attack violated § 13981. . . .

The District Court . . . dismissed the complaint because it concluded that Congress lacked authority to enact the section under either the Commerce Clause or § 5 of the Fourteenth Amendment. [The Court of Appeals affirmed.]

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

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

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

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

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

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

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

Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C. J.). Congress explicitly identified the sources of federal authority on which it relied in enacting § 13981. It said that a "Federal civil rights cause of action" is established "[p]ursuant to the affirmative power of Congress ... under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution." 42 U.S.C. § 13981(a). We address Congress' authority to enact this remedy under each of these constitutional provisions in turn.

II

Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez,* 514 U.S., at 568, 577-578, 115 S.Ct. 1624 (KENNEDY, J., concurring); *United States v. Harris,* 106 U.S., at 635, 1 S.Ct. 601. With this presumption of constitutionality in mind, we turn to the question whether § 13981 falls within Congress' power under Article I, § 8, of the Constitution. Brzonkala and the United States rely upon the third clause of the section, which gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

As we discussed at length in *Lopez,* our interpretation of the Commerce Clause has changed as our Nation has developed. See 514 U.S., at 552-557, 115 S.Ct. 1624; *id.,* at 568-574, 115 S.Ct. 1624 (KENNEDY, J., concurring); *id.,* at 584, 593-599, 115 S.Ct. 1624 (THOMAS, J., concurring). We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted. See *Lopez,* 514 U.S., at 555-556, 115 S.Ct. 1624; *id.,* at 573-574, 115 S.Ct. 1624 (KENNEDY, J., concurring).

Lopez emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds. *Id.,* at 557, 115 S.Ct. 1624.

> "[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel,* the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' " *Id.,* at 556-557, 115 S.Ct. 1624 (quoting *Jones & Laughlin Steel, supra,* at 37, 57 S.Ct. 615).

As we observed in *Lopez,* modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power.". . . "First, Congress may regulate the use of the channels of interstate commerce." . . . "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.". . . "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... *i.e.,* those activities that substantially affect interstate commerce."

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

Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981. In *Lopez,* we held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. See 514 U.S., at 551, 115 S.Ct. 1624. Several significant considerations contributed to our decision.

First, we observed that § 922(q) was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." . . .

The second consideration that we found important in analyzing § 922(q) was that the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." . . .

Third, we noted that neither § 922(q) " 'nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.' " . . .

Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. . . . We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.,* at 564, 115 S.Ct. 1624. We noted that, under this but-for reasoning:

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

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. See, *e.g., id.,* at 559-560, 115 S.Ct. 1624, and the cases cited therein.

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

In contrast with the lack of congressional findings that we faced in *Lopez,* § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. See, *e.g.,* H.R. Conf. Rep. No. 103-711, p. 385 (1994), U.S.Code Cong. & Admin.News 1994, pp. 1803, 1853; S.Rep. No. 103-138, p. 40 (1993); S.Rep. No. 101-545, p. 33 (1990). But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez,* " '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " 514 U.S., at 557, n. 2, 115 S.Ct. 1624 (quoting *Hodel,* 452 U.S., at 311, 101 S.Ct. 2389 (REHNQUIST, J., concurring in judgment)). Rather, " '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative

question, and can be settled finally only by this Court.' " 514 U.S., at 557, n. 2, 115 S.Ct. 1624 (quoting *Heart of Atlanta Motel,* 379 U.S., at 273, 85 S.Ct. 348 (Black, J., concurring)).

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

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

. . . . Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. . . . .

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. *Lopez,* 514 U.S., at 568, 115 S.Ct. 1624 (citing *Jones & Laughlin Steel,* 301 U.S., at 30, 57 S.Ct. 615). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See, *e.g., Cohens v. Virginia,* 6 Wheat. 264, 426, 428, 5 L.Ed. 257 (1821) (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear ... that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. See, *e.g., Lopez,* 514 U.S., at 566, 115 S.Ct. 1624 ("The Constitution ... withhold[s] from Congress a plenary police power"); *id.,* at 584-585, 115 S.Ct. 1624 (THOMAS, J., concurring) ("[W]e *always* have rejected reading of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596-597, and n. 6, 115 S.Ct. 1624 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

III

Because we conclude that the Commerce Clause does not provide Congress with authority to enact § 13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise of Congress' remedial power under § 5 of the Fourteenth Amendment. As noted above, Congress expressly invoked the Fourteenth Amendment as a source of authority to enact § 13981.
. . . .

Petitioners' § 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion is supported by a voluminous

congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. See H.R. Conf. Rep. No. 103-711, at 385-386; S.Rep. No. 103-138, at 38, 41-55; S.Rep. No. 102-197, at 33-35, 41, 43-47. Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts.

As our cases have established, state-sponsored gender discrimination violates equal protection unless it " 'serves "important governmental objectives and ... the discriminatory means employed" are "substantially related to the achievement of those objectives." ' " *United States v. Virginia,* 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (quoting *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), in turn quoting *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 150, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980)). See also *Craig v. Boren,* 429 U.S. 190, 198-199, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. See *Flores, supra,* at 520-524, 117 S.Ct. 2157 (reviewing the history of the Fourteenth Amendment's enactment and discussing the contemporary belief that the Amendment " 'does not concentrate power in the general government for any purpose of police government within the States' ") (quoting T. Cooley, Constitutional Limitations 294, n. 1 (2d ed. 1871)). Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer,* 334 U.S. 1, 13, and n. 12, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

. . . .

Petitioners alternatively argue that, unlike the situation in the *Civil Rights Cases,* here there has been gender-based disparate treatment by state authorities, whereas in those cases there was no indication of such state action. There is abundant evidence, however, to show that the Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting § 13981: There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves. . . .

But even if that distinction were valid, we do not believe it would save § 13981's civil remedy. For the remedy is simply not "corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers." *Civil Rights Cases, supra,* at 18, 3 S.Ct. 18. Or, as we have phrased it in more recent cases, prophylactic legislation under § 5 must have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 639, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *Flores,* 521 U.S., at 526, 117 S.Ct. 2157. Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.

For these reasons, we conclude that Congress' power under § 5 does not extend to the enactment of § 13981.

IV

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

Affirmed.

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

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

I

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard v. Filburn,* 317 U.S. 111, 124-128, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 277, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, *ibid.,* but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See *ibid.* Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.
. . . .

II

The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I, § 8, cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, see *Heart of Atlanta, supra,* at 258, 85 S.Ct. 348; *McClung, supra,* at 301-305, 85 S.Ct. 377, but declined to limit the commerce power through a formal distinction between legislation focused on "commerce" and statutes addressing "moral and social wrong[s]," *Heart of Atlanta,* 379 U.S., at 257, 85 S.Ct. 348.

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.

I

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

II

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

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. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.

III

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

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an

economic "class of activities" that have a substantial effect on interstate commerce. See, *e.g., Perez,* 402 U.S., at 151, 91 S.Ct. 1357; *Wickard v. Filburn,* 317 U.S. 111, 128-129, 63 S.Ct. 82, 87 L.Ed. 122 (1942). As we stated in *Wickard,* "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.,* at 125, 63 S.Ct. 82. We have never required Congress to legislate with scientific exactitude. When Congress decides that the " 'total incidence' " of a practice poses a threat to a national market, it may regulate the entire class. See *Perez,* 402 U.S., at 154-155, 91 S.Ct. 1357 (" '[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so' "(quoting *Westfall v. United States,* 274 U.S. 256, 259, 47 S.Ct. 629, 71 L.Ed. 1036 (1927))). In this vein, we have reiterated that when " 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.' " *E.g., Lopez,* 514 U.S., at 558, 115 S.Ct. 1624 (quoting *Maryland v. Wirtz,* 392 U.S. 183, 196, n. 27, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968); emphasis deleted).

Our decision in *Wickard,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122, is of particular relevance. In *Wickard,* we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, 52 Stat. 31, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess by consuming it on his own farm. Filburn argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm." *Wickard,* 317 U.S., at 118, 63 S.Ct. 82. Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote:

> "The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.,* at 127-128, 63 S.Ct. 82.

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

The similarities between this case and *Wickard* are striking. . . . .

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *Lopez,* 514 U.S., at 557, 115 S.Ct. 1624; see also *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276-280, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Perez,* 402 U.S., at 155-156, 91 S.Ct. 1357; *Katzenbach v. McClung,* 379 U.S. 294, 299- 301, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 252-253, 85 S.Ct. 348, 13 L.Ed.2d

258 (1964). Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, 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.

IV

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

Those two cases, of course, are *Lopez,* 514 U.S. 549, 115 S.Ct. 1624, and *Morrison,* 529 U.S. 598, 120 S.Ct. 1740. As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison,* the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez,* 402 U.S., at 154, 91 S.Ct. 1357 (quoting *Wirtz,* 392 U.S., at 193, 88 S.Ct. 2017 (emphasis deleted)); see also *Hodel,* 452 U.S., at 308, 101 S.Ct. 2352.

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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. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Printz v. United States
521 U.S. 898 (1997)

Justice SCALIA delivered the opinion of the Court.

The question presented in these cases is whether certain interim provisions of the Brady Handgun Violence Prevention Act, Pub.L. 103-159, 107 Stat. 1536, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution.

I

The Gun Control Act of 1968(GCA), 18 U.S.C. § 921 *et seq.,* establishes a detailed federal scheme governing the distribution of firearms. It prohibits firearms dealers from transferring handguns to any person under 21, not resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms, § 922(b). It also forbids possession of a firearm by, and transfer of a firearm to, convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or been convicted of a misdemeanor offense involving domestic violence. §§ 922(d) and (g).

In 1993, Congress amended the GCA by enacting the Brady Act. The Act requires the Attorney General to establish a national instant background-check system by November 30, 1998, Pub.L. 103-159, as amended, Pub.L. 103-322, 103 Stat. 2074, note following 18 U.S.C. § 922, and immediately puts in place certain interim provisions until that system becomes operative. Under the interim provisions, a firearms dealer who proposes to transfer a handgun must first: (1) receive from the transferee a statement (the Brady Form), § 922(s)(1)(A)(i)(I), containing the name, address, and date of birth of the proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers, § 922(s)(3); (2) verify the identity of the transferee by examining an identification document, § 922(s)(1)(A)(i)(II); and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form, §§ 922(s)(1)(A)(i)(III) and (IV). With some exceptions, the dealer must then wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal. § 922(s)(1)(A)(ii).

The Brady Act creates two significant alternatives to the foregoing scheme. A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, § 922(s)(1)(C), or if state law provides for an instant background check, § 922(s)(1)(D). In States that have not rendered one of these alternatives applicable to all gun purchasers, CLEOs are required to perform certain duties. When a CLEO receives the required notice of a proposed transfer from the firearms dealer, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." § 922(s)(2). The Act

does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so. If, however, the CLEO notifies a gun dealer that a prospective purchaser is ineligible to receive a handgun, he must, upon request, provide the would-be purchaser with a written statement of the reasons for that determination. § 922(s)(6)(C). Moreover, if the CLEO does not discover any basis for objecting to the sale, he must destroy any records in his possession relating to the transfer, including his copy of the Brady Form. § 922(s)(6)(B)(i). Under a separate provision of the GCA, any person who "knowingly violates [the section of the GCA amended by the Brady Act] shall be fined under this title, imprisoned for not more than 1 year, or both." § 924(a)(5).

Petitioners Jay Printz and Richard Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions. In each case, the District Court held that the provision requiring CLEOs to perform background checks was unconstitutional, but concluded that that provision was severable from the remainder of the Act, effectively leaving a voluntary background-check system in place. 856 F.Supp. 1372 (D.Ariz.1994); 854 F.Supp. 1503 (D.Mont.1994). A divided panel of the Court of Appeals for the Ninth Circuit reversed, finding none of the Brady Act's interim provisions to be unconstitutional. 66 F.3d 1025 (1995). We granted certiorari. 518 U.S. 1003, 116 S.Ct. 2521, 135 L.Ed.2d 1046 (1996).

II

From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state-law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed 5-day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. We treat those three sources, in that order, in this and the next two sections of this opinion.

Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws," Brief for United States 28. The Government's contention demands our careful consideration, since early congressional enactments "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning," *Bowsher v. Synar,* 478 U.S. 714, 723-724, 106 S.Ct. 3181,

3186, 92 L.Ed.2d 583 (1986) (quoting *Marsh v. Chambers,* 463 U.S. 783, 790, 103 S.Ct. 3330, 3335, 77 L.Ed.2d 1019 (1983)). Indeed, such "contemporaneous legislative exposition of the Constitution ..., acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers v. United States,* 272 U.S. 52, 175, 47 S.Ct. 21, 45, 71 L.Ed. 160 (1926) (citing numerous cases). Conversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.

. . . .

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress-even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. See C. Warren, The Making of the Constitution 325-327 (1928). And the Supremacy Clause, Art. VI, cl. 2, announced that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. The principle underlying so-called "transitory" causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum State would enforce. See, *e.g., McKenna v. Fisk,* 1 How. 241, 247-249, 11 L.Ed. 117 (1843). The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States. See *Hughes v. Fetter,* 341 U.S. 609, 71 S.Ct. 980, 95 L.Ed. 1212 (1951).

For these reasons, we do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power. The only early federal law the Government has brought to our attention that imposed duties on state executive officers is the Extradition Act of 1793, which required the "executive authority" of a State to cause the arrest and delivery of a fugitive from justice upon the request of the executive authority of the State from which the fugitive had fled. See Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302. That was in direct implementation, however, of the Extradition Clause of the Constitution itself, see Art. IV, § 2.

. . . .

In addition to early legislation, the Government also appeals to other sources we have usually regarded as indicative of the original understanding of the Constitution. It points to portions of The Federalist which reply to criticisms that Congress's power to tax will produce two sets of revenue officers-for example, "Brutus's" assertion in his letter to the New York Journal of December 13, 1787, that the Constitution "opens a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community, eat up their substance, and riot on the spoils of the country," reprinted in 1 Debate on the Constitution 502 (B. Bailyn ed.1993). "Publius" responded that Congress will probably "make use of the State officers and State regulations, for collecting" federal taxes, The

Federalist No. 36, p. 221 (C. Rossiter ed. 1961) (A. Hamilton) (hereinafter The Federalist), and predicted that "the eventual collection [of internal revenue] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States," *id.,* No. 45, at 292 (J. Madison). The Government also invokes The Federalist's more general observations that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws," *id.,* No. 27, at 176 (A. Hamilton), and that it was "extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union," *id.,* No. 45, at 292 (J. Madison). But none of these statements necessarily implies-what is the critical point here-that Congress could impose these responsibilities *without the consent of the States.* They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government, see *FERC v. Mississippi,* 456 U.S. 742, 796, n. 35, 102 S.Ct. 2126, 2157, n. 35, 72 L.Ed.2d 532 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part), an assumption proved correct by the extensive mutual assistance the States and Federal Government voluntarily provided one another in the early days of the Republic, see generally White, *supra,* at 401-404, including voluntary *federal implementation of state law,* see, *e.g.,* Act of Apr. 2, 1790, ch. 5, § 1, 1 Stat. 106 (directing federal tax collectors and customs officers to assist in enforcing state inspection laws).

. . . .

To complete the historical record, we must note that there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years. The Government points to the Act of August 3, 1882, ch. 376, §§ 2, 4, 22 Stat. 214, which enlisted state officials "to take charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need of public aid"; to inspect arriving immigrants and exclude any person found to be a "convict, lunatic, idiot," or indigent; and to send convicts back to their country of origin "without compensation." The statute did not, however, *mandate* those duties, but merely empowered the Secretary of the Treasury "to *enter into contracts* with such State ... officers as *may be designated* for that purpose *by the governor* of any State." (Emphasis added.)

. . . .

III

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," *Principality of Monaco v. Mississippi,* 292 U.S. 313, 322, 54 S.Ct. 745, 748, 78 L.Ed. 1282 (1934), a principle that controls the present cases.

A

It is incontestible that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft,* 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); *Tafflin v. Levitt,* 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990). Although the States surrendered many of their powers to the

new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, *Lane County v. Oregon,* 7 Wall. 71, 76, 19 L.Ed. 101 (1869); *Texas v. White,* 7 Wall. 700, 725, 19 L.Ed. 227 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and ... those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering v. Gerhardt,* 304 U.S. 405, 414-415, 58 S.Ct. 969, 973, 82 L.Ed. 1427 (1938). Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. . . .

This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." 501 U.S., *supra,* at 458, 111 S.Ct., at 2400. To quote Madison once again:

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, at 323.

See also The Federalist No. 28, at 180-181 (A.Hamilton). The power of the Federal Government would be augmented immeasurably if it were able to impress into its service-and at no cost to itself-the police officers of the 50 States.

B

We have thus far discussed the effect that federal control of state officers would have upon the first element of the "double security" alluded to by Madison: the division of power between State and Federal Governments. It would also have an effect upon the second element: the separation and equilibration of powers between the three branches of the Federal Government itself. The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves Presidential appointees), Art. II, § 2. The Brady Act effectively

transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive-to ensure both vigor and accountability-is well known. See The Federalist No. 70 (A.Hamilton); 2 Documentary History of the Ratification of the Constitution 495 (M. Jensen ed.1976) (statement of James Wilson); see also Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541 (1994). That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

IV

Finally, the Government puts forward a cluster of arguments that can be grouped under the heading: "The Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers." There is considerable disagreement over the extent of the burden, but we need not pause over that detail. Assuming *all* the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. See, *e.g., Fry v. United States,* 421 U.S. 542, 548, 95 S.Ct. 1792, 1796, 44 L.Ed.2d 363 (1975); *National League of Cities v. Usery,* 426 U.S. 833, 853, 96 S.Ct. 2465, 2475, 49 L.Ed.2d 245 (1976) (overruled by *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)); *South Carolina v. Baker,* 485 U.S. 505, 529, 108 S.Ct. 1355, 1370, 99 L.Ed.2d 592 (1988) (REHNQUIST, C.J., concurring in judgment). But where, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect. Cf. *Bowsher,* 478 U.S., at 736, 106 S.Ct., at 3192-3193 (declining to subject principle of separation of powers to a balancing test); *Chadha,* 462 U.S., at 944-946, 103 S.Ct., at 2780-2782 (same); *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 933 211, 239-240, 115 S.Ct. 1447, 1462-1463, 131 L.Ed.2d 328 (1995) (holding legislated invalidation of final judgments to be categorically unconstitutional). We expressly rejected such an approach in *New York,* and what we said bears repeating:

> "Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." 505 U.S., at 187, 112 S.Ct., at 2434.

We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York:* "The Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.,* at 188, 112 S.Ct., at 2435. The mandatory obligation imposed on CLEOs to perform

background checks on prospective handgun purchasers plainly runs afoul of that rule.

V

What we have said makes it clear enough that the central obligation imposed upon CLEOs by the interim provisions of the Brady Act-the obligation to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General," 18 U.S.C. § 922(s)(2)-is unconstitutional. Extinguished with it, of course, is the duty implicit in the background-check requirement that the CLEO accept notice of the contents of, and a copy of, the completed Brady Form, which the firearms dealer is required to provide to him, §§ 922(s)(1)(A)(i) (III) and (IV).

* * *

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

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

When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens. This conclusion is firmly supported by the text of the Constitution, the early history of the Nation, decisions of this Court, and a correct understanding of the basic structure of the Federal Government.

These cases do not implicate the more difficult questions associated with congressional coercion of state legislatures addressed in *New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Nor need we consider the wisdom of relying on local officials rather than federal agents to carry out aspects of a federal program, or even the question whether such officials may be required to perform a federal function on a permanent basis. The question is whether Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program. It is remarkably similar to the question, heavily debated by the Framers of the Constitution, whether Congress could require state agents to collect federal taxes. Or the question whether Congress could impress state judges into federal service to entertain and decide cases that they would prefer to ignore.

Indeed, since the ultimate issue is one of power, we must consider its implications in times of national emergency. Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment, "in historical understanding and practice, in the structure of the Constitution, [or] in the jurisprudence of this Court," *ante,* at 2370, that forbids the enlistment of state officers to make that response effective? More narrowly, what basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today?

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Justice BREYER, with whom Justice STEVENS joins, dissenting.

I would add to the reasons Justice STEVENS sets forth the fact that the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 Am. J. Comp. L. 205, 237 (1990); D. Currie, The Constitution of the Federal Republic of Germany 66, 84 (1994); Mackenzie-Stuart, Foreword, Comparative Constitutional Federalism: Europe and America ix (M. Tushnet ed.1990); Kimber, A Comparison of Environmental Federalism in the United States and the European Union, 54 Md. L.Rev. 1658, 1675-1677 (1995). They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well. See Council of European Communities, European Council in Edinburgh, 11-12 Dec. 1992, Conclusions of the Presidency 20-21 (1993); D. Lasok & K. Bridge, Law and Institutions of the European Union 114 (1994); Currie, *supra,* at 68, 81-84, 100-101; Frowein, Integration and the Federal Experience in Germany and Switzerland, in 1 Integration Through Law 573, 586-587 (M. Cappelletti, M. Seccombe, & J. Weiler eds.1986); Lenaerts, *supra,* at 232, 263.

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. Cf. The Federalist No. 20, pp. 134-138 (C. Rossiter ed. 1961) (J. Madison and A. Hamilton) (rejecting certain aspects of European federalism). But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem-in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity. Cf. *id.*, No. 42, at 268 (J. Madison) (looking to experiences of European countries); *id.,* No. 43, at 275, 276 (J. Madison) (same). And that experience here offers empirical confirmation of the implied answer to a question Justice STEVENS asks: Why, or how, would what the majority sees as a constitutional

alternative-the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy-better promote either state sovereignty or individual liberty? See *ante,* at 2389, 2396 (STEVENS, J., dissenting).

As comparative experience suggests, there is no need to interpret the Constitution as containing an absolute principle-forbidding the assignment of virtually any federal duty to any state official. Nor is there a need to read the Brady Act as permitting the Federal Government to overwhelm a state civil service. The statute uses the words "reasonable effort," 18 U.S.C. § 922(s)(2)-words that easily can encompass the considerations of, say, time or cost, necessary to avoid any such result.

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Florida v. United States Department of Health and Human Services
2011 WL 285683 (N.D. Fla. 2011)

ORDER GRANTING SUMMARY JUDGMENT

ROGER VINSON, Senior District Judge.

On March 23, 2010, President Obama signed health care reform legislation: "The Patient Protection and Affordable Care Act." Pub.L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub.L. No. 111-152, 124 Stat. 1029 (2010) (the "Act").

This case, challenging the Constitutionality of the Act, was filed minutes after the President signed. It has been brought by the Attorneys General and/or Governors of twenty-six states (the "state plaintiffs"); two private citizens (the "individual plaintiffs"); and the National Federation of Independent Business ("NFIB") (collectively, the "plaintiffs"). The defendants are the United States Department of Health and Human Services, the Department of Treasury, the Department of Labor, and their secretaries (collectively, the "defendants"). I emphasized once before, but it bears repeating again: this case is not about whether the Act is wise or unwise legislation, or whether it will solve or exacerbate the myriad problems in our health care system. In fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.

. . . .

The Framers believed that limiting federal power, and allowing the "residual" power to remain in the hands of the states (and of the people), would help "ensure protection of our fundamental liberties" and "reduce the risk of tyranny and abuse." *See Gregory v. Ashcroft,* 501 U.S. 452, 458, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (citation omitted). Very early, the great Chief Justice John Marshall noted "that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803). Over two centuries later, this delicate balancing act continues. Rather than being the mere historic relic of a bygone era, the principle behind a central government with limited power has "never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient." *Brzonkala v. Virginia Polytechnic Institute,* 169 F.3d 820, 826 (4th Cir.1999) (*en banc*), *aff'd sub nom., United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

. . . .

BACKGROUND

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In Count I, all of the plaintiffs challenge the "individual mandate" set forth in Section 1501 of the Act, which, beginning in 2014 will require that everyone (with certain limited exceptions) purchase federally-approved health insurance, or pay a monetary penalty. The individual mandate allegedly violates the Commerce Clause, which is the provision of the Constitution Congress relied on in passing it. . . . .

DISCUSSION

For this claim, the plaintiffs contend that the individual mandate exceeds Congress' power under the Commerce Clause. To date, three district courts have ruled on this issue on the merits. Two have held that the individual mandate is a proper exercise of the commerce power [*Liberty Univ., Inc. v. Geithner,* --- F.Supp.2d ----, 2010 WL 4860299 (W.D.Va. Nov. 30, 2010); *Thomas More Law Center v. Obama,* 720 F.Supp.2d 882 (E.D.Mich.2010)], while the other court held that it violates the Commerce Clause. *Virginia v. Sebelius,* 728 F.Supp.2d 768 (E.D.Va.2010).

At issue here, as in the other cases decided so far, is the assertion that the Commerce Clause can only reach individuals and entities engaged in an "activity"; and because the plaintiffs maintain that an individual's failure to purchase health insurance is, almost by definition, "inactivity," the individual mandate goes beyond the Commerce Clause and is unconstitutional. The defendants contend that activity is not required before Congress can exercise its Commerce Clause power, but that, even if it is required, not having insurance constitutes activity. The defendants also claim that the individual mandate is sustainable for the "second reason" that it falls within the Necessary and Proper Clause.

B. ***Analysis***

(1) ***The Commerce Clause***

The current state of Commerce Clause law has been summarized and defined by the Supreme Court on several occasions:

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

United States v. Lopez, 514 U.S. 549, 558-59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (citations omitted). . . .
. . . .

Unsurprisingly, the plaintiffs rely heavily on *Lopez* and *Morrison* in framing their arguments, while the defendants, of course, look principally to *Wickard* and *Raich.* These cases (along with the others discussed above) all have something to add to the discussion. However, while they frame the analysis, and are important from a historical perspective, they do not by themselves resolve this case. That is because, as Congress' attorneys in the Congressional Research Service ("CRS") and Congressional Budget Office ("CBO") advised long before the Act was passed into law, the notion of Congress having the power under the Commerce Clause to directly impose an individual mandate to purchase health care insurance is "novel" and "unprecedented." *See* Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,* July 24,

2009, at 3, 6 ("whether Congress can use its Commerce Clause authority to require a person to buy a good or a service" raises a "novel issue" and "most challenging question") ("CRS Analysis"); Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance,* August 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.") ("CBO Analysis"). Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States.[FN14]

(i) ***Is Activity Required Under the Commerce Clause?***

The threshold question that must be addressed is whether activity is required before Congress can exercise its power under the Commerce Clause. As previously discussed, Commerce Clause jurisprudence has "'taken some turns,' " [*see* *Lopez, supra,* 514 U.S. at 579, 115 S.Ct. 1624 (Kennedy, J., concurring)], and contracted and expanded (and contracted and expanded again) during our nation's development. But, in every one of the cases-in both the contractive and expansive-there has always been clear and inarguable *activity,* from exerting control over and using navigable waters *(Gibbons)* to growing or consuming marijuana (*Raich*). In all the cases discussed above, the Supreme Court was called upon to decide different issues (e.g., whether commerce encompassed navigation; whether it included manufacture and agriculture or was limited to trade or exchange of goods; whether the activity at issue was interstate or intrastate and had a direct or indirect effect on commerce; whether that effect was substantial; whether the activity was economic or noneconomic; and whether it was part of a single-subject statute or a necessary and essential component of a broader comprehensive scheme), but it has never been called upon to consider if "activity" is required. On this point at least, the district courts that have reached opposite conclusions on the individual mandate agree. *Compare* *Thomas More Law Center, supra,* 720 F.Supp.2d at 893 (noting that the Supreme Court "has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity"; then proceeding to uphold the individual mandate), *with* *Virginia, supra,* 728 F.Supp.2d at 781 (noting that "every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity"; then proceeding to strike down the individual mandate).

. . . .

It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting-as was done in the Act-that compelling the actual transaction is *itself* "commercial and economic in nature, and substantially affects interstate commerce" [*see* Act § 1501(a)(1)], it is not hyperbolizing to suggest that Congress could do almost anything it wanted. It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be "difficult to perceive any limitation on federal power" [*Lopez, supra,* 514 U.S. at 564, 115 S.Ct. 1624], and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended. *See* *id.* at 592, 115 S.Ct.

1624 (quoting Hamilton at the New York Convention that there would be just cause to reject the Constitution if it would allow the federal government to "penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals") (Thomas, J., concurring). In *Lopez,* the Supreme Court struck down the Gun Free School Zones Act of 1990 after stating that, if the statute were to be upheld, "we are *hard pressed* to posit any *activity* by an individual that Congress is without power to regulate." *See id.* at 564, 115 S.Ct. 1624. (emphasis added). If some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power, we would go beyond the concern articulated in *Lopez* for it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate.

As previously noted, the Supreme Court has summarized and defined the current state of the law under the Commerce Clause, and it has uniformly and consistently declared that it applies to "three broad categories of *activity.* " *Lopez, supra,* 514 U.S. at 558, 115 S.Ct. 1624 (emphasis added); *accord Morrison, supra,* 529 U.S. at 608, 120 S.Ct. 1740. It has further described the third category as "the power to regulate those *activities* having a substantial relation to interstate commerce." *Lopez, supra,* 514 U.S. at 558-59, 115 S.Ct. 1624 (emphasis added); *accord Morrison, supra,* 529 U.S. at 609, 120 S.Ct. 1740; *see also Raich, supra,* 545 U.S. at 17, 125 S.Ct. 2195; *Perez,* 402 U.S. at 150, 91 S.Ct. 1357; *Wickard, supra,* 317 U.S. at 124, 63 S.Ct. 82; *Darby, supra,* 312 U.S. at 119-20, 61 S.Ct. 451; *Jones & Laughlin Steel, supra,* 301 U.S. at 37, 57 S.Ct. 615. Without doubt, existing case law thus extends only to those "activities" that have a substantial relationship to, or substantially affect, interstate commerce. I am required to interpret this law as the Supreme Court presently defines it. Only the Supreme Court can redefine it or expand it further-a point implicitly made by one of the defendants' own cited authorities. *See* Stern, *supra,* at 1363 (stating that the Supreme Court had at one point in time only talked about "movement" of goods across state lines under the Commerce Clause because it was necessary to decide those earlier cases and there had "been no need for a broader definition" of commerce; going on to opine that "it would seem timely that the *Supreme Court* " expand the definition, as "the time has now arrived for the *[Supreme] Court* to cut loose from the 'old' approach and to select the 'new' one") (emphasis added).

Having found that "activity" is an indispensable part the Commerce Clause analysis (at least as currently understood, defined, and applied in Supreme Court case law), the Constitutionality of the individual mandate will turn on whether the failure to buy health insurance is "activity."

(ii) ***Is the Failure to Purchase Health Insurance "Activity"?***

Preliminarily, based solely on a plain reading of the Act itself (and a common sense interpretation of the word "activity" and its absence), I must agree with the plaintiffs' contention that the individual mandate regulates inactivity. Section 1501 states in relevant part: "If an applicable individual fails to [buy health insurance], there is hereby imposed a penalty." By its very own terms, therefore, the statute applies to a person who does not buy the government-approved insurance; that is, a person who "fails" to act pursuant to the congressional dictate. . . . .

(iii) ***The Purported "Uniqueness" of the Health Care Market***

The defendants contend that there are three unique elements of the health care market which, when viewed cumulatively and in combination, belie the claim that the uninsured are inactive. First, as living and breathing human beings who are always susceptible to sudden and unpredictable illness and injury, no one can "opt out" of the health care market. Second, if and when health services are sought, hospitals are required by law to provide care, regardless of inability to pay. And third, if the costs incurred cannot be paid (which they frequently cannot, given the high cost of medical care), they are passed along (cost-shifted) to third parties, which has economic implications for everyone. Congress found that the uninsured received approximately $43 billion in "uncompensated care" in 2008 alone. These three things, according to the defendants and various health care industry experts and scholars on whom they rely, are "replicated in no other market" and defeat the argument that uninsured individuals are inactive.
. . . .

In *Lopez,* the majority was concerned that using the Commerce Clause to regulate things such as possession of guns in school zones would "obliterate" the distinction between what is national and what is local and effectively create a centralized government that could potentially permit Congress to begin regulating "any and all aspects" of our lives, including marriage, divorce, child custody, and education. The dissent insisted that this concern was unfounded because the statute at issue was "aimed at curbing a *particularly acute* threat" of violence in schools that had "*singularly* disruptive potential." *Supra,* 514 U.S. at 624, 115 S.Ct. 1624 (Breyer, J., dissenting). Relying on "empirical evidence ... documented by scholars," the dissent highlighted the link between education and the national economy and "the *speciway* in which guns and education are incompatible." *See id.* The impact on commerce, it was urged, derived from the unchallenged fact that "violent crime in school zones has brought about a decline in the quality of education" which, in turn, has "an adverse impact on interstate commerce." *See id.* at 623, 115 S.Ct. 1624 (citation and quotation marks omitted). This was "the *rare* case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce." *Id.* (all emphasis added).

Two things become apparent after reading these arguments attempting to justify extending Commerce Clause power to the legislation in that case, and the majority opinion (which is the controlling precedent) rejecting those same arguments. First, the contention that Commerce Clause power should be upheld merely because the government and its experts or scholars claim that it is being exercised to address a "particularly acute" problem that is "singular [ ]," "special," and "rare"-that is to say "unique"-will not by itself win the day. Uniqueness is not an adequate limiting principle as every market problem is, at some level and in some respects, unique. If Congress asserts power that exceeds its enumerated powers, then it is unconstitutional, regardless of the purported uniqueness of the context in which it is being asserted.

Second, and perhaps more significantly, under *Lopez* the causal link between what is being regulated and its effect on interstate commerce cannot be attenuated and require a court "to pile inference upon inference," which is, in my view, exactly what would be required to uphold the individual mandate. . . . .

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides

> power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.... [A] judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse [than the crisis itself].
>
> *New York, supra,* 505 U.S. at 187, 112 S.Ct. 2408.

In short, the defendants' argument that people without health insurance are actively engaged in interstate commerce based on the purported "unique" features of the much broader health care market is neither factually convincing nor legally supportable.

(iv) ***The "Economic Decision" to Forego Health Insurance***

The defendants next contend that the uninsured have made the calculated decision to engage in market timing and try to finance their future medical needs out-of-pocket rather than through insurance, and that this "economic decision" is tantamount to activity. . . .

The problem with this legal rationale, however, is it would essentially have unlimited application. There is quite literally *no* decision that, in the natural course of events, does not have an economic impact of some sort. The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that-when aggregated with similar economic decisions-affect the price of that particular product or service and have a substantial effect on interstate commerce. To be sure, it is not difficult to identify an economic decision that has a cumulatively substantial effect on interstate commerce; rather, the difficult task is to find a decision that does not.

. . . .

The Commerce Clause originally applied to the trade and exchange of goods as it sought to eliminate trade barriers by and between the states. Over the years, the Clause's reach has been expanded from covering actual interstate commerce (and its channels and instrumentalities) to intrastate activities that substantially affect interstate commerce. It has even been applied to activities that involve the mere consumption of a product (even if there is no legal commercial interstate market for that product). To now hold that Congress may regulate the so-called "economic decision" to *not* purchase a product or service in anticipation of *future* consumption is a "bridge too far." It is without logical limitation and far exceeds the existing legal boundaries established by Supreme Court precedent.

Because I find both the "uniqueness" and "economic decision" arguments unpersuasive, I conclude that the individual mandate seeks to regulate economic inactivity, which is the very opposite of economic activity. And because activity is required under the Commerce Clause, the individual mandate exceeds Congress' commerce power, as it is understood, defined, and applied in the existing Supreme Court case law.

. . . .

(3) ***Constitutionality of the Individual Mandate***

The individual mandate is outside Congress' Commerce Clause power, and it cannot be otherwise authorized by an assertion of power under the Necessary and Proper Clause. It is not Constitutional. Accordingly, summary judgment must be granted in favor of the plaintiffs on Count I.

(4) *Severability*

Having determined that the individual mandate exceeds Congress' power under the Commerce Clause, and cannot be saved by application of the Necessary and Proper Clause, the next question is whether it is severable from the remainder of the Act. In considering this issue, I note that the defendants have acknowledged that the individual mandate and the Act's health insurance reforms, including the guaranteed issue and community rating, will rise or fall together as these reforms "cannot be severed from the [individual mandate]." *See, e.g.,* Def. Opp. at 40. As explained in my order on the motion to dismiss: "the defendants concede that [the individual mandate] is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss." Thus, the only question is whether the Act's other, non-health-insurance-related provisions can stand independently or whether they, too, must fall with the individual mandate.

First, the Act does not contain a "severability clause," which is commonly included in legislation to provide that if any part or provision is held invalid, then the rest of the statute will not be affected. . . .

[T]he individual mandate is indisputably necessary to the Act's insurance market reforms, which are, in turn, indisputably necessary to the purpose of the Act. This is obviously a very different situation than in *Alaska Airlines, Inc., supra,* 480 U.S. at 694 n. 18 and 696, 107 S.Ct. 1476 (unconstitutional provision severed from rest of statute where the provision was "uncontroversial," and the debate on the final bill demonstrated its "relative unimportance"), and is more in line with the situation alluded to in *New York, supra,* 505 U.S. at 187, 112 S.Ct. 2408 (suggesting by implication that the entire legislation should be struck when "the purpose of the Act is ... defeated by the invalidation" of one of its provisions).
. . . .

In the final analysis, this Act has been analogized to a finely crafted watch, and that seems to fit. It has approximately 450 separate pieces, but one essential piece (the individual mandate) is defective and must be removed. It cannot function as originally designed. There are simply too many moving parts in the Act and too many provisions dependent (directly and indirectly) on the individual mandate and other health insurance provisions-which, as noted, were the chief engines that drove the entire legislative effort-for me to try and dissect out the proper from the improper, and the able-to-stand-alone from the unable-to-stand-alone. Such a quasi-legislative undertaking would be particularly inappropriate in light of the fact that any statute that might conceivably be left over after this analysis is complete would plainly not serve Congress' main purpose and primary objective in passing the Act. The statute is, after all, called "The Patient Protection and Affordable Care Act," not "The Abstinence Education and Bone Marrow Density Testing Act." The Act, like a defectively designed watch, needs to be redesigned and reconstructed by the watchmaker.

If Congress intends to implement health care reform-and there would appear to be widespread agreement

across the political spectrum that reform is needed-it should do a comprehensive examination of the Act and make a legislative determination as to which of its hundreds of provisions and sections will work as intended without the individual mandate, and which will not. It is Congress that should consider and decide these quintessentially legislative questions, and not the courts.

. . . .

CONCLUSION

The existing problems in our national health care system are recognized by everyone in this case. There is widespread sentiment for positive improvements that will reduce costs, improve the quality of care, and expand availability in a way that the nation can afford. This is obviously a very difficult task. Regardless of how laudable its attempts may have been to accomplish these goals in passing the Act, Congress must operate within the bounds established by the Constitution. Again, this case is not about whether the Act is wise or unwise legislation. It is about the Constitutional role of the federal government.

For the reasons stated, I must reluctantly conclude that Congress exceeded the bounds of its authority in passing the Act with the individual mandate. That is not to say, of course, that Congress is without power to address the problems and inequities in our health care system. The health care market is more than one sixth of the national economy, and without doubt Congress has the power to reform and regulate this market. That has not been disputed in this case. The principal dispute has been about how Congress chose to exercise that power here.

Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void. . . .

Michigan v. Long
463 U.S. 1032 (1983)

Justice O'CONNOR delivered the opinion of the Court.

In *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), we upheld the validity of a protective search for weapons in the absence of probable cause to arrest because it is unreasonable to deny a police officer the right "to neutralize the threat of physical harm," *id.,* at 24, 88 S.Ct., at 1881, when he possesses an articulable suspicion that an individual is armed and dangerous. We did not, however, expressly address whether such a protective search for weapons could extend to an area beyond the person in the absence of probable cause to arrest. In the present case, respondent David Long was convicted for possession of marijuana found by police in the passenger compartment and trunk of the automobile that he was driving. The police searched the passenger compartment because they had reason to believe that the vehicle contained weapons potentially dangerous to the officers. We hold that the protective search of the passenger compartment was reasonable under the principles articulated in *Terry* and other decisions of this Court. We also examine Long's argument that the decision below rests upon an adequate and independent state ground, and we decide in favor of our jurisdiction.

I

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The Barry County [Michigan] Circuit Court denied Long's motion to suppress the marijuana taken from both the interior of the car and its trunk. He was subsequently convicted of possession of marijuana. The Michigan Court of Appeals affirmed Long's conviction, holding that the search of the passenger compartment was valid as a protective search under *Terry, supra,* and that the search of the trunk was valid as an inventory search under *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). See 94 Mich.App. 338, 288 N.W.2d 629 (1979). The Michigan Supreme Court reversed. The court held that "the sole justification of the *Terry* search, protection of the police officers and others nearby, cannot justify the search in this case." 413 Mich., at 472, 320 N.W.2d, at 869. The marijuana found in Long's trunk was considered by the court below to be the "fruit" of the illegal search of the interior, and was also suppressed.

We granted certiorari in this case to consider the important question of the authority of a police officer to protect himself by conducting a *Terry*-type search of the passenger compartment of a motor vehicle during the lawful investigatory stop of the occupant of the vehicle. 459 U.S. 904, 103 S.Ct. 205, 74 L.Ed.2d 164 (1982).

II

Before reaching the merits, we must consider Long's argument that we are without jurisdiction to decide this case because the decision below rests on an adequate and independent state ground. The court below referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law. Long argues that the Michigan courts have provided greater protection from searches and seizures under the

state constitution than is afforded under the Fourth Amendment, and the references to the state constitution therefore establish an adequate and independent ground for the decision below.

It is, of course, "incumbent upon this Court ... to ascertain for itself ... whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan,* 282 U.S. 765, 773, 51 S.Ct. 252, 255, 75 L.Ed. 690 (1931). Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue. . . .

Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

This approach obviates in most instances the need to examine state law in order to decide the nature of the state court decision, and will at the same time avoid the danger of our rendering advisory opinions. It also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court. We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *National Tea Co., supra,* 309 U.S., at 557, 60 S.Ct., at 679.

The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on "the limitations of our own jurisdiction." *Herb v. Pitcairn,* 324 U.S. 117, 125, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945). The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.,* at 126, 65 S.Ct., at 463. Our requirement of a "plain statement" that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions. Rather, in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent

state grounds, see *Abie State Bank v. Bryan, supra,* 282 U.S., at 773, 51 S.Ct., at 255, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

. . . .

Smith v. Doe
538 U.S. 84 (2003)

This decision of the United States Supreme Court upheld the Alaska Sex Offender Registration Act, which required sex offenders to register with the state and report back every three months for the remainder of their lives. The information was kept on a central registry and non-confidential information was made available to the public. This statute, which applied to crimes and convictions that occurred prior to the passage of the Act, was found not to be punitive and its retroactive application was held not to be an ex post facto law.

The Court of Appeals had held that the law was punitive, in part, because it made the person virtually unemployable or unable to obtain housing. However, Chief Justice Rehnquist rejected this argument, stating:

> This is conjecture. Landlords and employers could conduct background checks on the criminal records of prospective employees or tenants even with the Act not in force. The record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords. . . . 538 U.S. at 100.

He also held that the law was not excessive and was narrowly tailored to the state's legitimate interest in public safety.

In a separate concurring opinion, Justice Souter agreed that the intent of the Act was not punitive; nonetheless, he did recognize that the registration requirement carried the consequence of possible exclusion from jobs or housing, harassment, and even physical harm:

> . . . It is true that the Act imposes no formal proscription against any particular employment, but there is significant evidence of onerous practical effects of being listed on a sex offender registry. See ., e.g., *Doe v. Pataki,* 120 F.3d 1263, 1279 (C.A.2 1997) (noting "numerous instances in which sex offenders have suffered harm in the aftermath of notification—ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson"); *E.B. v. Verniero,* 119 F.3d 1077 1102 (C.A.3 1997) ("The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of 'vigilante justice' are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them"); . . . . 538 U.S. at 109 n. 1.

Justice Ginsburg and Breyer dissented. Justice Ginsburg stated that the statute "calls to mind shaming punishments once used to mark an offender as someone to be shunned." 538 U.S. at 116. She also cited the duration of the reporting requirement and found that it did not take into consideration the fact that a sex offender did not currently pose any treat of recidivism. 538 U.S. at 117.

Doe v. Alaska
189 P.3d 999 (Alaska 2008)

EASTAUGH, Justice.

I. INTRODUCTION

The Alaska statute known as the Alaska Sex Offender Registration Act (ASORA) requires persons convicted of sex offenses to register and periodically re-register with the Alaska Department of Corrections, the Alaska State Troopers, or local police, and disclose detailed personal information, some of which is not otherwise public. Most of the disclosed information is publicly disseminated and is published by the state on the internet. Does applying ASORA to "John Doe," who committed his crime and was convicted and sentenced before ASORA was enacted, violate the ex post facto clause of the Alaska Constitution? We conclude that it does because ASORA imposes burdens that have the effect of adding punishment beyond what could be imposed when the crime was committed. We therefore hold that ASORA's registration requirement does not apply to persons who committed their crimes before ASORA became effective, and reverse the superior court order granting final judgment in favor of the state and against Doe.

II. FACTS AND PROCEEDINGS

"John Doe" was charged in 1985 with three counts of first-degree sexual abuse of a minor for molesting one of his daughters. Doe pleaded no contest to one count of first-degree sexual abuse of a minor, an unclassified felony, and to one count of second-degree sexual abuse of a minor, a class B felony. The superior court accepted his plea and sentenced him to twelve years of imprisonment with four suspended. Doe began serving his sentence in August 1985.

In December 1990 Doe completed serving the unsuspended portion of his sentence less a good-time reduction required by AS 33.20.010(a) and was released to mandatory parole and supervised probation. In September 1991 the Parole Board released Doe from mandatory parole nearly two years early, based on its determination that Doe had participated in rehabilitative counseling and posed little or no threat to the public. In 1995 Doe completed his period of probation.

In May 1994 the Alaska Legislature enacted the statute known as the Alaska Sex Offender Registration Act (ASORA). It became effective August 10, 1994, after Doe was convicted, sentenced, and released from prison, but before he completed his probation. ASORA requires sex offenders to register with the Alaska Department of Corrections, the Alaska State Troopers, or local police. It requires registrants to disclose their names, addresses, places of employment, date of birth, information about their conviction, all aliases used, driver's license numbers, information about the vehicles they have access to, any identifying physical features, anticipated address changes, and information about any psychological treatment received. It authorizes registrants to be photographed and fingerprinted. Registrants must periodically re-register and update their disclosures: those convicted of aggravated crimes must re-register quarterly; those not convicted of aggravated crimes must re-register annually. A sex offender who

changes residences must give notice to the state trooper office or municipal police department closest to his new residence within one working day.

ASORA requires the Alaska Department of Public Safety to maintain a central registry of sex offenders that contains the information obtained under ASORA. ASORA authorizes public access to offenders' names, aliases, dates of birth, addresses, photographs, physical descriptions, motor vehicle information, places of employment, and public information about their convictions and sentences. Public access to the information includes a statement as to whether the offender is in compliance with AS 12.63 or cannot be located. The Department of Public Safety provides public access to the information by posting it on the internet. A photograph of each registrant appears on a webpage under the caption "Registered Sex Offender/Child Kidnapper." Each registrant's page also displays the registrant's physical description, home address, employer, work address, and conviction information.

ASORA's provisions require Doe to register and re-register every three months for the rest of his life. But his information has never been publicly released on the state's website. In 1994 Doe (using the pseudonym Rowe) sued state officials in the United States District Court for the District of Alaska challenging ASORA on the grounds it violates the federal prohibition against ex post facto laws, the Fourth Amendment prohibition against unreasonable searches and seizures, his plea bargain contract, and his right to privacy. The federal court concluded that Doe established a likelihood of success on his ex post facto and plea agreement violation claims, and found that the balance of hardships tipped in favor of Doe to the extent his registration information would be publicly disseminated. It therefore granted a preliminary injunction requiring Doe to register under the act, but prohibiting the state from publicly disclosing the registration information. In 1998 the parties filed cross-motions for summary judgment and the district court granted the state's motion.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the state's summary judgment and held that ASORA is an ex post facto law as applied to Doe. The Alaska Public Safety Commissioner petitioned for certiorari and the United States Supreme Court reversed the Ninth Circuit's decision after concluding that the statute did not violate the federal ex post facto clause. The Court remanded the case to the Ninth Circuit. On remand, the Ninth Circuit rejected Doe's other federal substantive and procedural due process claims. The federal courts did not rule on Doe's state law claims.

In January 2005 Doe sued the state in the superior court, seeking a judgment declaring that ASORA denies him due process in violation of the Alaska Constitution. Doe also requested a temporary restraining order and preliminary and permanent injunctions to prevent the state from requiring him to publicly register. The state opposed Doe's motion for injunctive relief. In August 2005 the superior court denied Doe's motion. It determined that Doe had established the potential for irreparable harm, but had not established a likelihood of success on the merits. It concluded that Doe had not shown that ASORA's registration requirement violated any fundamental right or liberty interest and that requiring Doe to publicly register therefore would not violate his substantive or procedural due process rights.

Anticipating an appeal to this court, the superior court entered a temporary stay under Alaska Civil Rule 62 prohibiting the state from publishing or disseminating Doe's information. The parties agreed no further superior court proceedings were necessary to resolve Doe's claims and stipulated to entry of final

judgment. In November 2005 the superior court entered final judgment for the state and against Doe.

Doe appeals.

III. DISCUSSION

B. The Ex Post Facto Clause

1. The parties' contentions

Doe's opening brief argues that compliance with ASORA would impose "harmful and onerous new consequences," violating his right to due process. Because we determined that the essence of his argument is an ex post facto claim, we asked the parties to submit supplemental briefs addressing whether as applied to Doe ASORA violates Alaska's prohibition against ex post facto laws.

Article I, section 15 of the Alaska Constitution, like article I, section 9 of the United States Constitution, provides that "[n]o ... ex post facto law shall be passed." An ex post facto law is a law "passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." These constitutional prohibitions bar the legislature from enacting any law that "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission; or which deprives one charged with a crime of any defense available according to law at the time when the act was committed." But "[t]he mere fact that [a statute] alters a convicted felon's circumstances to his or her disadvantage does not in itself invalidate the statute as ex post facto." In short, the prohibition applies only to penal statutes; the critical question is therefore whether ASORA imposes additional punishment on individuals, like Doe, who committed their crimes before ASORA became effective. Federal courts use a two-part test to determine whether a statute imposes punishment. This is the test we will describe in Part III.B.3 and apply in Part III.C. We will refer to this test as the "intent-effects" test or the "multifactor effects" test.

Doe argues that because it "substantially alters" the consequences attached to the completed crime, ASORA satisfies Alaska's ex post facto clause only if ASORA is applied prospectively, to persons who committed their crimes after August 10, 1994, when ASORA took effect.

Doe advances two main arguments in support. First, recognizing that the United States Supreme Court held in *Smith v. Doe* that ASORA does not violate the federal ex post facto clause, Doe argues that the Alaska Constitution provides more protection than the Federal Constitution. Doe urges us to read the Alaska ex post facto clause in conjunction with the due process clause and article I, section 1 of the Alaska Constitution. He argues that Alaska's due process and ex post facto clauses, unlike the corresponding federal clauses, are aimed at the legislature and that both clauses are intended to "protect individual liberties from retroactive infringement." Doe therefore reasons that we should interpret Alaska's ex post facto clause more broadly than the corresponding federal clause. He alternatively argues that ASORA is an invalid ex post facto law even if Alaska's ex post facto clause is coextensive with its federal counterpart because ASORA is punitive under the federal standard.

The state responds that ASORA is a regulatory law intended to help protect the public by collecting information and making it publicly accessible. It argues that ASORA is not a penal law, and that it was not intended to punish convicted individuals for past acts. The state also contends that because our past decisions discussing the ex post facto clause have interpreted the Alaska prohibition to be the same as the federal prohibition, the doctrine of stare decisis obliges us to hold that the Alaska provision is coextensive with the federal provision. The state consequently concludes that because ASORA satisfies the federal ex post facto clause, ASORA also satisfies Alaska's ex post facto clause.

2. Stare decisis

The state correctly notes that we have relied on federal precedent and analysis in addressing state ex post facto claims in the past.

. . . .

In following federal authority, our ex post facto cases have implicitly reasoned that it was unnecessary in those cases either to deviate from the federal analytical approach or to construe our constitution more protectively. We implicitly so reasoned because the federal decisions reached an outcome not inconsistent with the Alaska Constitution. Nonetheless, we have never endorsed federal ex post facto analysis as superseding or limiting our independent consideration of Alaska's ex post facto prohibition. Nor have we indicated that federal interpretation of the federal ex post facto prohibition prevents us from reaching a different, and more protective, result under the Alaska Constitution.

Stare decisis therefore has no application here. Today's decision does not overrule or depend on overruling any prior decision of this court, nor does it depart from any past holding of this court. We have never adopted a reading of Alaska's ex post facto prohibition that would, unless overruled, foreclose today's result.

Nor is today's decision, or the analysis we apply here, inconsistent with the analytical approach we have approved for deciding ex post facto claims under the Alaska Constitution. Our reliance on the multifactor effects test is consistent with our past use of federal law in resolving state ex post facto claims. And in applying that test here we also reach a result consistent with what the federal standards appear to have been before 2003, when the Supreme Court decided *Smith.*

That the Supreme Court, after considering the same factors and same statute that we consider today, held in *Smith v. Doe* that there was no ex post facto violation may seem to raise several questions. First, why doesn't *Smith's* holding control this case as a matter of stare decisis? Second, why doesn't *Smith's* discussion of the multifactor effects test control our analysis in applying the same factors? Third, even if *Smith's* discussion of those factors is not directly controlling, how can we rationally disagree with it?

As to the first question, *Smith's* holding is not stare decisis here because Doe's claims are based on the Alaska Constitution, whereas *Smith* was based exclusively on the Federal Constitution. *Smith* did not apply state law or decide state law issues.

As to the second question, how we apply the multifactor effects test in deciding an ex post facto claim

under the Alaska Constitution is not governed by how the federal courts independently apply the same test under the Federal Constitution, as long as our interpretation is at least as protective as the federal interpretation. What we have said in our ex post facto cases cannot be read as prospectively limiting the protections of the Alaska Constitution to what federal courts might later say the corresponding federal clauses provide. Nor could we have done so.

Finally, the Supreme Court's discussion in *Smith* certainly informs our analysis here. But it does not and cannot preempt our independent analysis or dictate the result we reach. Our interpretation of a clause in the Alaska Constitution is not limited by the Supreme Court's interpretation of the corresponding federal clause. As the Supreme Court has recognized,

> [i]f a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Consequently, the results of the federal opinions do not control our independent analysis when, in interpreting the Alaska Constitution, we look for guidance to either federal precedent or the analytical framework applied by federal courts. Our adoption of the analytical approach approved by the federal courts likewise does not mean that we are bound by how the Supreme Court applied that approach in *Smith.* The question before us is whether applying ASORA to Doe violates Alaska's ex post facto provision. As to that question, Alaska retains its sovereign authority.

3. Our choice of analytical approach

We begin our analysis by identifying the appropriate analytical framework. In *Smith v. Doe,* the Supreme Court considered the identical issue under the Federal Constitution and applied the multifactor "intent-effects" test derived from the Court's prior decisions. Under this test, a court first determines whether the legislature intended to impose punishment; if punishment was the intent, the court's inquiry ends. But if the court concludes that the legislature intended a non-punitive regulatory scheme, the court next analyzes the effects of the statute under a number of factors to determine whether the statute is nonetheless punitive in effect. Our court has never adopted this test, but the Alaska Court of Appeals applied it in considering and rejecting an ex post facto challenge to ASORA in *Patterson v. State.*

The intent-effects test provides an appropriate analytical framework here. Although a multifactor test is potentially susceptible to different conclusions, the availability of reported decisions applying that test helps inform its application in new cases.

Our conclusion that it is appropriate to apply the federal test to our state law inquiry in this case is consistent with our independent consideration of each of the test's seven factors, because we are here both construing the protections of our constitution and reviewing an enactment of our legislature. Therefore, even though we choose to consider the same factors the federal courts use to distinguish between civil remedies and criminal penalties, we give independent consideration to these factors in applying the Alaska Constitution.

C. ASORA Is Punitive for Purposes of the Alaska Ex Post Facto Clause.

The intent-effects test would usually first require us to consider whether the Alaska Legislature, when it enacted ASORA, intended to enact a regulatory scheme that is civil and non-punitive. If the purpose was not punishment but regulation, the test would next require us to determine whether the effects of regulation are so punitive that we must nonetheless conclude that ASORA imposes punishment.

It is not necessary to address the first step of the test-whether the legislature intended ASORA to punish convicted sex offenders-because the second part of the test-whether ASORA's effects are punitive-resolves the dispute before us. Assuming without deciding that the legislature intended ASORA to be non-punitive, we therefore focus on the statute's effects to determine whether they are punitive.
. . . .

1. Affirmative disability or restraint

We first ask "[w]hether the sanction involves an affirmative disability or restraint." The state argues that ASORA involves neither because it imposes no physical restraint, has obligations less harsh than occupational debarment-which the Supreme Court has held to be non-punitive and, in the Supreme Court's words, "restrains [no] activities sex offenders may pursue but leaves them free to change jobs or residences."

But even though the statute imposes no physical restraints, we agree with Justice Stevens's dissenting comments in *Smith* that ASORA "impose[s] significant affirmative obligations and a severe stigma on every person to whom [it] appl[ies]." First, ASORA compels affirmative post-discharge conduct (mandating registration, re-registration, disclosure of public and private information, and updating of that information) under threat of prosecution. The duties are significant and intrusive, because they compel offenders to contact law enforcement agencies and disclose information, some of which is otherwise private, most of it for public dissemination. Furthermore, the time periods associated with ASORA are intrusive. Sex offenders convicted of an aggravated sex offense or two or more sex offenses must re-register quarterly for the rest of their lives; all other offenders must re-register annually for fifteen years. All sex offenders who change residences must notify the state trooper office or municipal police department closest to their new residences within one working day. As we stated in *Doe v. State, Department of Public Safety* (*Doe A*), "ASORA thus treats offenders not much differently than the state treats probationers and parolees subject to continued state supervision."

Second, we agree with the conclusion of Justice Ginsburg, also dissenting in *Smith,* that ASORA "exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism." In the decision reversed in *Smith,* the Ninth Circuit observed that "[b]y posting [registrants'] names, addresses, and employer addresses on the internet, the Act subjects [registrants] to community obloquy and scorn that damage them personally and professionally." The Ninth Circuit observed that the practical effect of this dissemination is that it leaves open the possibility that the registrant will be denied employment and housing opportunities as a result of community hostility. As Justice Souter noted in concurring in *Smith,* "there is significant evidence of onerous

practical effects of being listed on a sex offender registry." Outside Alaska, there have been reports of incidents of suicide by and vigilantism against offenders on state registries.

We also disagree with the Supreme Court's conclusion in ***Smith*** that the obligations ASORA imposes are less harsh than the occupational debarment which the Court has held to be non-punitive. The Supreme Court has upheld the constitutionality of post-conduct professional sanctions that included the prohibition of further participation in the banking industry and revocation of medical licenses. A comparable bar for sex offenders who pose a risk to children might be employment in places frequented by children. But the practical effects here can predictably extend to *all* employment opportunities as well as to all other non-employment aspects of life, including housing opportunities. There are published reports that offenders are sometimes subjected to protests and group actions designed to force them out of their jobs and homes. We agree that "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment."

The state argues, however, that the negative effects that Doe emphasizes (negative impacts on employment and housing opportunities) will exist even if Doe is not subject to ASORA because those consequences result not from registration and dissemination of information, but from the conviction itself. Moreover, the state asserts that there is no evidence that Alaskans have directed any wrath at convicted sex offenders and notes that the sex offender registry website warns viewers about using registry information to commit a criminal act.

Neither of these arguments is persuasive. ASORA requires release of information that is in part not otherwise public or readily available. Moreover, the regulations authorize dissemination of most ASORA registration information "for any purpose, to any person." Taken in conjunction with the Alaska Public Records Act, ASORA's treatment of this information, confirmed by the regulations, seems to require that the information be publicly available. By federal law, it is disseminated statewide, indeed worldwide, on the state's website. There is a significant distinction between retaining public paper records of a conviction in state file drawers and posting the same information on a state-sponsored website; this posting has not merely improved public access but has broadly disseminated the registrant's information, some of which is not in the written public record of the conviction. As the Alaska Court of Appeals noted, "ASORA does provide for dissemination of substantial personal and biographical information about a sex offender that is not otherwise readily available from a single governmental source." We also recognized in *Doe A* that several sex offenders had stated that they had lost their jobs, been forced to move from their residences, and received threats of violence following establishment of the registry, even though the facts of their convictions had always been a matter of public record. We therefore conclude that the harmful effects of ASORA stem not just from the conviction but from the registration, disclosure, and dissemination provisions.

We are also unpersuaded by the state's assertion that there is insufficient evidence to establish that harmful effects have actually occurred in Alaska. Doe's affidavit contains excerpts from affidavits submitted in the federal court. The excerpts recite instances of registrants losing employment, having difficulty finding housing and employment, and moving out of the marital home due to fear of the effects public dissemination would have on their families. Similarly, the Ninth Circuit, when addressing Doe's earlier ex post facto challenge to ASORA, noted that the record before that court contained evidence that

a sex offender suffered community hostility and damage to his business after printouts of the Alaska sex offender registration website were publicly distributed and posted on bulletin boards.
. . . .

5. Application only to criminal behavior

Under the fifth factor we consider "whether the behavior to which [the statute] applies is already a crime." The fact that a statute applies only to behavior that is already, and exclusively, criminal supports a conclusion that its effects are punitive. When analyzing ASORA the Supreme Court asserted in *Smith* that this factor was "of little weight in this case." The Court there stated that conviction is "a necessary beginning point, for recidivism is the statutory concern." But if recidivism, i.e., new sexual misconduct, were the only concern, the statute would apply not just to convicted sex offenders but to other individuals who may pose a threat to society even if they were not convicted. See, for example, the Washington registration act, upheld by the Ninth Circuit; it includes sex offenders not found guilty-including those incompetent to stand trial, those found not guilty by reason of insanity, and those committed as sexual psychopaths or sexually violent predators-as well as those who are convicted.
. . . .

6. Advancing a non-punitive interest

We next ask whether, in the words of the Supreme Court, "an alternative purpose to which [the statute] may rationally be connected is assignable for it." We translate this as an inquiry whether ASORA advances a legitimate, regulatory purpose. ASORA can rationally be viewed as advancing a non-punitive purpose. When it enacted ASORA the legislature found that:

(1) sex offenders pose a high risk of reoffending after release from custody;

(2) protecting the public from sex offenders is a primary governmental interest;

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and

(4) the release of certain information about sex offenders to public agencies and the ***1016** general public will assist in protecting the public safety.

The Ninth Circuit stated that the state's non-punitive interest in public safety "unquestionably provides support, indeed, the principal support, for the view that the statute is not punitive for Ex Post Facto Clause purposes." The Supreme Court also stated that ASORA's rational connection to a non-punitive purpose was a "[m]ost significant" factor in its determination that ASORA is non-punitive in effect. We likewise conclude that ASORA advances a non-punitive interest.

7. Closeness of connection of means to the state's interest in public safety

Finally, we determine "whether [ASORA] appears excessive in relation to the alternative purpose

assigned." In analyzing this factor the Ninth Circuit addressed the scope of individuals subject to ASORA and the breadth of its dissemination provision; it determined that ASORA makes "information as to all sex offenders ... available without any restriction and without any regard to whether the individual poses any future risk." The Ninth Circuit consequently concluded that ASORA's "non-punitive purpose, while of unquestioned importance, does not serve to render a statute that is so broad and sweeping non-punitive."

The Supreme Court also addressed the scope and magnitude of ASORA's registration requirements and its dissemination provision, but concluded that ASORA is not excessive in relation to the state's interest in public safety. In so deciding it determined that "[t]he Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences," and that the duration of ASORA's reporting requirements and what the Court called ASORA's "passive" notification system are not so excessive as to be effectively penal.
. . . .

As the legislature found when enacting ASORA, "protecting the public from sex offenders is a primary governmental interest." The state certainly has a valid interest in addressing not just the egregious and highly publicized crimes that gave rise to the Megan's Law movement, but also other crimes of which the risk of repetition and grave harm is sufficiently predictable to justify the protections afforded by ASORA. But in the context of our ex post facto inquiry, we have an obligation to determine whether the means chosen to carry out legitimate purposes are excessive, i.e., not close enough to be classified as non-penal.

We use "means" here to include the scope of the statute and the obligations it imposes on those subject to it and what the state can or must do in enforcing it.

It is significant that ASORA's scope is broad; it encompasses a wide array of crimes that vary greatly in severity. Moreover, ASORA provides no mechanism by which a registered sex offender can petition the state or a court for relief from the obligations of continued registration and disclosure. "Offenders cannot shorten their registration or notification period, even on the clearest determination of rehabilitation or conclusive proof of physical incapacitation." Doe successfully completed a treatment program and was granted early release from mandatory parole. A superior court granted him legal custody of his minor daughter based on its determination that he was successfully rehabilitated and posed "a very low risk of re-offending." Despite this evidence of rehabilitation, ASORA requires Doe to register quarterly and requires the state to publicly disseminate his personal information for the rest of his life.

Under ex post facto analysis we further conclude that the statute's chosen means are excessive in relation to the statute's purpose because the statute is also underinclusive. As we discussed in Part III.C.5, ASORA only applies to those convicted of specified offenses. It therefore excludes from its requirements individuals who may have committed the same acts and may pose threats to the public but who avoided conviction by pleading to a lesser charge or whose convictions were overturned. We do not mean to suggest that making the statute more inclusive would necessarily resolve ex post facto issues or that such changes would otherwise be constitutionally unobjectionable, but we point to this feature to illustrate that ASORA has a punitive effect.

ASORA also imposes obligations that, for ex post facto purposes, are excessive in relation to the state's legitimate public safety interest. It is significant that the registration and re-registration requirements are demanding and intrusive and are of long duration.

Finally, the provisions authorizing or requiring the state to disseminate the information are sweeping. ASORA is much broader than the Connecticut statute that authorizes courts to order the state to restrict dissemination if the court finds that dissemination is not required for public safety and that publication of the information would likely reveal the identity of the victim. ASORA is much closer to the Kansas statute struck down on ex post facto grounds by the Kansas Supreme Court because of its "unrestricted public access ... [that] goes beyond that necessary to promote public safety."

We are not balancing the rights of sex offenders against the rights of their victims. Rather, we are determining for ex post facto purposes whether the means chosen to protect the public have consequences to sex offenders that significantly go beyond the state's valid interest in public safety, and exclude individuals who may pose equivalent threats to public safety. Some sex offender registration statutes employ means that have been held to relate rationally and closely enough to the state's interest in public safety. For example, the Second Circuit concluded that the notification policy adopted by the Connecticut Office of Adult Probation was "not excessive in relation to its purpose of enhancing public awareness and helping to prevent the recovering offender from harmful relapses." Connecticut allows certain sex offenders convicted between October 1, 1988 and June 30, 1999 to "petition the court to order the Department of Public Safety to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access." Connecticut also provides certain sex offenders the possibility of avoiding registration and dissemination upon a judicial determination that registration or public dissemination is not required for public safety.

"A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." Although the non-punitive aims are undeniably legitimate and important, ASORA's registration and dissemination provisions have consequences to sex offenders that go beyond the state's interest in public safety; we must therefore conclude that the Alaska statute is excessive in relation to the state's interest in public safety.

8. ASORA's effect

Summing up the effects under the seven factors, we conclude that ASORA's effects are punitive, and convincingly outweigh the statute's non-punitive purposes and effects. We recognize that several of the factors seem closely related, and that discussion of one may overlap discussion of another. Nonetheless it is not the mere number of factors that leads us to our conclusion, but our assessment of those factors and their relative weight. Six of those factors lead us to disagree, respectfully but firmly, with the Supreme Court's analysis and its ultimate conclusion that ASORA is not penal. Our decision is consistent with what we consider to be the compelling comments of dissenting justices in ***Smith*** and with the majority of the Ninth Circuit Court of Appeals panel that, before reversal, discerned an ex post facto violation under federal law.

Because ASORA compels (under threat of conviction) intrusive affirmative conduct, because this conduct

is equivalent to that required by criminal judgments, because ASORA makes the disclosed information public and requires its broad dissemination without limitation, because ASORA applies only to those convicted of crime, and because ASORA neither meaningfully distinguishes between classes of sex offenses on the basis of risk nor gives offenders any opportunity to demonstrate their lack of risk, ASORA's effects are punitive. We therefore conclude that the statute violates Alaska's ex post facto clause.

IV. CONCLUSION

Because ASORA's registration, disclosure, and dissemination provisions violate the protection against ex post facto laws afforded by the Alaska Constitution as it applies to defendants who committed their crimes before the legislature enacted ASORA, we hold that AS 12.63.100(3) cannot be applied to Doe. We consequently REVERSE the final judgment for the state, and REMAND for entry of judgment for Doe.

Watters v. Wachovia Bank
127 S.Ct. 1559 (2007)

Justice GINSBURG delivered the opinion of the Court.

Business activities of national banks are controlled by the National Bank Act (NBA or Act), 12 U.S.C. § 1 *et seq.*, and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC). See §§ 24, 93a, 371(a). As the agency charged by Congress with supervision of the NBA, OCC oversees the operations of national banks and their interactions with customers. See *NationsBank of N. C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 254, 256, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995). The agency exercises visitorial powers, including the authority to audit the bank's books and records, largely to the exclusion of other governmental entities, state or federal. See § 484(a); 12 CFR § 7.4000 (2006).

The NBA specifically authorizes federally chartered banks to engage in real estate lending. 12 U.S.C. § 371. It also provides that banks shall have power "[t]o exercise ... all such incidental powers as shall be necessary to carry on the business of banking." § 24 Seventh. Among incidental powers, national banks may conduct certain activities through "operating subsidiaries," discrete entities authorized to engage solely in activities the bank itself could undertake, and subject to the same terms and conditions as those applicable to the bank. See § 24a(g)(3)(A); 12 CFR § 5.34(e) (2006).

Respondent Wachovia Bank, a national bank, conducts its real estate lending business through Wachovia Mortgage Corporation, a wholly owned, state-chartered entity, licensed as an operating subsidiary by OCC. It is uncontested in this suit that Wachovia's real estate business, if conducted by the national bank itself, would be subject to OCC's superintendence, to the exclusion of state registration requirements and visitorial authority. The question in dispute is whether the bank's mortgage lending activities remain outside the governance of state licensing and auditing agencies when those activities are conducted, not by a division or department of the bank, but by the bank's operating subsidiary. In accord with the Courts of Appeals that have addressed the issue, we hold that Wachovia's mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates.

II

A

Nearly 200 years ago, in *McCulloch v. Maryland,* 4 Wheat. 316, 4 L.Ed. 579 (1819), this Court held federal law supreme over state law with respect to national banking. Though the bank at issue in *McCulloch* was short-lived, a federal banking system reemerged in the Civil War era. See *Atherton v. FDIC,* 519 U.S. 213, 221-222, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997); B. Hammond, Banks and Politics in America: from the Revolution to the Civil War (1957). In 1864, Congress enacted the NBA, establishing the system of national banking still in place today. National Bank Act, ch. 106, 13 Stat. 99; *Atherton,* 519 U.S., at 222, 117 S.Ct. 666; *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.,* 439 U.S. 299, 310, 314-315, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978). The Act vested in nationally chartered banks enumerated powers and "all such incidental powers as shall be necessary to carry on the

business of banking." 12 U.S.C. § 24 Seventh. To prevent inconsistent or intrusive state regulation from impairing the national system, Congress provided: "No national bank shall be subject to any visitorial powers except as authorized by Federal law ...." § 484(a).

In the years since the NBA's enactment, we have repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation. See, *e.g., Beneficial Nat. Bank v. Anderson,* 539 U.S. 1, 10, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003) (national banking system protected from "possible unfriendly State legislation" (quoting *Tiffany v. National Bank of Mo.,* 18 Wall. 409, 412, 21 L.Ed. 862 (1874))). Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA. *Davis v. Elmira Savings Bank,* 161 U.S. 275, 290, 16 S.Ct. 502, 40 L.Ed. 700 (1896). See also *Atherton,* 519 U.S., at 223, 117 S.Ct. 666. For example, state usury laws govern the maximum rate of interest national banks can charge on loans, 12 U.S.C. § 85, contracts made by national banks "are governed and construed by State laws," *National Bank v. Commonwealth,* 9 Wall. 353, 362, 19 L.Ed. 701 (1870), and national banks' "acquisition and transfer of property [are] based on State law," *ibid.* However, "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is an abuse, because it is the usurpation of power which a single State cannot give." *Farmers' and Mechanics'Nat. Bank v. Dearing,* 91 U.S. 29, 34, 23 L.Ed. 196 (1875) (internal quotation marks omitted).

We have "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion Cty., N.A. v. Nelson,* 517 U.S. 25, 32, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). See also *Franklin Nat. Bank of Franklin Square v. New York,* 347 U.S. 373, 375-379, 74 S.Ct. 550, 98 L.Ed. 767 (1954). States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way. *Barnett Bank,* 517 U.S., at 32-34, 116 S.Ct. 1103 (federal law permitting national banks to sell insurance in small towns preempted state statute prohibiting banks from selling most types of insurance); *Franklin Nat. Bank,* 347 U.S., at 377-379, 74 S.Ct. 550 (local restrictions preempted because they burdened exercise of national banks' incidental power to advertise).

The NBA authorizes national banks to engage in mortgage lending, subject to OCC regulation. The Act provides:

> "Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a).

Beyond genuine dispute, state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the NBA. See *Barnett Bank,* 517 U.S., at 33-34, 116 S.Ct. 1103; *Franklin,* 347 U.S., at 375-379, 74 S.Ct. 550. See also 12 CFR § 34.4(a)(1) (2006) (identifying preempted

state controls on mortgage lending, including licensing and registration). In particular, real estate lending, when conducted by a national bank, is immune from state visitorial control: The NBA specifically vests exclusive authority to examine and inspect in OCC. 12 U.S.C. § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law.").

Harmoniously, the Michigan provisions at issue exempt national banks from coverage. Mich. Comp. Laws Ann. § 445.1675(a) (West 2002). This is not simply a matter of the Michigan Legislature's grace. Cf. *post,* at 1570 - 1571, and n. 17. For, as the parties recognize, the NBA would have preemptive force, *i.e.,* it would spare a national bank from state controls of the kind here involved. See Brief for Petitioner 12; Brief for Respondents 14; Brief for United States as *Amicus Curiae* 9. State laws that conditioned national banks' real estate lending on registration with the State, and subjected such lending to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business: National banks would be subject to registration, inspection, and enforcement regimes imposed not just by Michigan, but by all States in which the banks operate. Diverse and duplicative superintendence of national banks' engagement in the business of banking, we observed over a century ago, is precisely what the NBA was designed to prevent: "Th[e] legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." *Easton v. Iowa,* 188 U.S. 220, 229, 23 S.Ct. 288, 47 L.Ed. 452 (1903). Congress did not intend, we explained, "to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation .... [C]onfusion would necessarily result from control possessed and exercised by two independent authorities." *Id*., at 231-232, 23 S.Ct. 288. Recognizing the burdens and undue duplication state controls could produce, Congress included in the NBA an express command: "No national bank shall be subject to any visitorial powers except as authorized by Federal law ...." 12 U.S.C. § 484(a). See *supra,* at 1566, 1568; *post,* at 1569 (acknowledging that national banks have been "exemp[t] from state visitorial authority ... for more than 140 years"). "Visitation," we have explained "is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." *Guthrie v. Harkness,* 199 U.S. 148, 158, 26 S.Ct. 4, 50 L.Ed. 130 (1905) (internal quotation marks omitted). See also 12 CFR § 7.4000(a)(2) (2006) (defining "visitorial" power as "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv)[e]nforcing compliance with any applicable federal or state laws concerning those activities"). Michigan, therefore, cannot confer on its commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks.

B

While conceding that Michigan's licensing, registration, and inspection requirements cannot be applied to national banks, see, *e.g.,* Brief for Petitioner 10, 12, Watters argues that the State's regulatory regime survives preemption with respect to national banks' operating subsidiaries. Because such subsidiaries are separately chartered under some State's law, Watters characterizes them simply as "affiliates" of national banks, and contends that even though they are subject to OCC's superintendence, they are also subject to multistate control. *Id*., at 17-22. We disagree.

Since 1966, OCC has recognized the "incidental" authority of national banks under § 24 Seventh to do business through operating subsidiaries. See 31 Fed.Reg. 11459-11460 (1966); 12 CFR § 5.34(e)(1) (2006) ("A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking...."). That authority is uncontested by Michigan's commissioner. See Brief for Petitioner 21 ("[N]o one disputes that 12 U.S.C. § 24 (Seventh) authorizes national banks to use nonbank operating subsidiaries ... ."). OCC licenses and oversees national bank operating subsidiaries just as it does national banks. § 5.34(e)(3) ("An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."); United States Office of the Comptroller of the Currency, Related Organizations: Comptroller's Handbook 53 (Aug.2004) (hereinafter Comptroller's Handbook) ("Operating subsidiaries are subject to the same supervision and regulation as the parent bank, except where otherwise provided by law or OCC regulation.").

In 1999, Congress defined and regulated "financial" subsidiaries; simultaneously, Congress distinguished those national bank affiliates from subsidiaries-typed "operating subsidiaries" by OCC-which may engage only in activities national banks may engage in directly, "subject to the same terms and conditions that govern the conduct of such activities by national banks." Gramm-Leach-Bliley Act (GLBA), § 121(a)(2), 113 Stat. 1378 (codified at 12 U.S.C. § 24a(g)(3)(A)). For supervisory purposes, OCC treats national banks and their operating subsidiaries as a single economic enterprise. Comptroller's Handbook 64. OCC oversees both entities by reference to "business line," applying the same controls whether banking "activities are conducted directly or through an operating subsidiary." *Ibid*.

As earlier noted, Watters does not contest the authority of national banks to do business through operating subsidiaries. Nor does she dispute OCC's authority to supervise and regulate operating subsidiaries in the same manner as national banks. Still, Watters seeks to impose state regulation on operating subsidiaries over and above regulation undertaken by OCC. But just as duplicative state examination, supervision, and regulation would significantly burden mortgage lending when engaged in by national banks, see *supra,* at 1566 - 1569, so too would those state controls interfere with that same activity when engaged in by an operating subsidiary.

We have never held that the preemptive reach of the NBA extends only to a national bank itself. Rather, in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers,* not on its corporate structure. See, *e.g.,* *Barnett Bank,* 517 U.S., at 32, 116 S.Ct. 1103. And we have treated operating subsidiaries as equivalent to national banks with respect to powers exercised under federal law (except where federal law provides otherwise). In *NationsBank of N. C., N. A.,* 513 U.S., at 256-261, 115 S.Ct. 810, for example, we upheld OCC's determination that national banks had "incidental" authority to act as agents in the sale of annuities. It was not material that the function qualifying as within "the business of banking," § 24 Seventh, was to be carried out not by the bank itself, but by an operating subsidiary, *i.e.,* an entity "subject to the same terms and conditions that govern the conduct of [the activity] by national banks [themselves]," § 24a(g)(3)(A); 12 CFR § 5.34(e)(3) (2006). See also *Clarke v. Securities Industry Assn.,* 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (national banks, acting through operating subsidiaries, have power to offer discount

brokerage services).

Security against significant interference by state regulators is a characteristic condition of the "business of banking" conducted by national banks, and mortgage lending is one aspect of that business. See, *e.g.,* 12 U.S.C. § 484(a); 12 CFR § 34.4(a)(1) (2006). See also *supra,* at 1566 - 1569; *post,* at 1576 (acknowledging that, in 1982, Congress broadly authorized national banks to engage in mortgage lending); *post,* at 1581, and n. 20 (acknowledging that operating subsidiaries "are subject to the same federal oversight as their national bank parents"). That security should adhere whether the business is conducted by the bank itself or is assigned to an operating subsidiary licensed by OCC whose authority to carry on the business coincides completely with that of the bank. See *Wells Fargo Bank, N.A. v. Boutris,* 419 F.3d 949, 960 (C.A.9 2005) (determination whether to conduct business through operating subsidiaries or through subdivisions is "essentially one of internal organization").

Watters contends that if Congress meant to deny States visitorial powers over operating subsidiaries, it would have written § 484(a)'s ban on state inspection to apply not only to national banks but also to their affiliates. She points out that § 481, which authorizes OCC to examine "affiliates" of national banks, does not speak to state visitorial powers. This argument fails for two reasons. *First,* one cannot ascribe any intention regarding operating subsidiaries to the 1864 Congress that enacted §§ 481 and 484, or the 1933 Congress that added the provisions on examining affiliates to § 481 and the definition of "affiliate" to § 221a. That is so because operating subsidiaries were not authorized until 1966. See *supra,* at 1569 - 1570. Over the past four decades, during which operating subsidiaries have emerged as important instrumentalities of national banks, Congress and OCC have indicated no doubt that such subsidiaries are "subject to the same terms and conditions" as national banks themselves.

Second, Watters ignores the distinctions Congress recognized among "affiliates." The NBA broadly defines the term "affiliate" to include "any corporation" controlled by a national bank, including a subsidiary. See 12 U.S.C. § 221a(b). An operating subsidiary is therefore one type of "affiliate." But unlike affiliates that may engage in functions not authorized by the NBA, *e.g.,* financial subsidiaries, an operating subsidiary is tightly tied to its parent by the specification that it may engage only in "the business of banking" as authorized by the Act. § 24a(g)(3)(A); 12 CFR § 5.34(e)(1) (2006). See also *supra,* at 1569 - 1570, and 1576 n. 10. Notably, when Congress amended the NBA confirming that operating subsidiaries may "engag[e] solely in activities that national banks are permitted to engage in directly," 12 U.S.C. § 24a(g)(3)(A), it did so in an Act, the GLBA, providing that other affiliates, authorized to engage in nonbanking financial activities, *e.g.,* securities and insurance, are subject to state regulation in connection with those activities. See, *e.g.,* §§ 1843(k), 1844(c)(4). See also 15 U.S.C. § 6701(b) (any person who sells insurance must obtain a state license to do so).

C

Recognizing the necessary consequence of national banks' authority to engage in mortgage lending through an operating subsidiary "subject to the same terms and conditions that govern the conduct of such activities by national banks," 12 U.S.C. § 24a(g)(3)(A), see also § 24 Seventh, OCC promulgated 12 CFR § 7.4006 (2006): "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

See Investment Securities; Bank Activities and Operations; Leasing, 66 Fed.Reg. 34784, 34788 (2001). Watters disputes the authority of OCC to promulgate this regulation and contends that, because preemption is a legal question for determination by courts, § 7.4006 should attract no deference. See also *post,* at 1582 - 1585. This argument is beside the point, for under our interpretation of the statute, the level of deference owed to the regulation is an academic question. Section 7.4006 merely clarifies and confirms what the NBA already conveys: A national bank has the power to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern the national bank itself; that power cannot be significantly impaired or impeded by state law. See, *e.g., Barnett Bank,* 517 U.S., at 33-34, 116 S.Ct. 1103; 12 U.S.C. §§ 24 Seventh, 24a(g)(3)(A), 371.

The NBA is thus properly read by OCC to protect from state hindrance a national bank's engagement in the "business of banking" whether conducted by the bank itself or by an operating subsidiary, empowered to do only what the bank itself could do. See *supra,* at 1569 - 1570. The authority to engage in the business of mortgage lending comes from the NBA, § 371, as does the authority to conduct business through an operating subsidiary. See §§ 24 Seventh, 24a(g)(3)(A). That Act vests visitorial oversight in OCC, not state regulators. § 484(a). State law (in this case, North Carolina law), all agree, governs incorporation-related issues, such as the formation, dissolution, and internal governance of operating subsidiaries. And the laws of the States in which national banks or their affiliates are located govern matters the NBA does not address. See *supra,* at 1566 - 1567. But state regulators cannot interfere with the "business of banking" by subjecting national banks or their OCC-licensed operating subsidiaries to multiple audits and surveillance under rival oversight regimes.

III

Watters' alternative argument, that 12 CFR § 7.4006 violates the Tenth Amendment to the Constitution, is unavailing. As we have previously explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States,* 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses. See *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 58, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003) *(per curiam)*. The Tenth Amendment, therefore, is not implicated here.

* * *

For the reasons stated, the judgment of the Sixth Circuit is

Affirmed.

Justice STEVENS, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

Congress has enacted no legislation immunizing national bank subsidiaries from compliance with nondiscriminatory state laws regulating the business activities of mortgage brokers and lenders. Nor has it authorized an executive agency to pre-empt such state laws whenever it concludes that they interfere with national bank activities. Notwithstanding the absence of relevant statutory authority, today the Court

endorses an agency's incorrect determination that the laws of a sovereign State must yield to federal power. The significant impact of the Court's decision on the federal-state balance and the dual banking system makes it appropriate to set forth in full the reasons for my dissent.

I

This Court has consistently recognized that because federal law is generally interstitial, national banks must comply with most of the same rules as their state counterparts. As early as 1870, we articulated the principle that has remained the lodestar of our jurisprudence: that national banks

> "are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government .... They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. *It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional*." National Bank v. Commonwealth, 9 Wall. 353, 362, 19 L.Ed. 701 (1870) (emphasis added).

Until today, we have remained faithful to the principle that nondiscriminatory laws of general application that do not "forbid" or "impair significantly" national bank activities should not be pre-empted. See, *e.g.,* Barnett Bank of Marion Cty., N.A. v. Nelson, 517 U.S. 25, 33, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996).

. . . .

Cuomo v. The Clearing House Association
129 U.S. 2710 (2009)

Justice SCALIA delivered the opinion of the Court.

In 2005, Eliot Spitzer, Attorney General for the State of New York, sent letters to several national banks making a request "in lieu of subpoena" that they provide certain non-public information about their lending practices. He sought this information to determine whether the banks had violated the State's fair-lending laws. Spitzer's successor in office, Andrew Cuomo, is the petitioner here. Respondents, the federal Office of the Comptroller of the Currency ("Comptroller" or "OCC") and the Clearing House Association, a banking trade group, brought suit to enjoin the information request, claiming that the Comptroller's regulation promulgated under the National Bank Act prohibits that form of state law enforcement against national banks.

The United States District Court for the Southern District of New York entered an injunction in favor of respondents, prohibiting the attorney general from enforcing state fair-lending laws through demands for records or judicial proceedings. The United States Court of Appeals for the Second Circuit affirmed. 510 F.3d 105 (2007). We granted certiorari. 555 U.S. ----, 129 S.Ct. 987, 173 L.Ed.2d 171 (2009). The question presented is whether the Comptroller's regulation purporting to pre-empt state law enforcement can be upheld as a reasonable interpretation of the National Bank Act.

I

Section 484(a) of Title 12, U.S.C., a provision of the National Bank Act, 13 Stat. 99, reads as follows:

> "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized."

The Comptroller, charged with administering the National Bank Act, adopted, through notice-and-comment rulemaking, the regulation at issue here designed to implement the statutory provision. Its principal provisions read as follows:

> "§ 7.4000 Visitorial powers.
>
> "(a) *General rule*. (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

"(2) For purposes of this section, visitorial powers include:

"(i) Examination of a bank;

"(ii) Inspection of a bank's books and records;

"(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

"(iv) Enforcing compliance with any applicable federal or state laws concerning those activities." 12 CFR § 7.4000 (2009).

By its clear text, this regulation prohibits the States from "prosecuting enforcement actions" except in "limited circumstances authorized by federal law."

Under the familiar *Chevron* framework, we defer to an agency's reasonable interpretation of a statute it is charged with administering. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). There is necessarily some ambiguity as to the meaning of the statutory term "visitorial powers," especially since we are working in an era when the prerogative writs-through which visitorial powers were traditionally enforced-are not in vogue. The Comptroller can give authoritative meaning to the statute within the bounds of that uncertainty. But the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act. We can discern the outer limits of the term "visitorial powers" even through the clouded lens of history. They do not include, as the Comptroller's expansive regulation would provide, ordinary enforcement of the law. Evidence from the time of the statute's enactment, a long line of our own cases, and application of normal principles of construction to the National Bank Act make that clear.

A

Historically, the sovereign's right of visitation over corporations paralleled the right of the church to supervise its institutions and the right of the founder of a charitable institution "to see that [his] property [was] rightly employed," 1 W. Blackstone, Commentaries on the Laws of England 469 (1765). By extension of this principle, "[t]he king [was] by law the visitor of all civil corporations," *ibid.* A visitor could inspect and control the visited institution at will.

When the National Bank Act was enacted in 1864, "visitation" was accordingly understood as "[t]he act of examining into the affairs of a corporation" by "the government itself." 2 J. Bouvier, A Law Dictionary 790 (15th ed. 1883). Lower courts understood "visitation" to mean "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." *First Nat. Bank of Youngstown v. Hughes,* 6 F. 737, 740 (C.C.N.D.Ohio 1881). A State was the "visitor" of all companies incorporated in the State, simply by virtue of the State's role as sovereign: The "legislature is the visitor of all corporations founded by it." *Guthrie v. Harkness,* 199 U.S. 148, 157, 26 S.Ct. 4, 50 L.Ed. 130 (1905) (internal quotation marks omitted).

This relationship between sovereign and corporation was understood to allow the States to use prerogative writs-such as mandamus and *quo warranto*-to exercise control "whenever a corporation [wa]s abusing the power given it, or, ... or acting adversely to the public, or creating a nuisance." H. Wilgus, Private Corporations, in 8 American Law and Procedure § 157, pp. 224-225 (1910). State visitorial commissions were authorized to "exercise a general supervision" over companies in the State. I. Wormser, Private Corporations § 80, pp. 100, 101, in 4 Modern American Law (1921).

B

Our cases have always understood "visitation" as this right to oversee corporate affairs, quite separate from the power to enforce the law. In the famous *Dartmouth College* case, Justice Story, describing visitation of a charitable corporation, wrote that Dartmouth was "subject to the controlling authority of its legal visitor, who ... may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of [its] trusts," and who are "liable to no supervision or control." *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 676, 681, 4 L.Ed. 629 (1819) (concurring opinion). This power of "genera[l] superintend[ence]" stood in contrast to action by the court of chancery, which acted "not as itself possessing a visitorial power ... but as possessing a general jurisdiction ... to redress grievances, and frauds." *Id*., at 676.

. . . .

Our most recent decision, *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 127 S.Ct. 1559, 167 L.Ed.2d 389 (2007), does not, as the dissent contends, *post,* at 2731, "suppor[t] OCC's construction of the statute." To the contrary, it is fully in accord with the well established distinction between supervision and law enforcement. *Watters* held that a State may not exercise " 'general supervision and control' " over a subsidiary of a national bank, 550 U.S., at 8, 127 S.Ct. 1559, because "multiple audits and surveillance under rival oversight regimes" would cause uncertainty, *id.,* at 21, 127 S.Ct. 1559. "[G]eneral supervision and control" and "oversight" are worlds apart from law enforcement. All parties to the case agreed that Michigan's general oversight regime could not be imposed on national banks; the sole question was whether operating subsidiaries of national banks enjoyed the same immunity from state visitation. The opinion addresses and answers no other question.

The foregoing cases all involve enforcement of state law. But if the Comptroller's exclusive exercise of visitorial powers precluded law enforcement by the States, it would also preclude law enforcement by federal agencies. Of course it does not. See, *e.g., Bank of America Nat. Trust & Sav. Assn. v. Douglas,* 105 F.2d 100, 105-106 (CADC 1939) (Securities Exchange Commission investigation of bank fraud is not an exercise of "visitorial powers"); *Peoples Bank of Danville v. Williams,* 449 F.Supp. 254, 260 (W.D.Va.1978) (same).

In sum, the unmistakable and utterly consistent teaching of our jurisprudence, both before and after enactment of the National Bank Act, is that a sovereign's "visitorial powers" and its power to enforce the law are two different things. There is not a credible argument to the contrary. And contrary to what the Comptroller's regulation says, the National Bank Act pre-empts only the former.

C

The consequences of the regulation also cast doubt upon its validity. No one denies that the National Bank Act leaves in place some state substantive laws affecting banks. See Brief for Federal Respondent 20; Brief for Respondent Clearing House Association, L.L.C. 29; *post,* at 2730 - 2731. But the Comptroller's rule says that the State may not *enforce* its valid, non-pre-empted laws against national banks. *Ibid.* The bark remains, but the bite does not.

. . . .

On a pragmatic level, the difference between visitation and law enforcement is clear. If a State chooses to pursue enforcement of its laws in court, then it is not exercising its power of visitation and will be treated like a litigant. An attorney general acting as a civil litigant must file a lawsuit, survive a motion to dismiss, endure the rules of procedure and discovery, and risk sanctions if his claim is frivolous or his discovery tactics abusive. Judges are trusted to prevent "fishing expeditions" or an undirected rummaging through bank books and records for evidence of some unknown wrongdoing. In New York, civil discovery is far more limited than the full range of "visitorial powers" that may be exercised by a sovereign. Courts may enter protective orders to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice," N.Y. Civ. Prac. Law Ann. § 3103(a) (West 2005), and may supervise discovery *sua sponte,* § 3104(a). A visitor, by contrast, may inspect books and records at any time for any or no reason.

II

The Comptroller's regulation, therefore, does not comport with the statute. Neither does the Comptroller's *interpretation* of its regulation, which differs from the text and must be discussed separately.

Evidently realizing that exclusion of state enforcement of *all* state laws against national banks is too extreme to be contemplated, the Comptroller sought to limit the sweep of its regulation by the following passage set forth in the agency's statement of basis and purpose in the Federal Register:

> "What the case law *does* recognize is that 'states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law.' [citing a Ninth Circuit case.] Application of these laws to national banks and their implementation by state authorities typically does not affect the content or extent of the Federally-authorized business of banking ... but rather establishes the legal infrastructure that surrounds and supports the ability of national banks ... to do business." 69 Fed.Reg. 1896 (2004) (footnote omitted).

This cannot be reconciled with the regulation's almost categorical prohibition in 12 CFR § 7.4000(a)(1) of "prosecuting enforcement actions." Nor can it be justified by the provision in subsection (a)(2)(iv) which defines visitorial powers to include "[e]nforcing compliance with any applicable ... state laws concerning" "activities authorized or permitted pursuant to federal banking law," § 7.4000(a)(2)(iii). . . .

IV

Applying the foregoing principles to this case is not difficult. "Visitorial powers" in the National Bank Act refers to a sovereign's supervisory powers over corporations. They include any form of administrative oversight that allows a sovereign to inspect books and records on demand, even if the process is mediated by a court through prerogative writs or similar means. The Comptroller reasonably interpreted this statutory term to include "conducting examinations [and] inspecting or requiring the production of books or records of national banks," § 7.4000, when the State conducts those activities in its capacity as supervisor of corporations.

When, however, a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather in the role of sovereign-as-law-enforcer. Such a lawsuit is not an exercise of "visitorial powers" and thus the Comptroller erred by extending the definition of "visitorial powers" to include "prosecuting enforcement actions" in state courts, § 7.4000.

The request for information in the present case was stated to be "in lieu of" other action; implicit was the threat that if the request was not voluntarily honored, that other action would be taken. All parties have assumed, and we agree, that if the threatened action would have been unlawful the request-cum-threat could be enjoined. Here the threatened action was not the bringing of a civil suit, or the obtaining of a judicial search warrant based on probable cause, but rather the Attorney General's issuance of subpoena on his own authority under New York Executive Law, which permits such subpoenas in connection with his investigation of "repeated fraudulent or illegal acts ... in the carrying on, conducting or transaction of business." See N.Y. Exec. Law Ann. § 63(12) (West 2002). That is not the exercise of the power of law enforcement "vested in the courts of justice" which 12 U.S.C. § 484(a) exempts from the ban on exercise of supervisory power.

Accordingly, the injunction below is affirmed as applied to the threatened issuance of executive subpoenas by the Attorney General for the State of New York, but vacated insofar as it prohibits the Attorney General from bringing judicial enforcement actions.

* * *

The judgment of the Court of Appeals is affirmed in part and reversed in part.

It is so ordered.