

Chapter Eleven: The Contemporary Era

I. INTRODUCTION

In the Reagan era, conservatism seemed to be ascendant. But victory proved elusive. Republicans could not dislodge the Democrats from the House of Representatives or hold the Senate after 1986. Despite high poll numbers earlier in his term immediately after the fall of the Berlin Wall and the first Iraq War, President George H.W. Bush proved surprisingly vulnerable by the time of the 1992 election when the economy entered a downturn and businessman H. Ross Perot emerged as a significant independent candidate. The way was open for Bill Clinton to seize the White House for the Democrats for the first time since the Carter administration. The Arkansas governor had run as a “new” kind of Democrat, fending off more liberal candidates in the primaries to win the nomination. Eight years later, Texas governor George W. Bush avenged his father in 2000 by winning the Republican presidential nomination and wresting the White House from Vice President Al Gore after a bruising election dispute eventually ended by the U.S. Supreme Court. In 2008, the White House again changed hands in the midst of an economic recession as Barak Obama handily won election.

The “Republican Revolution” (or “Gingrich Revolution”) of 1994 provided a significant electoral shock of the era. A Southern moderate, Bill Clinton had led a reform movement against the liberal wing of the Democratic Party so as to accommodate the party to the changes that Reagan had made in the political landscape, and his 1992 campaign focused on conservative themes. With the smallest winning popular vote margin since Woodrow Wilson’s victory in the splintered campaign of 1912, Clinton’s success was a qualified one. Nonetheless, since the Democrats retained control of Congress, he enjoyed unified party government for the first time in a dozen years. The Democrats’ electoral success was short-lived as the Republicans made stunning gains in the midterm elections of 1994, winning control of both chambers of Congress. Although their majorities in both chambers were fairly narrow, the Republican victory was unexpected and marked the first time that the Republicans had controlled the House since the Eisenhower administration.

As in 1980, the Republican ranks in Congress were swelled by political novices and conservative firebrands willing to challenge the establishment, particularly under the leadership of new Speaker of the House Newt Gingrich. The Republican congressional gains had also finally completed the partisan and ideological “realignment” of congressional seats that had been expected during Reagan’s first term of office. Republicans had been frustrated by “split ticket voting,” in which voters (such as “Reagan Democrats”) might vote for one party for president but a different party for Congress. The districts that went Republican in 1994, however, also tended to go Republican in presidential elections, which suggested that Republicans might have some success in defending their majority into the future (unlike, for example, the one-term majority that rode into the House on Eisenhower’s coattails in 1952 elections). Republican success in the 1994 midterm elections set the stage for the GOP to enjoy unified party control of the federal government after the 2000 elections (when George W. Bush won the presidency for the GOP) for the first time since Eisenhower’s short-lived majority of 1952. Hopes of solidifying a Republican majority did not survive the Bush presidency, however. Republican numbers in Congress dwindled, until they lost their majorities in the House and Senate during Bush’s second term.

[Insert Table 11-1 about here]

The era of contemporary politics is a period shaped by the success of Ronald Reagan, but it cannot be readily characterized as a new Republican era. Divided government and slim, unstable congressional majorities have been common. Every president since George H.W. Bush have positioned themselves as “post-partisan,” but have presided over an era of deep partisan polarization. The parties in Congress have, by twentieth century standards, become highly disciplined, unified, and distant from one

another. Voters have become increasingly reliable supporters of one party or the other. Political rhetoric has been heated, and the commonplace tools of political combat include criminal investigations, public hearings, and impeachment threats. The two political parties have staked out divergent positions on notable constitutional issues ranging from abortion to federalism. The Supreme Court has often found itself taking positions that fall between those laid out in the party platforms.¹

The institutional and ideological legacies of the Reagan era are even less certain than the electoral ones. Presidents Reagan and Bush were able to place five new justices on the Supreme Court. Clarence Thomas was the last of the five, and finally secured a slim conservative majority. But the balance of power on the Court was held by Sandra Day O'Connor and Anthony Kennedy, whom conservatives had derided as "eighty percenters." They often sided with the more conservative justices on the Court, but one or both of them frequently broke from the conservatives on high-profile issues, either limiting how far the conservatives could push constitutional law or joining the liberal justices to move the law in an entirely different direction. Subsequent appointments have (thus far) largely managed only to maintain that balance of power on the Court, with Democratic presidents replacing more liberal justices and Republican presidents replacing more conservative justices.

The Supreme Court's most notable decisions of the contemporary era have been as likely to be liberal as conservative. A distinct conservative coalition composed of O'Connor, Kennedy, Rehnquist, Scalia and Thomas held together to issue a series of high-profile federalism decisions in the late 1990s, and the conservatives have been able to assemble majorities on some other issues over time as well. But the liberal wing of the Court has also been able to peel off swing voters such as O'Connor and Kennedy, and sometimes other, to issue a variety of important rulings, especially in high-profile rights and liberties cases. The contemporary Court has been noteworthy not only for its unusual ideological wobble. The contemporary Court has also been noteworthy for its willingness to strike down laws (it strikes down laws at a historically rapid pace), while taking relatively few cases overall and arguably having fewer policy consequences to show for its decisions than some earlier Courts. The contemporary Supreme Court is assertive in using its power of judicial review, but not necessarily ambitious in how it uses the power.

The ideological character of the contemporary era is still awaiting definition. The contemporary era remains fundamentally affected by conservative vision of smaller government, decentralization and individual responsibility. But reducing the size of government no longer drives the agenda in the way that it did during the Reagan years. Democratic President Bill Clinton famously declared that the "era of big government is over," but both Republicans and Democrats have looked to the federal government to provide new solutions to a variety of social and economic problems, from education to health care. The emphasis has been on finding "pragmatic" solutions to discrete problems, often working against a headwind of concern over costs and growth of government. At the same time, governmental accountability – a relatively minor theme of earlier years – has become a central concern of contemporary politics. The Republican "Contract with America" that future House Speaker Newt Gingrich championed as the basis for the GOP takeover of Congress in the 1994 midterm elections and as the foundation for a new Republican majority primarily emphasized populist policies concerned with accountability and responsibility, such as congressional term limits and balance budgets. Even welfare reform and anti-crime measures, central planks of the GOP platform of the 1990s and ones that Clinton embraced as his own, emphasized ways of making government work better rather than more traditional conservative themes. Neither George W. Bush nor Barack Obama made reducing the size of government a goal of their administrations. Rather they struggled over the vestiges of the sense of the proper limits on the scope of government. With the exception of Clarence Thomas, the conservative justices on the Court seem to have little inclination to raise fundamental challenges to the size and scope of government. With the parties deeply polarized over the proper goals of politics and limits on government power, it remains to be seen how the constitutional politics of the contemporary era will be defined.

¹ H.W. Perry, Jr. and L.A. Powe, Jr., "The Political Battle for the Constitution," *Constitutional Commentary* 21 (2004): 641.

[Insert Box 11-1 about here]

William J. Clinton, Fourth Annual Message (1996)¹

Despite running a fairly conservative campaign for his first term of office, President Clinton's early acts were ideologically mixed – successfully completing the ratification of the North American Free Trade Accord and passing a deficit reduction package on the one hand, but becoming entangled in a debate over homosexuals in the military and a massive failed health care reform plan on the other. After the Republican takeover of Congress in 1994, the president's goals became more defensive, and he returned more consistently to the conservative themes of his first campaign. As he prepared for his own 1996 reelection campaign, the Democratic president hoped to claim welfare reform (an element of the Republican's "Contract with America") as part of his own record of success and famously declared, "The era of big Government is over." Clinton's willingness to compromise with congressional Republican legislation to abandon the New Deal-era Aid to Families with Dependent Children ("welfare") – shifting more authority to the states and reducing the sense in which income support was an "entitlement" or even a "right" – led a number of administration officials to resign in protest but helped secure his own reelection as a "New Democrat."

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We must answer here three fundamental questions: First, how do we make the American dream of opportunity for all a reality for all Americans who are willing to work for it? Second, how do we preserve our old and enduring values as we move into the future? And third, how do we meet these challenges together, as one America?

We know big Government does not have all the answers. We know there's not a program for every problem. We know, and we have worked to give the American people a smaller, less bureaucratic Government in Washington. And we have to give the American people one that lives within its means. The era of big Government is over. But we cannot go back to the time when our citizens were left to fend for themselves.

Instead, we must go forward as one America, one nation working together to meet the challenges we face together. Self-reliance and teamwork are not opposing virtues; we must have both. I believe our new, smaller Government must work in an old-fashioned American way, together with all of our citizens through State and local governments, in the workplace, in religious, charitable, and civic associations. Our goal must be to enable all our people to make the most of their own lives, with stronger families, more educational opportunity, economic security, safer streets, a cleaner environment in a safer world.

....

I say to those who are on welfare, and especially to those who have been trapped on welfare for a long time: For too long our welfare system has undermined the values of family and work, instead of supporting them. The Congress and I are near agreement on sweeping welfare reform. We agree on time limits, tough work requirements, and the toughest possible child support enforcement. But I believe we must also provide child care so that mothers who are required to go to work can do so without worrying about what is happening to their children.

I challenge this Congress to send me a bipartisan welfare reform bill that will really move people from welfare to work and do the right thing by our children. I will sign it immediately.

Let us be candid about this difficult problem. Passing a law, even the best possible law, is only a first step. The next step is to make it work. I challenge people on welfare to make the most of this opportunity for independence. I challenge American businesses to give people on welfare the chance to move into the work force. I applaud the work of religious groups and others who care for the poor. More

¹ Excerpt taken from *Public Papers of the Presidents of the United States: William J. Clinton, 1996*, Book 1 (Washington, D.C.: United States Government Printing Office, 1997), 79.

than anyone else in our society, they know the true difficulty of the task before us, and they are in a position to help.

Every one of us should join them. That is the only way we can make real welfare reform a reality in the lives of the American people.

Barak Obama, Inaugural Address (2009)¹

Barak Obama entered the presidential race with a relatively short political record, having represented Illinois for less than a term in the U.S. Senate. As a young, African-American candidate with few political strings attached entering into a crowded Democratic field, Obama looked to position himself as a “post-partisan” candidate who did not fit conventional political labels and stood outside of “politics as usual” as it was practiced in Washington, D.C. After a bruising battle for the Democratic nomination with Hilary Clinton, Obama easily defeated the Republican candidate, John McCain. Although McCain had likewise favored the role of the maverick, the long-time senator proved willing to defend the unpopular Iraq War and was running in the midst of a severe economic downturn. The 2008 elections would solidify Democratic majorities in Congress, as well as put Obama in the White House. The economy and the on-going war were the overwhelming priorities for the new Obama administration. In launching his administration, Obama tried to avoid laying out a new ideological or constitutional vision for the nation in favor of a more pragmatic, if amorphous, focus on making “hard choices.”

....

The question we ask today is not whether our government is too big or too small, but whether it works -- whether it helps families find jobs at a decent wage, care they can afford, a retirement that is dignified. Where the answer is yes, we intend to move forward. Where the answer is no, programs will end. And those of us who manage the public's dollars will be held to account, to spend wisely, reform bad habits, and do our business in the light of day, because only then can we restore the vital trust between a people and their government.

Nor is the question before us whether the market is a force for good or ill. Its power to generate wealth and expand freedom is unmatched. But this crisis has reminded us that without a watchful eye, the market can spin out of control. The nation cannot prosper long when it favors only the prosperous. The success of our economy has always depended not just on the size of our gross domestic product, but on the reach of our prosperity, on the ability to extend opportunity to every willing heart -- not out of charity, but because it is the surest route to our common good.

As for our common defense, we reject as false the choice between our safety and our ideals. Our Founding Fathers faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man -- a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience sake.

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¹ Excerpt taken from *Daily Compilation of Presidential Documents* (Washington, D.C.: Government Printing Office, January 20, 2009), 1.

II. POWERS OF THE NATIONAL GOVERNMENT

The New Deal and World War II had effectively put an end to one set of long-standing debates in American constitutionalism over the scope of national powers. The federal government that emerged from the 1940s was much larger in its scope of activities, share of government revenues, claim on economic resources, and authority to regulate and direct economic activity than what the United States had known previously in its history. The cry of “states’ rights” had briefly been a rallying point in the 1950s and early 1960s, but those debates focused mostly on federal authority over racial civil rights.

Conservatives in the Reagan era sought to reopen the debate over federalism and constitutional powers of the national government. Borrowing themes from Barry Goldwater’s 1964 presidential campaign, among other places, conservatives in the 1980s often linked libertarian criticisms of “big government” with a call for greater respect for the limits on national power and for decentralization of power down to states and localities. As Figure 11-2 indicates, Democratic and Republican party platforms diverged in this period. Republicans began to talk more and more about federalism, and when they talked about federalism they often focused on the idea of constitutional limitations on national power rather than, for example, the system of federal grants to states and cities. At the extreme, this might mean calling into question the legitimacy of the New Deal itself. There were plenty of more immediate targets, however, such as the creation of the Department of Education during the Carter administration, which conservatives denounced as illegitimate.

[Insert Figure 11-2 about here]

Conservatives expected the courts to be a critical battleground on the limits of national power. Starting in the 1980s, lawyers in the Justice Department, in conservative interest groups, and in state governments began to map out strategies for testing those constitutional limits in court. The Reagan administration looked for judicial nominees who shared the president’s interest in federalism. Associate Justice William Rehnquist had been a long-time advocate of restricting national power and was elevated to the position of Chief Justice in 1986. Sandra Day O’Connor, Reagan’s first choice for the Supreme Court in 1981, was another westerner deeply interested in the issue. When President George H.W. Bush added Clarence Thomas to the bench in 1991, the conservatives for the first time had a slim majority willing to reconsider the scope of national power. At about the same time, Republicans took over Congress, and particularly the House of Representatives for the first time in decades, and gave brief, but vocal, support for reinvigorating federalism constraints. The result was a wide-ranging burst of decisions in the late 1990s striking down a variety of provisions of federal statutes and developing several new doctrines limiting congressional power. The pace of these decisions dramatically slowed in the 2000s, and it remains unclear the extent to which Chief Justice John Roberts (who replaced Rehnquist) and Justice Samuel Alito (who replaced O’Connor) share an interest in these earlier federalism decisions, despite their generally conservative constitutional philosophy. The Supreme Court developed new doctrine on the commerce clause, state sovereign immunity, the power of the federal government to “commandeer” state government officials, and congressional authority under Section Five of the Fourteenth Amendment to define the rights of individuals vis-à-vis the state governments. Conservatives also pressed for courts to adopt other structural reforms, reining in the congressional spending power and its delegation of lawmaking authority, but with less success.

A. Power to Regulate Commerce

United States v. Lopez, 514 U.S. 549 (1995)

From 1937 until 1995, the Supreme Court announced no limits on the federal power to regulate interstate commerce. Every claimed exercise of the national commerce power was sustained. This sixty

year trend was broken in 1995 when the justices in United States v. Lopez declared that Congress had no power to pass the Gun-Free School Zones Act of 1990. The crucial question, as of yet unclear, is whether Lopez (and United States v. Morrison, noted below) signal a serious effort to declare sharp limitations on federal power or are mere prunings of largely symbolic statutes.

The Gun-Free Schools Zones Act (GFSZA) was passed as part of a broader crime bill in 1990, when the Democrats controlled Congress and Republican George H.W. Bush was in the White House. For the Democrats in Congress, the GFSZA was seen as a modest gun control measure that simply modified the already popular idea of "drug-free school zones." For federal politicians, it allowed them to claim credit for "doing something" about school violence, even though state and local laws already covered much of the same ground as the GFSZA, without the controversy that normally accompanied gun control legislation. No objections – constitutional or otherwise – were raised to the bill in Congress. When 12th-grader Alfonso Lopez faced federal charges under the GFSZA for carrying a handgun to his San Antonio, Texas, high school, he argued that Congress did not have the constitutional authority to pass the statute. The district court upheld the law under the commerce clause, and Lopez was convicted and sentenced to six months in prison and two years supervised release. In a unanimous holding, however, a Fifth Circuit opinion written by a Reagan-appointee, but joined by two Carter-appointees, struck down the GFSZA as exceeding Congress' power under the commerce clause and marking with no explanation a federal encroachment into the traditional state arena of education. The majority of the justices on the Supreme Court agreed. Lopez had no effect on the state and local laws regulating guns in schools. Congress responded to the lower court decision by passing the Gun Free Schools Act of 1994, which required schools receiving federal funds to adopt a variety of policies to penalize those found with a gun on school grounds, and it responded to the Supreme Court decision by passing the Gun Free School Zones Act of 1996, which added a requirement that federal charges could be filed only when the gun had previously moved through interstate commerce.

Lopez was notable not only for its powerful symbolism of striking down a federal law on interstate commerce clause grounds but also for locking into place the five-justice majority of Rehnquist, O'Connor, Scalia, Kennedy, and Thomas that would become familiar in numerous federalism cases over the next several years of the Rehnquist Court (most of which did not involve the commerce clause).

As you read the case, consider the differences between the majority opinion by Chief Justice Rehnquist and the concurring opinion by Justice Thomas. Does Rehnquist work within or significantly challenge the New Deal settlement? In what ways might the Gun-Free School Zones Act be understood to be working at the margins of the New Deal settlement? In what ways might it be understood to be well within the bounds of that settlement?

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." . . . The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce . . . among the several States . . ." . . .

. . . .
We start with first principles. The Constitution creates a Federal Government of enumerated powers. . . . As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." "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." . . .

The Constitution delegates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." . . . The Court, through Chief Justice Marshall, first defined the nature of Congress' commerce power in *Gibbons v. Ogden*:

"Commerce, undoubtedly, is traffic, but it is something more: it is 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."

The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." . . .

For nearly a century thereafter, the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. . . . Under this line of precedent, the Court held that certain categories of activity such as "production," "manufacturing," and "mining" were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause.

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Jones & Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these 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." . . . Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce. . . .

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Consistent with this structure, we 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. . . .

....

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. . . .

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. . . . The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

"One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." . . .

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

Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. . . . § 922(q) has 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.

. . . [T]he Government concedes that "neither the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." . . . We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. . . . But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

. . . .

The Government's essential contention . . . is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. . . . The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. . . . Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. . . . The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. . . . Similarly, under the Government's "national productivity" 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 theories that the Government presents in support of § 922(q), 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.

Although JUSTICE BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. . . .

. . . .
[I]f Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then . . . it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," . . . and that, in turn, has a substantial effect on interstate commerce.

[A] determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." . . . The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. . . . Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers

. . . .
. . . 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. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

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. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

MR. JUSTICE KENNEDY, with whom MS. JUSTICE O'CONNOR joins, concurring.

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.

. . . .
The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates

with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

...

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, . . . and hold each other in check by competing for the affections of the people, . . . those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." . . . Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. . . . The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. Madison's observation that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due," . . . can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment. . . . Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.

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At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. . . .

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The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. . . .

....

The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation. There are over 100,000 elementary and secondary schools in the United States. . . . Each of these now has an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property. In some communities no doubt it would be difficult to navigate without infringing on those zones. Yet throughout these areas, school officials would find their own programs for the prohibition of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule.

MR. JUSTICE THOMAS, concurring.

The Court today properly concludes that the Commerce Clause does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school. . . . Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

We have said that Congress may regulate not only "Commerce . . . among the several States," . . . but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. . . .

While the principal dissent concedes that there are limits to federal power, the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession. But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.

. . . .
At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. . . .

As one would expect, the term "commerce" was used in contradistinction to productive activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. . . .

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.

The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The Commerce Clause does not state that Congress may "regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes." . . .

In addition to its powers under the Commerce Clause, Congress has the authority to enact such laws as are "necessary and proper" to carry into execution its power to regulate commerce among the several States. . . . But on this Court's understanding of congressional power under these two Clauses, many of Congress' other enumerated powers under Art. I, § 8, are wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, . . . or coin money and fix the standard of weights and measures, . . . or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. . . .

. . . [I]f a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army

and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended.

Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined.

....

From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. . . . Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation. . . .

The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether the class of activities *as a whole* substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation. . . .

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional. Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.

This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions. It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court's opinion should not be viewed as "radical" or another "wrong turn" that must be corrected in the future. The analysis also suggests that we ought to temper our Commerce Clause jurisprudence.

MR. JUSTICE STEVENS, dissenting.

....

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The market for the possession of handguns by school-age children is, distressingly, substantial. Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today.

MR. JUSTICE SOUTER, dissenting.

In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce "if there is any rational basis for such a finding." . . .

The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." . . . In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.

. . . .

In the years following [1937], deference to legislative policy judgments on commercial regulation became the powerful theme under both the Due Process and Commerce Clauses, . . . and in due course that deference became articulate in the standard of rationality review. . . . [U]nder commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments.

There is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation. . . . The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. And the act of calibrating the level of deference by drawing a line between what is patently commercial and what is less purely so will probably resemble the process of deciding how much interference with contractual freedom was fatal. Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring. To be sure, the occasion for today's decision reflects the century's end, not its beginning. But if it seems anomalous that the Congress of the United States has taken to regulating school yards, the Act in question is still probably no more remarkable than state regulation of bake shops 90 years ago. In any event, there is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began . . .

. . . .

The question for the courts, as all agree, is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce. The legislation implies such a finding, and there is no reason to entertain claims that Congress acted *ultra vires* intentionally. Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason. . . . Congressional findings do not, however, directly address the question of reasonableness; they tell us what Congress actually has found, not what it could rationally find. If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot. The resulting congressional obligation to justify its policy choices on the merits would imply either a judicial authority to review the justification (and, hence, the wisdom) of those choices, or authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. But review for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937, and review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. Such a legislative process requirement would function merely as an excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied. Under such a regime, in any case, the rationality standard of review would be a thing of the past.

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

. . . . In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce . . . among the several States . . ." encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. . . ."

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i. e.*, the effect of all guns possessed in or near schools). . . .

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce -- both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway.

. . . .
Applying these principles to the case at hand, we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. . . . As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," the answer to this question must be yes. Numerous reports and studies -- generated both inside and outside government -- make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts. . . .

To hold this statute constitutional is not to "obliterate" the "distinction between what is national and what is local," . . . nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. . . . First, this statute is aimed at curbing a particularly acute threat to the educational process -- the possession (and use) of life-threatening firearms in, or near, the classroom. . . . Second, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. . . .

In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply pre-existing law to changing economic circumstances.

The majority's holding . . . creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. In *Perez v. United States*, . . . the Court held that the Commerce Clause authorized a federal statute that makes it a crime to engage in loan sharking ("extortionate credit transactions") at a local level. . . . But, why then cannot Congress also reason that the threat or use of force -- the frequent consequence of possessing a gun -- in or near a school occurs sufficiently often so that such activity (by inhibiting basic education) affects commerce among the States? The negative impact upon the national economy of an inability to teach basic skills seems no smaller (nor less significant) than that of organized crime.

In *Katzenbach v. McClung*, . . . this Court upheld, as within the commerce power, a statute prohibiting racial discrimination at local restaurants, in part because that discrimination discouraged travel by African Americans and in part because that discrimination affected purchases of food and restaurant supplies from other States. . . . It is difficult to distinguish the case before us, for the same critical elements are present. Businesses are less likely to locate in communities where violence plagues the classroom. Families will hesitate to move to neighborhoods where students carry guns instead of books. . . . And (to look at the matter in the most narrowly commercial manner), interstate publishers therefore will sell fewer books and other firms will sell fewer school supplies where the threat of violence disrupts learning. Most importantly . . . the local instances here, taken together and considered as a

whole, create a problem that causes serious human and social harm, but also has nationally significant economic dimensions.

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between "commercial" and noncommercial "transaction[s]."

. . . .Although the majority today attempts to categorize *Perez*, *McClung*, and *Wickard* as involving intrastate "economic activity," . . . the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce.

More importantly, if a distinction between commercial and noncommercial activities is to be made, this is not the case in which to make it. . . . Schools that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial purposes, and one cannot easily separate the one from the other. American industry itself has been, and is again, involved in teaching. . . .

Regardless, if there is a principled distinction that could work both here and in future cases, Congress (even in the absence of vocational classes, industry involvement, and private management) could rationally conclude that schools fall on the commercial side of the line. In 1990, the year Congress enacted the statute before us, primary and secondary schools spent \$ 230 billion -- that is, nearly a quarter of a trillion dollars -- which accounts for a significant portion of our \$ 5.5 trillion gross domestic product for that year. . . . Why could Congress, for Commerce Clause purposes, not consider schools as roughly analogous to commercial investments from which the Nation derives the benefit of an educated work force?

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. . . .

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress . . . to act in terms of economic . . . realities." . . . Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten.

Gonzales v. Raich, 545 U.S. 1 (2005)

The Controlled Substances Act of 1970 (CSA, or Title II of the Comprehensive Drug Abuse Prevention and Control Act) consolidated and expanded federal regulation of narcotics. Marijuana is regulated as a "Schedule I" drug under the CSA, with a high potential for abuse and little or no medicinal value. As such, its manufacture, distribution or possession is a federal criminal offense, except when preapproved by the federal Food and Drug Administration for a research study.

In 1996, the voters of California approved the Compassionate Use Act which gave "seriously ill Californians" a "right to obtain and use marijuana for medical purposes" and to provide legal protections to doctors who recommend marijuana to such patients and to patients and primary caregivers who cultivate or possess marijuana for such use. The California statute and the litigation challenged the assumption of the federal law that marijuana was of no medicinal value.

*Angel Raich and Diane Monson provided a test case for the conflict between these two laws. Both used marijuana for their own medical conditions, though only Monson was physically able to cultivate the plants herself. In 2002, both county deputies and federal Drug Enforcement Agents came to Munson's home. The former determined that Munson was operating within the terms of the Compassionate Use Act. The latter found her in violation of the Controlled Substances Act and destroyed six marijuana plants. Raich and Munson then filed suit against the United States attorney general seeking an injunction against further enforcement of the CSA and a declaration that CSA was unconstitutional as applied to them. Although the district court initially denied the motion, a divided Ninth Circuit court ruled in favor of Raich and Munson in light of the Supreme Court's recent decisions in *Lopez* and *Morrison*. Unlike the conservative Fifth Circuit that decided the original *Lopez* case from*

Texas, the Ninth Circuit that decided the Raich case from California was a liberal court, suggesting the strange political bedfellows that the federalism cases could make.

The Raich case was closely watched. Unlike the Gun-Free School Zones Act, the Controlled Substances Act was a central piece of social policy. Invalidating it, even on narrow grounds, would have real policy consequences. The case also pitted the libertarian value of small government against the war on drugs dear to many social conservatives, testing the political and constitutional commitments of the conservative justices. The Supreme Court reversed the Ninth Circuit, and upheld the CSA, on a 6-3 vote, with Justices Kennedy and Scalia switching sides to rule in favor of the federal government and its authority under the commerce clause in this case. As you read this case, consider whether Scalia is persuasive in distinguishing Raich from the earlier cases. Does Raich signal the repudiation of Lopez?

MR. 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.

....

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. . . . 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.

....

[Contemporary cases] have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. . . . Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce. . . . Only the third category is implicated in the case at hand.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. . . . 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." . . . 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.

....

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

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, . . . a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. . . .

....

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. . . . Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, . . . and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. . . .

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* . . . and *Morrison*. As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." . . .

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." . . . 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. . . .

More fundamentally, if, as the principal dissent contends, the personal cultivation, possession, and use of marijuana for medicinal purposes is beyond the "'outer limits' of Congress' Commerce Clause authority," . . . it must also be true that such personal use of marijuana (or any other homegrown drug) for recreational purposes is also beyond those "'outer limits,'" whether or not a State elects to authorize or even regulate such use. Justice Thomas' separate dissent suffers from the same sweeping implications. That is, the dissenters' rationale logically extends to place *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the "'outer limits'" of Congress' Commerce Clause authority. One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but "visible to the naked eye," . . . under any commonsense appraisal of the probable consequences of such an open-ended exemption.

MR. JUSTICE SCALIA, concurring.

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to

facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. . . .

. . . .

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

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

. . . .

Today's principal dissent objects that, by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces *Lopez* and *Morrison* to "little more than a drafting guide." . . . I think that criticism unjustified. Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. . . .

. . . .

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." . . . To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances--both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). . . . That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market--and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. . . . Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market. . . . "To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." . . .

. . . .

MS. JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and MR. JUSTICE THOMAS join as to all but Part [], dissenting.

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

....
 Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme. Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," . . . the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"--thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones.

....
 A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation--including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation--recognize that medical and nonmedical (*i.e.*, recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. . . . To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.

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

In *Lopez* and *Morrison*, we suggested that economic activity usually relates directly to commercial activity. . . . The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. . . . *Lopez* makes clear that possession is not itself commercial activity. . . . And respondents have not come into

possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value. . . .

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

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market--or otherwise to threaten the CSA regime. . . .

. . . .

MR. JUSTICE THOMAS, dissenting.

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

Respondents' local cultivation and consumption of marijuana is not "Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power. . . . Regulating respondents' conduct . . . is not "necessary and proper for carrying into Execution" Congress' restrictions on the interstate drug trade. Art. I, § 8, cl. 18. Thus, neither the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct.

. . . .

. . . . [I]n order to be "necessary," the intrastate ban must be more than "a reasonable means [of] effectuat[ing] the regulation of interstate commerce." . . . It must be "plainly adapted" to regulating interstate marijuana trafficking--in other words, there must be an "obvious, simple, and direct relation" between the intrastate ban and the regulation of interstate commerce. . . .

. . . . [E]ven assuming Congress has "obvious" and "plain" reasons why regulating intrastate cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich.

California's Compassionate Use Act sets respondents' conduct apart from other intrastate producers and users of marijuana. The Act channels marijuana use to "seriously ill Californians," . . . and prohibits "the diversion of marijuana for nonmedical purposes." . . . California strictly controls the cultivation and possession of marijuana for medical purposes. . . .

. . . .

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it is also "proper." The means selected by Congress to regulate interstate commerce cannot

be "prohibited" by, or inconsistent with the "letter and spirit" of, the Constitution. . . .

. . . . If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers--as expanded by the Necessary and Proper Clause --have no meaningful limits. Whether Congress aims at the possession of drugs, guns, or any number of other items, it may continue to "appropria[te] state police powers under the guise of regulating commerce." . . .

Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. . . . Further, the Government's rationale--that it may regulate the production or possession of any commodity for which there is an interstate market--threatens to remove the remaining vestiges of States' traditional police powers.

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

.....
 One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States. Yet this Court knows that "[t]he Constitution created a Federal Government of limited powers." . . . That is why today's decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of "Commerce among the several States." Congress may regulate interstate commerce--not things that affect it, even when summed together, unless truly "necessary and proper" to regulating interstate commerce.

B. Federal Power to Enforce Civil Rights

Note: *Boerne*, Section Five, and Federalism

Section Five of the Fourteenth Amendment gives Congress the power "to enforce by appropriate legislation" the other provisions of that amendment. It is, to some extent, the necessary and proper clause of the Fourteenth Amendment. It empowers Congress to pass "appropriate legislation" to carry out other constitutional provisions. It leaves open the question of what kind of legislation counts as "appropriate." Moreover, unlike the necessary and proper clause of Article I, Section Five of the Fourteenth Amendment is focused on a congressional power "to enforce" the terms of that amendment. How restrictive is the grant of an enforcement power?

At stake in the interpretation of Section Five of the Fourteenth Amendment is the balance between state and federal authority and between congressional and judicial authority. Section One of the Fourteenth Amendment recognizes rights of the individual that are federally protected against state and local governments, or democratic majorities in the states. The more expansive those individual rights are, or might be, the more political issues are nationalized and taken out of the hands of state and local government officials or communities. The more restricted the understanding of those rights are, the more federal channels are closed off to individuals and the more issues are left to states and localities to work out as they will. If Section Five is read broadly, then it empowers Congress to more issues into national politics.

The interpretation of Section Five also raises a question of the proper balance between judicial and congressional authority. Section Five authorizes Congress to pass “appropriate” legislation to “enforce” the rights contained in Section One of the Fourteenth Amendment. Does that give Congress a role in interpreting the substantive rights provisions contained in Section One of the Fourteenth Amendment? Who gets to determine what counts as “appropriate” legislation? Is it a legislative or a judicial judgment as to whether a given piece of legislation is “appropriate,” and has Section Five effectively delegated that judgment to Congress? Should the Court be deferential to whatever Congress does with its Section Five authority, even if when Congress disagrees with the Court about the meaning of the rights guaranteed by the Fourteenth Amendment and even when Congress imposes more restrictions on the states than the Constitution requires?

In the Warren Court era, the Supreme Court did seem to be deferential to Congress and supportive of the idea that Section Five empowered Congress to act creatively when it came to racial civil rights. The Rehnquist Court raised new questions about Section Five. There was no controversy over whether Congress could develop remedies for judicially defined Fourteenth Amendment rights. There has been more controversy over whether Congress can pass legislation obstructing or weakening the enforcement of judicially defined rights. The greatest controversy, however, has focused on whether Congress has an independent interpretive role and can question, challenge or alter the rights that the judiciary finds in the Fourteenth Amendment.

Most notably, *City of Boerne v. Flores* in 1997 picked up on the earlier suggestion of some of the justices that congressional authority to enforce the Constitution under Section Five had to be limited by the judicial authority to interpret the meaning of the constitutional provisions that are to be enforced.¹ The case involved a very different kind of law, the Religious Freedom Restoration Act of 1993 that was passed to overturn the Supreme Court’s interpretation of the constitutional requirements of religious liberty. The power to say what the Constitution means, the Court emphasized in *Boerne*, is ultimately a judicial power. The congressional power under Section Five was to pass statutes “which deters or remedies constitutional violations.” Congress cannot “decree the substance of the Fourteenth Amendment’s restrictions on the States” or “alter[] the meaning” of the Constitution under the guise of “enforcing” it.² At the end of the 1960s, the Court was primarily interested in freeing Congress to pass expansive new civil rights laws. At the turn of the twentieth-first century, the range of issues that might fall within Section Five were more diverse and the Court was more concerned with reemphasizing its role as the primary interpreter of the Constitution and defining some boundaries on the congressional authority to regulate the states. The Rehnquist Court heard a number of cases raising Section Five concerns after *Boerne*. Initially, many of the challenged federal statutory provisions failed to pass constitutional muster under this test, and the Court restricted an age discrimination statute in *Kimel v. Florida Board of Regents* (2000) and Americans with Disabilities Act in *Board of Trustees of the University of Alabama v. Garrett* (2001). By contrast, the Court upheld portions of the Family and Medical Leave Act and the American with Disabilities Act against Section Five challenges in *Nevada Department of Human Resources v. Hibbs* (2003) and *Tennessee v. Lane* (2004)

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

Going into the 1992 national election, the Democrats were looking for proposals that responded to political concerns that they appear tough on crime and address the policy problem of inadequate police attention to violence against women. The result was the Violence Against Women Act (VAWA), which ultimately passed as part of the Crime Control Act of 1994. In one of its provisions (42 U.S.C § 13981), VAWA followed the model of many civil rights statutes in providing a federal civil remedy for victims of “violence motivated by gender.” Under VAWA, such victims could sue those who commit a

¹ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

² *Ibid.*, 518, 519.

crime of violence motivated by gender in federal court for compensatory and punitive damages and other forms of relief. The act was controversial, both in analogizing violence against women to civil rights violations and in its expansion of federal authority over such areas of traditional state concern as rape and domestic violence, but with unified Democratic control it easily passed.

In the fall of 1994, Christy Brzonkala, a freshman at Virginia Tech, was allegedly raped by Antonio Morrison and James Crawford, both members of the Virginia Tech football team. Brzonkala later suffered depression and filed a complaint in 1995 with the university against Morrison and Crawford but did not pursue criminal charges. The university's disciplinary committee found insufficient evidence against Crawford but found Morrison guilty of sexual assault and suspended him for two semesters. When Morrison threatened a legal challenge to the sentence, a second hearing was conducted during the summer which found him guilty only of "using abusive language" but again imposed a two-semester suspension. Given the terms of the conviction, the university senior administration overturned the sentence as excessive in comparison to others convicted of similar offenses. When Brzonkala read in the newspapers that Morrison would be returning to campus in the fall, she withdrew from the university.

In December 1995, Brzonkala filed suit in federal district court against Crawford, Morrison and Virginia Tech. The suits against Crawford and Morrison were based on the civil remedy provision of VAWA. The district court ruled that that Congress lacked the authority under either the commerce clause or Section Five of the Fourteenth Amendment to provide for such a suit. A divided circuit court panel reversed the district court, but the full circuit court meeting en banc affirmed the district court in a divided vote. In a 5-4 decision, the U.S. Supreme Court affirmed the circuit court's ruling. The case was particularly notable in being first after Lopez in which the Court struck down a federal law on commerce clause grounds and in continuing a line of cases that the Rehnquist Court had begun to develop specifying the limits to congressional power under Section Five of the Fourteenth Amendment. Brzonkala offered two alternative justifications (the commerce clause and Section Five) for congressional authority to pass the statutory provision under which she hoped to pursue her lawsuit, but the Court did not accept either. In striking down the provision of VAWA allowing for federal civil lawsuits against those thought responsible for violent crimes, the Court's ruling had no effect on other provisions of the statute, which were subsequently expanded, providing federal funds for programs related to violence against women.

MR. CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

....

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* (Kennedy, J., concurring) . . . 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. . . .

As we discussed at length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed. . . . We need not repeat that detailed review here of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp* . . . , Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted. . . .

Lopez emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.

....

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. . . .

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.¹

. . . .
 . . . [T]he 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. . . . The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. . . . Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace. . . .

. . . .
 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.

The principles governing an analysis of congressional legislation under § 5 are well settled. Section 5 states that Congress may "'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.'" *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). . . .

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. . . . 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

¹ Title 42 U.S.C. § 13981 is not the sole provision of the Violence Against Women Act of 1994 to provide a federal remedy for gender-motivated crime. Section 40221(a) of the Act creates a federal criminal remedy to punish "interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse." S. Rep. No. 103-138, p. 43 (1993). . . . The Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress' Commerce Clause authority, reasoning that the provision properly falls within the first of *Lopez*'s categories as it regulates the use of channels of interstate commerce. . . .

unless it serves “important governmental objectives and . . . the discriminatory means employed” are “substantially related to the achievement of those objectives.” . . . 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* . . . Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. The 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. . . .

Shortly after the Fourteenth Amendment was adopted, we decided . . . the *Civil Rights Cases*. In those consolidated cases, we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the § 5 enforcement power. . . .

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur -- and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

. . . .

Petitioners . . . 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 state laws or proceedings of state officers." *Civil Rights Cases*, 109 U.S. at 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 (1999); *Flores*, 521 U.S. at 526. 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.

In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the § 5 remedies that we have previously upheld. . . .

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan* was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach* the remedy was directed only to those States in which Congress found that there had been discrimination.

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

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.

MR. JUSTICE THOMAS, concurring.

The majority opinion correctly applies our decision in *Lopez*, and I join it in full. I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

MR. JUSTICE SOUTER, with whom MR. JUSTICE STEVENS, MS. JUSTICE GINSBURG, and MR. 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.¹

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* The fact of such a substantial effect is not an issue for the courts in the first instance, 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. . . . Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *United States v. Lopez*, is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. . . .

. . . .

The evidence as to rape was similarly extensive [as to domestic violence], supporting these conclusions:

"[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years." . . .

"According to one study, close to half a million girls now in high school will be raped before they graduate." . . .

. . . .

"Almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." . . .

Based on the data thus partially summarized, Congress found that

"crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . [,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products" H. R. Conf. Rep. No. 103-

¹ Finding the law a valid exercise of Commerce Clause power, I have no occasion to reach the question whether it might also be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment.

711, p. 385 (1994).

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. . . .¹

....

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. . . .

....

If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power. This conception is the subject of the majority's second categorical discount applied today to the facts bearing on the substantial effects test.

....

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. . . . The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

MR. JUSTICE BREYER, with whom MR. JUSTICE STEVENS joins, and with whom MR. JUSTICE SOUTER and MS. JUSTICE GINSBURG join in part, dissenting.

....

. . . [I]n a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs. See, e.g., Child Support Recovery Act of 1992, 18 U.S.C. § 228. Although this possibility does not give the Federal Government the power to regulate everything, it means that any substantive limitation will apply randomly in terms of the interests the majority seeks to protect. How much would be gained, for example, were Congress to reenact the present law in the form of

¹ It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit. I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so. . . . [footnote repositioned from original, eds.]

"An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce"? Complex Commerce Clause rules creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being. That is why modern (pre-*Lopez*) case law rejected them. See *Wickard v. Filburn*; *United States v. Darby*; *Jones & Laughlin Steel Corp.*

....
I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an "area of traditional state regulation." And in response, attorneys general in the overwhelming majority of States (38) supported congressional legislation, telling Congress that "our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." . . .

Moreover, as Justice Souter has pointed out, Congress compiled a "mountain of data" explicitly documenting the interstate commercial effects of gender-motivated crimes of violence. After considering alternatives, it focused the federal law upon documented deficiencies in state legal systems. And it tailored the law to prevent its use in certain areas of traditional state concern, such as divorce, alimony, or child custody. . . .

....
Given my conclusion on the Commerce Clause question, I need not consider Congress' authority under § 5 of the Fourteenth Amendment. Nonetheless, I doubt the Court's reasoning rejecting that source of authority. . . .

....
The majority adds that Congress found that the problem of inadequacy of state remedies "does not exist in all States, or even most States." But Congress had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so. . . . The record nowhere reveals a congressional finding that the problem "does not exist" elsewhere. Why can Congress not take the evidence before it as evidence of a national problem? This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution. And the deference this Court gives to Congress' chosen remedy under § 5, suggests that any such requirement would be inappropriate.

Despite my doubts about the majority's § 5 reasoning, I need not, and do not, answer the § 5 question, which I would leave for more thorough analysis if necessary on another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us. And I would uphold its constitutionality as the "necessary and proper" exercise of legislative power granted to Congress by that Clause.

III. FEDERALISM

One dimension of the Rehnquist Court's federalism offensive was a reexamination of the proper scope and limits of national power. A second and closely related dimension of the federalism offensive was a reexamination of the rights and powers of the states, which created shields against or exemptions from the exercise of national power. Justice Rehnquist was not new to the idea, having championed as associate justice the short-lived 1976 *National League of Cities v. Usery*, which held that there were limits to congressional authority to regulate the "states qua states." With a new set of Reagan and Bush-appointed justices more sympathetic to his constitutional concerns, the Court under the leadership of Chief Justice Rehnquist gave new consideration to the meaning of the Tenth and Eleventh Amendments.

It should be emphasized that, while many Reagan revolutionaries praised federalism, some of their moves to empower states raised no interesting constitutional issues; for example, welfare reform reduced federal involvement, and shifted power to states, but violated no New Deal constitutional principle. Moreover, as we have seen time and time again, advocates who claim a strong principled view of federalism on some issues have been known to adjust their thinking when their preferences on other issues would be better supported by a different federal balance. Pro-slavery advocates declared their commitment to states rights when they were attempting to prevent federal meddling with pro-slavery policies in the Southern states, but they quickly turned into strong advocates of national power when debating the scope of federal power to return fugitive slaves from uncooperative Northern states. In the previous section we noticed that some conservatives articulated a cramped conception of federal power when debating national laws against gun possession near schools but a more generous conception when defending federal power to regulate narcotics. Gay rights advocates became proponents of federalism when some states past laws allowing for same-sex marriage around the same time that the national government was attempting to impose more conservative conceptions of marriage; and of course, concomitantly, conservatives who would otherwise decry federal meddling in areas that have been the traditional province of states (such as family law) were often silent about state prerogatives when it came to the passage of the national Defense of Marriage Act.

As you review these materials consider whether advocates articulate positions that they are willing to defend even when their constitutional views conflict with their preferred policy outcomes.

A. State Regulation of Federal Elections

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995)

In the 1980s, the reelection rates for incumbent legislators reached historically unprecedented levels. Although many scholars argued that this success reflected the extraordinary responsiveness of career-minded, incumbent politicians, many activists and political opponents began to question whether legislators had become too distant and insulated from their constituents. In the early 1990s, voter-enacted initiatives to limit the number of terms of office that legislators could serve were extremely popular and were adopted in nearly every state that allowed voter initiatives (legislatures rarely voted to adopt term limits on their own). It was hoped that term limits would result in more responsive, accountable, and simply more humble legislators. At the same time that voters were limiting their state legislators, they also adopted term limits for their congressional delegations. Such congressional term limits were adopted in nearly half the states. Congressional term limits were included in the 1994 Republican Contract with America, and many individual congressmen of both parties (but especially Republicans) pledged to voluntarily leave Congress after a set number of terms when they first ran for office against entrenched incumbents in the early 1990s. The proposal for a federal constitutional amendment imposing congressional term limits was one of the few measures that did not pass the Republican House of Representatives after the 1994 elections, and many individual members of Congress found reasons to break their pledges to adhere to voluntary term limits. Even so, opposition to terms limits was a risky

strategy, and Democratic House Speaker Thomas Foley, among others, was thought to have lost reelection due to his opposition to term limits.

In 1995, the Supreme Court closed the door on anything short of a constitutional amendment as a means to enforce congressional term limits. In 1992, Arkansas voters approved a state constitutional amendment limiting the number of terms that individuals could serve in various state offices and blocking eligibility for the ballot for individuals who had served a set number of terms in Congress. Democratic Congressman Ray Thornton was among a group of state and federal officeholders who filed suit in state court seeking to have the term limit amendment declared unconstitutional under state and federal constitutional provisions. U.S. Term Limits, an advocacy organization that had been one of the primary sponsors of the Arkansas amendment joined with the state to defend the amendment. The trial court struck down the amendment. In respect to the provision relating to federal legislators, a divided state supreme court affirmed the trial court. The U.S. Supreme Court heard the case on certiorari, and in a 5-4 decision affirmed the decision of the Arkansas supreme court and thus struck down the term limits amendment as inconsistent with the requirements of the U.S. Constitution. Before the end of his term, Thornton left Congress to successfully run for election to the Arkansas state supreme court.

As you read the opinions in this case, you may notice that Justice Kennedy provides the critical swing vote for the majority and leaving Justice Thomas writing in dissent. How does Kennedy's concurring opinion illuminate his different approach to the issues raised in U.S. Term Limits compared to the issues cases on the scope of national power such as Lopez or Alden?

MR. JUSTICE STEVENS delivered the opinion of the Court.

Today's cases present a challenge to an amendment to the Arkansas State Constitution that prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate. The Arkansas Supreme Court held that the amendment violates the Federal Constitution. We agree with that holding. Such a state-imposed restriction is contrary to the "fundamental principle of our representative democracy," embodied in the Constitution, that "the people should choose whom they please to govern them." . . . Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended.

. . . .
 . . . [T]he constitutionality of Amendment 73 depends critically on the resolution of two distinct issues. The first is whether the Constitution forbids States to add to or alter the qualifications specifically enumerated in the Constitution. The second is, if the Constitution does so forbid, whether the fact that Amendment 73 is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance. Our resolution of these issues draws upon our prior resolution of a related but distinct issue: whether Congress has the power to add to or alter the qualifications of its Members.

. . . .
Powell [v. McCormack] . . . establishes two important propositions: first, that the "relevant historical materials" compel the conclusion that, at least with respect to qualifications imposed by Congress, the Framers intended the qualifications listed in the Constitution to be exclusive; and second, that that conclusion is equally compelled by an understanding of the "fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them." . . .

. . . .
 Petitioners argue that the Constitution contains no express prohibition against state-added qualifications, and that Amendment 73 is therefore an appropriate exercise of a State's reserved power to place additional restrictions on the choices that its own voters may make. We disagree for two independent reasons. First, we conclude that the power to add qualifications is not within the "original powers" of the States, and thus is not reserved to the States by the Tenth Amendment. Second, even if

States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby "divested" States of any power to add qualifications.

....
 . . . [T]he power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States. Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only "reserve" that which existed before. As Justice Story recognized, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed." . . .

....
 Two other sections of the Constitution further support our view of the Framers' vision. First, consistent with Story's view, the Constitution provides that the salaries of representatives should "be ascertained by Law, and paid out of the Treasury of the United States," . . . rather than by individual States. The salary provisions reflect the view that representatives owe their allegiance to the people, and not to the States. Second, the provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States, namely that "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof" . . . [an] express delegation[] of power to the States to act with respect to federal elections.

....
 Even if we believed that States possessed as part of their original powers some control over congressional qualifications, the text and structure of the Constitution, the relevant historical materials, and, most importantly, the "basic principles of our democratic system" all demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.

....
 . . . Madison . . . explicitly contrasted the state control over the qualifications of electors with the lack of state control over the qualifications of the elected:

"The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election be an inhabitant of the State he is to represent; and, during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." . . .

We find further evidence of the Framers' intent in Art. 1, § 5, cl. 1, which provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." That Art. I, § 5, vests a federal tribunal with ultimate authority to judge a Member's qualifications is fully consistent with the understanding that those qualifications are fixed in the Federal Constitution, but not with the understanding that they can be altered by the States. If the States had the right to prescribe additional qualifications -- such as property, educational, or professional qualifications -- for their own representatives, state law would provide the standard for judging a Member's eligibility. . . .

....
 Congress' subsequent experience with state-imposed qualifications provides further evidence of the general consensus on the lack of state power in this area. . . . Congress first confronted the issue in

1807 when it faced a challenge to the qualifications of William McCreery, a Representative from Maryland who allegedly did not satisfy a residency requirement imposed by that State. In recommending that McCreery be seated, the Report of the House Committee on Elections noted:

"The committee proceeded to examine the Constitution, with relation to the case submitted to them, and find that *qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications*; and that, by that instrument, Congress is constituted the sole judge of the qualifications prescribed by it, and are obliged to decide agreeably to the Constitutional rules"

. . . .

. . . . {F}or over 150 years prior to *Powell*, commentators viewed the seating of McCreery as an expression of the view of the House that States could not add to the qualifications established in the Constitution. . . .

. . . .

. . . [F]inally, state-imposed restrictions, unlike the congressionally imposed restrictions at issue in *Powell*, violate a[n] . . . idea central to this basic principle: that the right to choose representatives belongs not to the States, but to the people. From the start, the Framers recognized that the "great and radical vice" of the Articles of Confederation was "the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." . . . Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people.

. . . .

Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure. . . .

. . . .

. . . . At the time of the Convention, States widely supported term limits in at least some circumstances. The Articles of Confederation contained a provision for term limits. [S]ome members of the Convention had sought to impose term limits for Members of Congress. . . . Despite this widespread support, no State sought to impose any term limits on its own federal representatives. Thus, a proper assessment of contemporaneous state practice provides further persuasive evidence of a general understanding that the qualifications in the Constitution were unalterable by the States.

. . . .

. . . . Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly. As the plurality opinion of the Arkansas Supreme Court recognized, Amendment 73 is an "effort to dress eligibility to stand for Congress in ballot access clothing," because the "intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service." . . . We must, of course, accept the state court's view of the purpose of its own law: We are thus authoritatively informed that the sole purpose of § 3 of Amendment 73 was to attempt to achieve a result that is forbidden by the Federal Constitution. . . .

. . . .

The merits of term limits, or "rotation," have been the subject of debate since the formation of our Constitution, when the Framers unanimously rejected a proposal to add such limits to the Constitution. . . . It is not our province to resolve this longstanding debate.

We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather -- as have other important changes in the electoral process -- through the amendment procedures set forth in Article V. The Framers decided that the qualifications for service in the Congress of the United States be

fixed in the Constitution and be uniform throughout the Nation. That decision reflects the Framers' understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government. In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a "more perfect Union."

MR. JUSTICE KENNEDY, concurring.

. . . .
Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. . .

A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it.

. . . .
The political identity of the entire people of the Union is reinforced by the proposition, which I take to be beyond dispute, that, though limited as to its objects, the National Government is, and must be, controlled by the people without collateral interference by the States. *McCulloch* affirmed this proposition as well, when the Court rejected the suggestion that States could interfere with federal powers. "This was not intended by the American people. They did not design to make their government dependent on the States." . . . The States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere. . . . That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.

. . . . Nothing in the Constitution or *The Federalist Papers* . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives. Indeed, even though the Constitution uses the qualifications for voters of the most numerous branch of the States' own legislatures to set the qualifications of federal electors . . . when these electors vote, we have recognized that they act in a federal capacity and exercise a federal right. Addressing this principle in *Ex parte Yarbrough* the Court stated as follows: "The right to vote for a member of Congress" is an "office . . . created by that Constitution, and by that alone. . . . It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State." . . .

. . . .
It is maintained by our dissenting colleagues that the State of Arkansas seeks nothing more than to grant its people surer control over the National Government, a control, it is said, that will be enhanced by the law at issue here. The arguments for term limitations (or ballot restrictions having the same effect) are not lacking in force; but the issue, as all of us must acknowledge, is not the efficacy of those measures but whether they have a legitimate source, given their origin in the enactments of a single State. There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere. Because the Arkansas enactment intrudes upon this federal domain, it exceeds the boundaries of the Constitution.

MR. JUSTICE THOMAS, with whom THE CHIEF JUSTICE, MS. JUSTICE O'CONNOR, and MR. JUSTICE SCALIA join, dissenting.

It is ironic that the Court bases today's decision on the right of the people to "choose whom they please to govern them." . . . Under our Constitution, there is only one State whose people have the right to "choose whom they please" to represent Arkansas in Congress. The Court holds, however, that neither the elected legislature of that State nor the people themselves (acting by ballot initiative) may prescribe any qualifications for those representatives. The majority therefore defends the right of the people of Arkansas to "choose whom they please to govern them" by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State.

I dissent. Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.

Because the majority fundamentally misunderstands the notion of "reserved" powers, I start with some first principles. Contrary to the majority's suggestion, the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in Congress, or to authorize their elected state legislators to do so.

Our system of government rests on one overriding principle: All power stems from the consent of the people. To phrase the principle in this way, however, is to be imprecise about something important to the notion of "reserved" powers. The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.

The ratification procedure erected by Article VII makes this point clear. The Constitution took effect once it had been ratified by the people gathered in convention in nine different States. But the Constitution went into effect only "between the States so ratifying the same"; it did not bind the people of North Carolina until they had accepted it. . . .

. . . .

In each State, the remainder of the people's powers -- "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States," Amdt. 10 -- are either delegated to the state government or retained by the people. The Federal Constitution does not specify which of these two possibilities obtains; it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government. As far as the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them. The Federal Government and the States thus face different default rules: Where the Constitution is silent about the exercise of a particular power -- that is, where the Constitution does not speak either expressly or by necessary implication -- the Federal Government lacks that power and the States enjoy it.

. . . . All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.

. . . .

The majority is therefore quite wrong to conclude that the people of the States cannot authorize their state governments to exercise any powers that were unknown to the States when the Federal Constitution was drafted. Indeed, the majority's position frustrates the apparent purpose of the Amendment's final phrase. The Amendment does not preempt any limitations on state power found in the state constitutions, as it might have done if it simply had said that the powers not delegated to the Federal Government are reserved to the States. But the Amendment also does not prevent the people of the States from amending their state constitutions to remove limitations that were in effect when the Federal Constitution and the Bill of Rights were ratified.

. . . .

[W]hile the majority is correct that the Framers expected the selection process to create a "direct link" between Members of the House of Representatives and the people, . . . the link was between the

Representatives from each State and the people of that State; the people of Georgia have no say over whom the people of Massachusetts select to represent them in Congress. This arrangement must baffle the majority, whose understanding of Congress would surely fit more comfortably within a system of nationwide elections. But the fact remains that when it comes to the selection of Members of Congress, the people of each State have retained their independent political identity. As a result, there is absolutely nothing strange about the notion that the people of the States or their state legislatures possess "reserved" powers in this area.

. . . .
 . . . [T]he Constitution's treatment of Presidential elections actively contradicts the majority's position. While the individual States have no "reserved" power to set qualifications for the office of President, we have long understood that they do have the power (as far as the Federal Constitution is concerned) to set qualifications for their Presidential electors -- the delegates that each State selects to represent it in the electoral college that actually chooses the Nation's chief executive. Even respondents do not dispute that the States may establish qualifications for their delegates to the electoral college, as long as those qualifications pass muster under other constitutional provisions (primarily the First and Fourteenth Amendments). As the majority cannot argue that the Constitution affirmatively grants this power, the power must be one that is "reserved" to the States. It necessarily follows that the majority's understanding of the Tenth Amendment is incorrect, for the position of Presidential elector surely "spring[s] out of the existence of the national government." . . .

The provisions that are generally known as the Qualifications Clauses read as follows:

"No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Art. I, § 2, cl. 2.

"No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." Art. I, § 3, cl. 3.

. . . [T]hese different formulations -- whether negative or affirmative -- merely establish *minimum* qualifications. They are quite different from an *exclusive* formulation, such as the following:

"Every Person who shall have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall, when elected, be an Inhabitant of that State in which he shall be chosen, shall be eligible to be a Representative."

At least on their face, then, the Qualifications Clauses do nothing to prohibit the people of a State from establishing additional eligibility requirements for their own representatives.

. . . .
 If the people of a State decide that they would like their representatives to possess additional qualifications, however, they have done nothing to frustrate the policy behind the Qualifications Clauses. Anyone who possesses all of the constitutional qualifications, plus some qualifications required by state law, still has all of the federal qualifications. Accordingly, the fact that the Constitution specifies certain qualifications that the Framers deemed necessary to protect the competence of the National Legislature does not imply that it strips the people of the individual States of the power to protect their own interests by adding other requirements for their own representatives.

The people of other States could legitimately complain if the people of Arkansas decide, in a particular election, to send a 6-year-old to Congress. But the Constitution gives the people of other States no basis to complain if the people of Arkansas elect a freshman representative in preference to a long-term incumbent. That being the case, it is hard to see why the rights of the people of other States have

been violated when the people of Arkansas decide to enact a more general disqualification of long-term incumbents. . . .

. . .

I agree with the majority that Congress has no power to prescribe qualifications for its own Members. This fact, however, does not show that the Qualifications Clauses contain a hidden exclusivity provision. The reason for Congress' incapacity is not that the Qualifications Clauses deprive Congress of the authority to set qualifications, but rather that nothing in the Constitution grants Congress this power. In the absence of such a grant, Congress may not act. But deciding whether the Constitution denies the qualification-setting power to the States and the people of the States requires a fundamentally different legal analysis.

. . . .

The fact that the Framers did not grant a qualification-setting power to Congress does not imply that they wanted to bar its exercise at the state level. One reason why the Framers decided not to let Congress prescribe the qualifications of its own Members was that incumbents could have used this power to perpetuate themselves or their ilk in office. As Madison pointed out at the Philadelphia Convention, Members of Congress would have an obvious conflict of interest if they could determine who may run against them. . . . But neither the people of the States nor the state legislatures would labor under the same conflict of interest when prescribing qualifications for Members of Congress, and so the Framers would have had to use a different calculus in determining whether to deprive them of this power.

. . . .

. . . . The recorded ratification debates also contain no affirmative statement that the States *cannot* supplement the constitutional qualifications. While ratification was being debated, the existing rule in America was that the States could prescribe eligibility requirements for their delegates to Congress If the Federal Constitution had been understood to deprive the States of this significant power, one might well have expected its opponents to seize on this point in arguing against ratification.

. . . . In fact, the constitutional text supports the contrary inference. As the majority observes, . . . at the time of the framing some States also imposed religious qualifications on state legislators. The Framers evidently did not want States to impose such qualifications on federal legislators, for the Constitution specifically provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." . . . If the *expressio unius* maxim cuts in any direction in this case, then, it undermines the majority's position: The Framers' prohibition on state-imposed religious disqualifications for Members of Congress suggests that other types of state-imposed disqualifications are permissible. . . .

. . . .

. . . Today's decision also means that no State may disqualify congressional candidates whom a court has found to be mentally incompetent, who are currently in prison, . . . or who have past vote-fraud convictions,

. . . .

The voters of Arkansas evidently believe that incumbents would not enjoy such overwhelming success if electoral contests were truly fair -- that is, if the government did not put its thumb on either side of the scale. The majority offers no reason to question the accuracy of this belief. Given this context, petitioners portray § 3 of Amendment 73 [forcing multi-term incumbents to run as write-in candidates] as an effort at the state level to offset the electoral advantages that congressional incumbents have conferred upon themselves at the federal level.

. . . .

B. Non-Commandeering

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

In 1991, the Supreme Court issued a 7-2 ruling authored by Justice O'Connor in Gregory v. Ashcroft holding that the application of the federal Age Discrimination in Employment Act to state judges would raise constitutional problems under the Tenth Amendment by interfering with how states organized their basic political offices. In 1992, the Court decided New York v. United States in a 6-3 decision authored by Justice O'Connor, holding that Congress could not "commandeer" the states' legislative process by requiring them to adopt a particular regulatory scheme for low-level radioactive waste. Justice Souter, appointed to the Court by the first President Bush in 1990, had joined those early decisions, but subsequently became a dissenter from the conservative federalism decisions of the Rehnquist Court.

The anti-commandeering principles seemed potentially idiosyncratic in New York v. United States but they were tested again in Printz. After James Brady, Ronald Reagan's press secretary, was permanently disabled in the assassination attempt on the president in 1981, his wife, Sarah Brady, helped found Handgun Control, Inc. to lobby for restrictions on guns, including waiting periods on gun purchases and mandatory background checks on those seeking to purchase guns. The Brady Bill languished until the early 1990s, when Democrats made a major push for the bill before the 1992 elections against a lobbying campaign by the National Rifle Association, a veto threat from President Bush, and a filibuster in the Senate that defeated the bill. After Bill Clinton won the presidency in 1992, the Democrats pressed the issue again. In order to avoid another filibuster, a bipartisan compromise was passed. The NRA and its supporters had proposed a system of "instant background checks" to keep guns "out of the wrong hands" with no mandatory waiting periods, but the computer database for such a system did not yet exist. The compromise reduced the mandatory waiting period and required local law enforcement officers to perform background checks as a temporary measure until the national database for the instant background check came online. Thus, the federal mandate to local law enforcement officials originated from conservative legislators seeking to minimize the federal intrusion into gun buying. Sheriff Jay Printz of Ravalli County, Montana, objected to Congress adding to the duties of his officers and filed suit in federal district court challenging the constitutionality of the background check provision. The trial court agreed, but a divided circuit court reversed. In a 5-4 decision, the Supreme Court reversed the circuit court, striking down the provision of the Brady Act as inconsistent with the anticcommandeering principles of the federal system. The local background check provisions of the Brady Act had been set to be replaced by the instant background check system in 1998, and so Congress did not respond to the Court's act in Printz. Many local law enforcement officials continued to voluntarily perform background checks on gun purchasers until the federal computer database came online. As you read the case, consider whether such a principle seems to be a necessary implication of two-tiered system of government. What type(s) of arguments does Scalia use in his majority opinion?

MR. JUSTICE SCALIA delivered the opinion of the Court.

....

... [T]he 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 [chief law enforcement officers of the local community], 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.

The 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. . . .

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" The Government's contention demands our careful consideration, since early congressional enactments "provide 'contemporaneous and weighty evidence' of the Constitution's meaning." . . . 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.

The Government observes that statutes enacted by the first Congresses required state courts to record applications for citizenship, . . . to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, . . . and to register aliens seeking naturalization and issue certificates of registry. . . . Other statutes of that era apparently or at least arguably required state courts to perform functions unrelated to naturalization, such as resolving controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel, . . . hearing the claims of slave owners who had apprehended fugitive slaves and issuing certificates authorizing the slave's forced removal to the State from which he had fled, . . . taking proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War, . . . and ordering the deportation of alien enemies in times of war. . .

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. . . .

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 numerosness 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. . . .

Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption. On September 23, 1789--the day before its proposal of the Bill of Rights. . . --the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. . . .

. . . . The Government also invokes the Federalist's . . . observations that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws" . . . 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 in the correspondent authority of the Union" . . . 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. . . .

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, . . . 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.)

. . . .
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 postulates," . . . a principle that controls the present cases.

It is incontestable that the Constitution established a system of "dual sovereignty." Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty." . . . 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, which implication was rendered express by the Tenth Amendment's assertion that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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. . . . As Madison expressed it: "The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."

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," . . . personally and through officers whom he appoints 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 insure both vigor and accountability--is well known. . . . 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.

The dissent of course resorts to the last, best hope of those who defend *ultra vires* congressional action, the Necessary and Proper Clause. . . . What destroys the dissent's Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a "Law . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of *The Federalist*, "merely [an] act of usurpation" which "deserves to be treated as such."

. . . .
. . . [O]pinions of ours have made clear that the [Federal Government] may not compel the States to implement, by legislation or executive action, federal regulatory programs. . . .

. . . .
The Government . . . maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of *New York* because it does not diminish the accountability of state or federal officials. This argument fails even on its own terms. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of

implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. . . .

. . . .

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. . . .

MS. JUSTICE O'CONNOR, concurring.

. . . .

MR. JUSTICE THOMAS, concurring.

The Court today properly holds that the Brady Act violates the Tenth Amendment in that it compels state law enforcement officers to "administer or enforce a federal regulatory program." . . . Although I join the Court's opinion in full, I write separately to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. . . .

In my "revisionist" view, . . . the Federal Government's authority under the Commerce Clause, which merely allocates to Congress the power "to regulate Commerce . . . among the several states," does not extend to the regulation of wholly *intrastate*, point-of-sale transactions. . . . Absent the underlying authority to regulate the intrastate transfer of firearms, Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations. . . .

MR. JUSTICE STEVENS, with whom MR. JUSTICE SOUTER, MS. JUSTICE GINSBURG, and MR. 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.

. . . .

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," . . . 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?

. . . .

The text of the Constitution provides a sufficient basis for a correct disposition of this case.

Article I, § 8, grants the Congress the power to regulate commerce among the States. . . . [T]here can be no question that that provision adequately supports the regulation of commerce in handguns effected by the Brady Act. Moreover, the additional grant of authority in that section of the Constitution "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. In short, the affirmative delegation of power in Article I provides ample authority for the congressional enactment.

Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. Using language that plainly refers only to powers that are "*not*" delegated to Congress, it provides:

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

The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress.

. . . .

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.

. . . .

. . . [I]ndeed, the historical materials strongly suggest that the Founders intended to enhance the capacity of the federal government by empowering it--as a part of the new authority to make demands directly on individual citizens--to act through local officials. Hamilton made clear that the new Constitution, "by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws." Hamilton's meaning was unambiguous; the federal government was to have the power to demand that local officials implement national policy programs. . . .

More specifically, during the debates concerning the ratification of the Constitution, it was assumed that state agents would act as tax collectors for the federal government. Opponents of the Constitution had repeatedly expressed fears that the new federal government's ability to impose taxes directly on the citizenry would result in an overbearing presence of federal tax collectors in the States. Federalists rejoined that this problem would not arise because, as Hamilton explained, "the United States . . . will make use of the State officers and State regulations for collecting" certain taxes. . . . Similarly, Madison made clear that the new central government's power to raise taxes directly from the citizenry would "not be resorted to, except for supplemental purposes of revenue . . . and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers . . . appointed by the several States." . . .

The Court's response to this powerful historical evidence is weak. The majority suggests that "none of these statements necessarily implies . . . Congress could impose these responsibilities without the consent of the States." . . . No fair reading of these materials can justify such an interpretation. As Hamilton explained, the power of the government to act on "individual citizens"--including "employing the ordinary magistracy" of the States--was an answer to the problems faced by a central government that could act only directly "upon the States in their political or collective capacities." . . .

This point is made especially clear in Hamilton's statement that "the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and *will be rendered auxiliary to the enforcement of its laws.*" . . . It is hard to imagine a more unequivocal statement that state judicial and

executive branch officials may be required to implement federal law where the National Government acts within the scope of its affirmative powers.

....

Bereft of support in the history of the founding, the Court rests its conclusion on the claim that there is little evidence the National Government actually exercised such a power in the early years of the Republic. . . . This reasoning is misguided in principle and in fact. While we have indicated that the express consideration and resolution of difficult constitutional issues by the First Congress in particular "provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of [its] Members . . . 'had taken part in framing that instrument,'" . . . we have never suggested that the failure of the early Congresses to address the scope of federal power in a particular area or to exercise a particular authority was an argument against its existence. . . .

More importantly, the fact that Congress did elect to rely on state judges and the clerks of state courts to perform a variety of executive functions . . . is surely evidence of a contemporary understanding that their status as state officials did not immunize them from federal service. . . .

....

The Court's evaluation of the historical evidence, furthermore, fails to acknowledge the important difference between policy decisions that may have been influenced by respect for state sovereignty concerns, and decisions that are compelled by the Constitution. Thus, for example, the decision by Congress to give President Wilson the authority to utilize the services of state officers in implementing the World War I draft . . . surely indicates that the national legislature saw no constitutional impediment to the enlistment of state assistance during a federal emergency. The fact that the President was able to implement the program by respectfully "requesting" state action, rather than bluntly commanding it, is evidence that he was an effective statesman, but surely does not indicate that he doubted either his or Congress' power to use mandatory language if necessary. If there were merit to the Court's appraisal of this incident, one would assume that there would have been some contemporary comment on the supposed constitutional concern that hypothetically might have motivated the President's choice of language.

....

. . . . Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom.

Indeed, the presumption of validity that supports all congressional enactments has added force with respect to policy judgments concerning the impact of a federal statute upon the respective States. The majority points to nothing suggesting that the political safeguards of federalism . . . need be supplemented by a rule, grounded in neither constitutional history nor text, flatly prohibiting the National Government from enlisting state and local officials in the implementation of federal law.

....

Perversely, the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government's ability to rely on the magistracy of the states. . . .

....

Far more important than the concerns that the Court musters in support of its new rule is the fact that the Framers entrusted Congress with the task of creating a working structure of intergovernmental relationships around the framework that the Constitution authorized. Neither explicitly nor implicitly did

the Framers issue any command that forbids Congress from imposing federal duties on private citizens or on local officials. As a general matter, Congress has followed the sound policy of authorizing federal agencies and federal agents to administer federal programs. That general practice, however, does not negate the existence of power to rely on state officials in occasional situations in which such reliance is in the national interest. Rather, the occasional exceptions confirm the wisdom of Justice Holmes' reminder that "the machinery of government would not work if it were not allowed a little play in its joints." . . .

. . . .

MR. JUSTICE SOUTER, dissenting.

. . . .

In deciding these cases, which I have found closer than I had anticipated, it is *The Federalist* that finally determines my position. I believe that the most straightforward reading of No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.

Hamilton in No. 27 first notes that because the new Constitution would authorize the National Government to bind individuals directly through national law, it could "employ the ordinary magistracy of each [State] in the execution of its laws." . . . Were he to stop here, he would not necessarily be speaking of anything beyond the possibility of cooperative arrangements by agreement. But he then addresses the combined effect of the proposed Supremacy Clause . . . and state officers' oath requirement, . . . and he states that "the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the national government, *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws." . . . The natural reading of this language is not merely that the officers of the various branches of state governments may be employed in the performance of national functions; Hamilton says that the state governmental machinery "will be incorporated" into the Nation's operation, and because the "auxiliary" status of the state officials will occur because they are "bound by the sanctity of an oath" . . . I take him to mean that their auxiliary functions will be the products of their obligations thus undertaken to support federal law, not of their own, or the States', unfettered choices.

. . . .

In the light of all these passages, I cannot persuade myself that the statements from No. 27 speak of anything less than the authority of the National Government, when exercising an otherwise legitimate power (the commerce power, say), to require state "auxiliaries" to take appropriate action.

. . . .

MR. JUSTICE BREYER, with whom MR. 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. . . .

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. . . . 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. . . . 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? . . .

D. State Sovereign Immunity

Alden v. Maine, 527 U.S. 706 (1999)

Alden v. Maine was the second in a series of state sovereign immunity cases decided by the late Rehnquist Court and part of a broader group of cases in which a narrow five-justice majority emphasized federalism principles in order to invalidate a provision of a congressional statute. The state sovereign immunity cases, or the “Eleventh Amendment cases,” are concerned with the conditions under which a state government or government agency can be sued in court by private parties for monetary damages. The Eleventh Amendment itself had made clear that citizens of other states could not make use of “diversity jurisdiction” to sue a state in federal court, and in the 1890 case of Hans v. Louisiana the Supreme Court had ruled that state sovereign immunity formed the implicit background principle of the Eleventh Amendment and prevented citizens from suing their own states in federal court to recover debts. In the late twentieth century, responding in part to a suggestion of the Warren Court, Congress increasingly allowed private lawsuits against state governments as a means of enforcing regulatory policies against the states. The possibility of recovering monetary damages and penalties created incentives for lawyers to take such cases and push them through the courts. Although not posing the same level of threat to the state treasuries as the outstanding revolutionary war debts that led to the passage of the Eleventh Amendment or the bankrupt railroad debts that fed that Hans litigation, the “unfunded mandates” and “coercive federalism” of the late twentieth century were a frequent source of complaint and financial concern to state governments. In 1996, the Supreme Court unexpectedly intervened in Seminole Tribe of Florida v. Florida, 517 U.S. 44, holding that Congress could not through statute using its Article I powers waive state sovereign immunity in federal courts. Alden v. Maine extended Seminole’s logic to state courts. In subsequent cases, the Court made clear that Congress could abrogate state sovereign immunity when acting under §5 of the Fourteenth Amendment (which was passed after the Eleventh Amendment and modified its principle of state sovereignty), but the Court has separately read narrowly the reach of congressional authority under §5 (see Note: Boerne, Section Five, and Federalism above). The Court later narrowed the implications of Seminole Tribe and Alden in Central Virginia Community College v. Katz (2006), which allowed Congress to abrogate state sovereign immunity when exercising power under the Bankruptcy Clause of Article I.

In 1992, a group of nearly a hundred state probation officers filed suit in federal district court against their employer, the state of Maine, seeking compensation and monetary damages for violations of the overtime provisions of the federal Fair Labor Standards Act (FLSA). Maine had classified probation officers as professional employees and therefore exempt from federal overtime requirements. The officers had been unsuccessful in persuading the state that court decisions elsewhere had suggested that such a classification was inappropriate. The officers won some key preliminary decisions in district court, leaving the amount of back pay owed by the state as the primary question still to be resolved when Seminole Tribe was handed down by the U.S. Supreme Court. In light of Seminole Tribe, the state promptly moved to have the case dismissed from the federal courts on the grounds of state sovereign immunity, and the district court reluctantly granted the motion. Most of the probation officers then filed their suit in state court, but the state court dismissed the suit on the grounds of sovereign immunity. The Maine Supreme Judicial Court affirmed the trial court’s ruling, holding that a provision of the FLSA authorizing such private suits against the state governments in state courts without state consent was unconstitutional. The U.S. Supreme Court accepted a cert petition in the case, and in a 5-4 decision

affirmed the Maine court's ruling. The justices' conflicting views echo debates that were first rehearsed during the Court's first decade.

After their loss in the courts, the state employees union in Maine took up the probation officers cause in the legislature. The legislature soon passed a bill appropriating funds to provide back pay and legal expenses for the officers (less than \$300,000, a somewhat lower amount than the union had sought) and later passed a bipartisan statute waiving state sovereign immunity for a limited range of similar suits in the future. In general, the state sovereign immunity cases narrowed the ability of individuals to win monetary awards from state governments based on violations of federal statutes that did not relate to civil rights. Congress still had other options to enforce such statutory requirements against the states, including persuading states to waive their sovereign immunity, allowing prospective relief in private lawsuits, and authorizing direct enforcement by federal agencies.

MR. JUSTICE KENNEDY delivered the opinion of the Court.

....
We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. We decide as well that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA. On these premises we affirm the judgment sustaining dismissal of the suit.

The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." *Seminole Tribe of Fla. v. Florida* Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. See *Printz v. United States* The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design, see, e.g., Art. I, § 8; Art. II, §§ 2-3; Art. III, § 2. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. . . .

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people -- who were, in Hamilton's words, 'the only proper objects of government.'" *Printz*

The States thus retain "a residuary and inviolable sovereignty." The Federalist No. 39. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.

The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts. See *Chisholm v. Georgia*, 2 Dall. 419, 437-446 (1793) (Iredell, J., dissenting) (surveying English practice)

Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified. See *Chisholm* (Iredell, J., dissenting) ("I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed"); *Hans v. Louisiana*, 134 U.S. 1, 16 (1890) ("The suability of a State, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted").

The ratification debates, furthermore, underscored the importance of the States' sovereign immunity to the American people. Grave concerns were raised by the provisions of Article III which extended the federal judicial power to controversies between States and citizens of other States or foreign nations. . . .

The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity. . . .

Despite the persuasive assurances of the Constitution's leading advocates and the expressed understanding of the only state conventions to address the issue in explicit terms, this Court held, just five years after the Constitution was adopted, that Article III authorized a private citizen of another State to sue the State of Georgia without its consent. *Chisholm v. Georgia*

. . . .

The Court's decision "fell upon the country with a profound shock." . . .

The States, in particular, responded with outrage to the decision. The Massachusetts Legislature, for example, denounced the decision as "repugnant to the first principles of a federal government," and called upon the State's Senators and Representatives to take all necessary steps to "remove any clause or article of the Constitution, which can be construed to imply or justify a decision, that, a State is compellable to answer in any suit by an individual or individuals in any Court of the United States." . . .

. . . .

. . . . By its terms, then, the Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court . . .

. . . . Given the outraged reaction to *Chisholm*, as well as Congress' repeated refusal to otherwise qualify the text of the Amendment, it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment:

"Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face." *Hans*, at 14-15.

. . . .

In short, the scanty and equivocal evidence offered by the dissent establishes no more than what is evident from the decision in *Chisholm* -- that some members of the founding generation disagreed with Hamilton, Madison, Marshall, Iredell, and the only state conventions formally to address the matter. The

events leading to the adoption of the Eleventh Amendment, however, make clear that the individuals who believed the Constitution stripped the States of their immunity from suit were at most a small minority.

Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit, they also underscore the importance of sovereign immunity to the founding generation. Simply put, "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239, n. 2 (1985). . . .

The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution," *Seminole Tribe*, 517 U.S. at 69, and that the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution. . . . As a consequence, we have looked to "history and experience, and the established order of things," rather than "adhering to the mere letter" of the Eleventh Amendment, in determining the scope of the States' constitutional immunity from suit.

. . . .

In this case we must determine whether Congress has the power, under Article I, to subject nonconsenting States to private suits in their own courts. As the foregoing discussion makes clear, the fact that the Eleventh Amendment by its terms limits only "the Judicial power of the United States" does not resolve the question. To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*. . . .

While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States . . . this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, "there is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" . . . This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution. In exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design. . . .

. . . .

Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers. Although some of our decisions had endorsed this contention, see *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184, 190-194 (1964); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-23 (1989) (plurality opinion), they have since been overruled, see *Seminole Tribe*; *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.* As we have recognized in an analogous context:

"When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'Law . . . proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'" *Printz* (quoting The Federalist No. 33, at 204 (A. Hamilton)).

. . . .

Our historical analysis is supported by early congressional practice, which provides "contemporaneous and weighty evidence of the Constitution's meaning." *Printz* Although early Congresses enacted various statutes authorizing federal suits in state court . . . we have discovered no instance in which they purported to authorize suits against nonconsenting States in these fora. The

"numerousness of these statutes [authorizing suit in state court], contrasted with the utter lack of statutes" subjecting States to suit, "suggests an assumed *absence* of such power." *Printz*. It thus appears early Congresses did not believe they had the power to authorize private suits against the States in their own courts.

Not only were statutes purporting to authorize private suits against nonconsenting States in state courts not enacted by early Congresses, statutes purporting to authorize such suits in any forum are all but absent from our historical experience. . . . The provisions of the FLSA at issue here, which were enacted in the aftermath of *Parden*, are among the first statutory enactments purporting in express terms to subject nonconsenting States to private suits. . . .

. . . .

A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. . . .

. . . .

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. . . .

Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity.

. . . .

This case at one level concerns the formal structure of federalism, but in a Constitution as resilient as ours form mirrors substance. Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

In apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law. We seek to discover, however, only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system. We appeal to no higher authority than the Charter which they wrote and adopted. Theirs was the unique insight that freedom is enhanced by the creation of two governments, not one. We need not attach a label to our dissenting colleagues' insistence that the constitutional structure adopted by the founders must yield to the politics of the moment. Although the Constitution begins with the principle that sovereignty rests with the people, it does not follow that the National Government becomes the ultimate, preferred mechanism for expressing the people's will. The States exist as a refutation of that concept. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control. The Framers of the Constitution did not share our dissenting colleagues' belief that the Congress may circumvent the federal design by regulating the States directly when it pleases to do so, including by a proxy in which individual citizens are authorized to levy upon the state treasuries absent the States' consent to jurisdiction.

. . . . The judgment of the Supreme Judicial Court of Maine is
Affirmed.

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

In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), a majority of this Court invoked the Eleventh Amendment to declare that the federal judicial power under Article III of the Constitution does not reach a private action against a State, even on a federal question. In the Court's conception, however, the Eleventh Amendment was understood as having been enhanced by a "background principle" of state sovereign immunity (understood as immunity to suit), that operated beyond its limited codification in the Amendment, dealing solely with federal citizen-state diversity jurisdiction. To the *Seminole Tribe* dissenters, of whom I was one, the Court's enhancement of the Amendment was at odds with constitutional history and at war with the conception of divided sovereignty that is the essence of American federalism.

. . . .
The Court rests its decision principally on the claim that immunity from suit was "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution," an aspect which the Court understands to have survived the ratification of the Constitution in 1788 and to have been "confirmed" and given constitutional status, by the adoption of the Tenth Amendment in 1791. If the Court truly means by "sovereign immunity" what that term meant at common law, its argument would be insupportable. While sovereign immunity entered many new state legal systems as a part of the common law selectively received from England, it was not understood to be indefeasible or to have been given any such status by the new National Constitution, which did not mention it. See *Seminole Tribe* (SOUTER, J., dissenting). Had the question been posed, state sovereign immunity could not have been thought to shield a State from suit under federal law on a subject committed to national jurisdiction by Article I of the Constitution. Congress exercising its conceded Article I power may unquestionably abrogate such immunity. . . .

. . . . The conception [of sovereign immunity in the majority opinion] is . . . not one of common law so much as of natural law, a universally applicable proposition discoverable by reason. This, I take it, is the sense in which the Court so emphatically relies on Alexander Hamilton's reference in *The Federalist* No. 81 to the States' sovereign immunity from suit as an "inherent" right, a characterization that does not require, but is at least open to, a natural law reading.

. . . . The Court's principal rationale for today's result, then, turns on history: was the natural law conception of sovereign immunity as inherent in any notion of an independent State widely held in the United States in the period preceding the ratification of 1788 (or the adoption of the Tenth Amendment in 1791)?

The answer is certainly no. There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. . . .

. . . .
At the Constitutional Convention, the notion of sovereign immunity, whether as natural law or as common law, was not an immediate subject of debate, and the sovereignty of a State in its own courts seems not to have been mentioned. This comes as no surprise, for although the Constitution required state courts to apply federal law, the Framers did not consider the possibility that federal law might bind States, say, in their relations with their employees. In the subsequent ratification debates, however, the issue of jurisdiction over a State did emerge in the question whether States might be sued on their debts in federal court, and on this point, too, a variety of views emerged and the diversity of sovereign immunity conceptions displayed itself.

The only arguable support for the Court's absolutist view that I have found among the leading participants in the debate surrounding ratification was the one already mentioned, that of Alexander

Hamilton in The Federalist No. 81, where he described the sovereign immunity of the States in language suggesting principles associated with natural law

. . . .
 There was no unanimity among the Virginians either on state- or federal-court immunity, however, for Edmund Randolph anticipated the position he would later espouse as plaintiff's counsel in *Chisholm v. Georgia*, 2 Dall. 419 (1793). He contented himself with agnosticism on the significance of what Hamilton had called "the general practice of mankind," and argued that notwithstanding any natural law view of the nonsuability of States, the Constitution permitted suit against a State in federal court: "I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party*." 3 Elliot's Debates 573. Randolph clearly believed that the Constitution both could and in fact by its language did trump any inherent immunity enjoyed by the States; his view on sovereign immunity in state court seems to have been that the issue was uncertain ("whatever the law of nations may say").

At the farthest extreme from Hamilton, James Wilson made several comments in the Pennsylvania Convention that suggested his hostility to any idea of state sovereign immunity. First, he responded to the argument that "the sovereignty of the states is destroyed" if they are sued by the United States, "because a suitor in a court must acknowledge the jurisdiction of that court, and it is not the custom of sovereigns to suffer their names to be made use of in this manner." 2 id. at 490. For Wilson, "the answer [was] plain and easy: the government of each state ought to be subordinate to the government of the United States." . . .

. . . .
 At the close of the ratification debates, the issue of the sovereign immunity of the States under Article III had not been definitively resolved, and in some instances the indeterminacy led the ratification conventions to respond in ways that point to the range of thinking about the doctrine. Several state ratifying conventions proposed amendments and issued declarations that would have exempted States from subjection to suit in federal court. . . .

. . . .
 At all events, the state ratifying conventions' felt need for clarification on the question of state suability demonstrates that uncertainty surrounded the matter even at the moment of ratification. This uncertainty set the stage for the divergent views expressed in *Chisholm*.

If the natural law conception of sovereign immunity as an inherent characteristic of sovereignty enjoyed by the States had been broadly accepted at the time of the founding, one would expect to find it reflected somewhere in the five opinions delivered by the Court in *Chisholm v. Georgia*, 2 Dall. 419 (1793). Yet that view did not appear in any of them. . . .

. . . .
 The Court, citing *Hans v. Louisiana*, 134 U.S. 1 (1890), says that the Eleventh Amendment "overruled" *Chisholm*, but the animadversion is beside the point. The significance of *Chisholm* is its indication that in 1788 and 1791 it was not generally assumed (indeed, hardly assumed at all) that a State's sovereign immunity from suit in its own courts was an inherent, and not merely a common-law, advantage. On the contrary, the testimony of five eminent legal minds of the day confirmed that virtually everyone who understood immunity to be legitimate saw it as a common-law prerogative (from which it follows that it was subject to abrogation by Congress as to a matter within Congress's Article I authority).

. . . .
 The Court's rationale for today's holding based on a conception of sovereign immunity as somehow fundamental to sovereignty or inherent in statehood fails for the lack of any substantial support for such a conception in the thinking of the founding era. The Court cannot be counted out yet, however, for it has a second line of argument looking not to a clause-based reception of the natural law conception or even to its recognition as a "background principle" . . . but to a structural basis in the Constitution's creation of a federal system. . . .

The National Constitution formally and finally repudiated the received political wisdom that a system of multiple sovereignties constituted the "great solecism of an *imperium in imperio*" Once

"the atom of sovereignty" had been split, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (KENNEDY, J., concurring), the general scheme of delegated sovereignty as between the two component governments of the federal system was clear, and was succinctly stated by Chief Justice Marshall: "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch v. Maryland*

Hence the flaw in the Court's appeal to federalism. The State of Maine is not sovereign with respect to the national objective of the FLSA. It is not the authority that promulgated the FLSA, on which the right of action in this case depends. That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees has already been decided, see *Garcia v. San Antonio Metropolitan Transit Authority*, and is not contested here.

....

It is symptomatic of the weakness of the structural notion proffered by the Court that it seeks to buttress the argument by relying on "the dignity and respect afforded a State, which the immunity is designed to protect," and by invoking the many demands on a State's fisc. Apparently beguiled by Gilded Era language describing private suits against States as "neither becoming nor convenient," the Court calls "immunity from private suits central to sovereign dignity," and assumes that this "dignity" is a quality easily translated from the person of the King to the participatory abstraction of a republican State. . . . It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own. Whatever justification there may be for an American government's immunity from private suit, it is not dignity. See *United States v. Lee*, 106 U.S. 196, 208 (1882).

It is equally puzzling to hear the Court say that "federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." So long as the citizens' will, expressed through state legislation, does not violate valid federal law, the strain will not be felt; and to the extent that state action does violate federal law, the will of the citizens of the United States already trumps that of the citizens of the State: the strain then is not only expected, but necessarily intended.

Least of all does the Court persuade by observing that "other important needs" than that of the "judgment creditor" compete for public money. The "judgment creditor" in question is not a dunning bill-collector, but a citizen whose federal rights have been violated, and a constitutional structure that stints on enforcing federal rights out of an abundance of delicacy toward the States has substituted politesse in place of respect for the rule of law.

....

If today's decision occasions regret at its anomalous versions of history and federal theory, it is the more regrettable in being the second time the Court has suddenly changed the course of prior decision in order to limit the exercise of authority over a subject now concededly within the Article I jurisdiction of the Congress. . . .

In 1974, Congress . . . amended the FLSA, this time "extending the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions." . . . [In] *National League of Cities*, the Court held the extension of the Act to these employees an unconstitutional infringement of state sovereignty. . . .

But *National League of Cities* was not the last word. In *Garcia*, decided some nine years later, . . . the Court overruled *National League of Cities*, this time taking the position that Congress was not barred by the Constitution from binding the States as employers under the Commerce Clause. . . . *Garcia* remains good law, its reasoning has not been repudiated, and it has not been challenged here.

The FLSA has not, however, fared as well in practice as it has in theory. The Court in *Seminole Tribe* created a significant impediment to the statute's practical application by rendering its damages

provisions unenforceable against the States by private suit in federal court. Today's decision blocking private actions in state courts makes the barrier to individual enforcement a total one.

. . . . It is true, of course, that the FLSA does authorize the Secretary of Labor to file suit seeking damages, but unless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer whenever private litigation is barred by today's decision and *Seminole Tribe*, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy. Facing reality, Congress specifically found, as long ago as 1974, "that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily." . . .

. . . .

So there is much irony in the Court's profession that it grounds its opinion on a deeply rooted historical tradition of sovereign immunity, when the Court abandons a principle nearly as inveterate, and much closer to the hearts of the Framers: that where there is a right, there must be a remedy. . . .

. . . .

. . . . The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in *laissez-faire*, the one being as unrealistic as the other, as indefensible, and probably as fleeting.

IV. Separation of Powers

Issues involving the separation of powers have been at the center of the constitutional agenda for both the Supreme Court and the elected branches of government throughout the contemporary era. This should not be a surprise. The modern era has featured two particularly important political phenomena. First, the two political parties have become increasingly polarized. Conservative Democrats and liberal Republicans were once common, but they are now increasingly rare in the halls of Congress. Political activists in both parties are not merely political professionals; they tend to be ideologically committed. They emphasize issues and principles, and they hold candidates and politicians accountable to them. Second, divided government has become a common. There have been long periods in American history when unified government – the legislature and the executive controlled by the same political party – has been the norm. The majority party was expected to govern with little assistance or participation from the minority party. Divided government was generally a temporary obstruction to be resolved by the next election. In modern politics, divided politics has often been the norm, with no expectation that unified government was just around the corner. In that context, both Congress and the White House have viewed the other branch of government with suspicion, if not outright hostility. They have often looked for ways to work around the other branch, or to constrain it.

Even as judges and politicians struggle with the consequences of divided government, they have also continued to wrestle with a variety of complicated policy problems. The continued growth of the government, the political power that such growth entails, and the political risks involved in dealing with some political issues (such as deficit reduction) have all led politicians to look for innovative ways to organize policymaking. The justices have sometimes been skeptical about whether those innovations are consistent with constitutional design.

The power of Congress to create a presidential line-item veto, the authority of the president to refuse to enforce statutory provisions that he regards as unconstitutional, the scope of presidential authority during wartime, executive privilege, and the extent to which the president is subject to judicial processes while in office are among the issues have been debated in the contemporary period.

A. SHARING THE LEGISLATIVE POWER

Clinton v. City of New York, 524 U.S. 417 (1998)

Many state constitutions give governors the power to exercise a “line-item veto,” the choice to reject individual provisions of a proposed bill and not simply the bill as a whole. In the 1980s, conservatives began to advocate giving the president a similar power in order to fight “wasteful” government spending and promote a smaller government. Some lawyers argued that the president could exercise a line-item veto consistent with the existing terms of the U.S. Constitution. More commonly, it was thought that giving the president a constitutional line-item veto power would require a constitutional amendment, but there was not enough support in Congress to pass a constitutional amendment. A “legislative line-item veto” was part of the 1994 Republican Contract with America, and one of the Clinton administration supported it. The Line Item Veto Act provided for an expedited procedure by which Congress would vote on a separate bill containing all the items that the president had lined out, and if Congress disagreed with the president then that entire “bill of disapproval” could then be subjected to a regular constitutional veto and sent back to Congress for a possible override. The complicated scheme was designed to comply with the Court’s earlier decision in Chadha, while providing something comparable to what could be achieved through a constitutional amendment.

Senator Robert Byrd, a well-known defender of the prerogatives of the Senate, brought a lawsuit in federal district court seeking to have the Line Item Veto Act declared unconstitutional, but the case was dismissed on the grounds that he did not have standing to file suit. President Clinton vetoed over 80

individual items tax and spending bills using the provisions the Line Item Veto Act, and several affected parties, including the City of New York, who had millions of dollars of funds removed from the bills filed suit. The act was declared invalid in district court, and the Supreme Court heard the case on expedited appeal from the district court. The Supreme Court affirmed the trial court in a 6-3 decision.

MR. JUSTICE STEVENS delivered the opinion of the Court.

....
The Line Item Veto Act gives the President the power to "cancel in whole" three types of provisions that have been signed into law: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."

The Act requires the President to adhere to precise procedures whenever he exercises his cancellation authority. In identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items. . . . He must determine, with respect to each cancellation, that it will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." . . . Moreover, he must transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the canceled provision. . . . It is undisputed that the President meticulously followed these procedures in these cases.

A cancellation takes effect upon receipt by Congress of the special message from the President. . . . If, however, a "disapproval bill" pertaining to a special message is enacted into law, the cancellations set forth in that message become "null and void." . . . The Act sets forth a detailed expedited procedure for the consideration of a "disapproval bill," . . . but no such bill was passed for either of the cancellations involved in these cases. A majority vote of both Houses is sufficient to enact a disapproval bill. The Act does not grant the President the authority to cancel a disapproval bill . . . but he does, of course, retain his constitutional authority to veto such a bill.

....
There are important differences between the President's "return" of a bill pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Our first President understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto." What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.

....
[We are not] persuaded by the Government's contention that the President's authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds. . . . The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act's predecessors could even arguably have been construed to authorize such a change.

....

MR. JUSTICE KENNEDY, concurring.

....

I write to respond to my colleague JUSTICE BREYER, who observes that the statute does not threaten the liberties of individual citizens, a point on which I disagree. . . . Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

....

In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two....

It follows that if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

....

Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority. In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority. Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised. The citizen has a vital interest in the regularity of the exercise of governmental power. If this point was not clear before *Chadha*, it should have been so afterwards. Though *Chadha* involved the deportation of a person, while the case before us involves the expenditure of money or the grant of a tax exemption, this circumstance does not mean that the vertical operation of the separation of powers is irrelevant here. By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.

....

MR. JUSTICE BREYER, with whom MS. JUSTICE O'CONNOR and MR. JUSTICE SCALIA join in part, dissenting.

....

I approach the constitutional question before us with three general considerations in mind. *First*, the Act represents a legislative effort to provide the President with the power to give effect to some, but not to all, of the expenditure and revenue-diminishing provisions contained in a single massive appropriations bill. And this objective is constitutionally proper.

When our Nation was founded, Congress could easily have provided the President with this kind of power. In that time period, our population was less than four million, . . . federal employees numbered fewer than 5,000, . . . [and] annual federal budget outlays totaled approximately \$ 4 million. . . . At that time, a Congress, wishing to give a President the power to select among appropriations, could simply have embodied each appropriation in a separate bill, each bill subject to a separate Presidential veto.

Today, however, our population is about 250 million, . . . the Federal Government employs more

than four million people, . . . the annual federal budget is \$ 1.5 trillion, and a typical budget appropriations bill may have a dozen titles, hundreds of sections, and spread across more than 500 pages of the Statutes at Large. . . . Congress cannot divide such a bill into thousands, or tens of thousands, of separate appropriations bills, each one of which the President would have to sign, or to veto, separately. Thus, the question is whether the Constitution permits Congress to choose a particular novel *means* to achieve this same, constitutionally legitimate, *end*.

. . . .
The background circumstances . . . mean that we are to interpret nonliteral Separation of Powers principles in light of the need for "workable government."

. . . .
. . . . Literally speaking, the President has not "repealed" or "amended" anything. He has simply *executed* a power conferred upon him by Congress, which power is contained in laws that were enacted in compliance with the exclusive method set forth in the Constitution. . . .

. . . .
. . . . [T]he delegated power to nullify statutory language was *itself* created and defined by Congress, and included in the statute books on an equal footing with (indeed, as a component part of) the sections that are potentially subject to nullification. As a Pennsylvania court put the matter more than a century ago: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power." . . .

. . . .
Because I disagree with the Court's holding of literal violation, I must consider whether the Act nonetheless violates Separation of Powers principles -- principles that arise out of the Constitution's vesting of the "executive Power" in "a President," . . . and "all legislative Powers" in "a Congress," There are three relevant Separation of Powers questions here: (1) Has Congress given the President the wrong kind of power, *i.e.*, "non-Executive" power? (2) Has Congress given the President the power to "encroach" upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of "nondelegation?" These three limitations help assure "adequate control by the citizen's representatives in Congress." . . . And with respect to *this* Act, the answer to all these questions is "no."

Viewed conceptually, the power the Act conveys is the right kind of power. It is "executive." As explained above, an exercise of that power "executes" the Act. Conceptually speaking, it closely resembles the kind of delegated authority -- to spend or not to spend appropriations, to change or not to change tariff rates -- that Congress has frequently granted the President, any differences being differences in degree, not kind.

. . . .
. . . . And, if an individual Member of Congress, who say, favors aid to Country A but not to Country B, objects to the Act on the ground that the President may "rewrite" an appropriations law to do the opposite, one can respond, "But a majority of Congress voted that he have that power; you may vote to exempt the relevant appropriations provision from the Act; and if you command a majority, your appropriation is safe." Where the burden of overcoming legislative inertia lies is within the power of Congress to determine by rule. Where is the encroachment?

The "nondelegation" doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch. And it raises a more serious constitutional obstacle here. . . . [T]he Constitution permits only those delegations where Congress "shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform." . . .

The Act before us seeks to create such a principle in three ways. The first is procedural. The Act tells the President that, in "identifying dollar amounts [or] . . . items. . . for cancellation" (which I take to refer to his selection of the amounts or items he will "prevent from having legal force or effect"), he is to "consider," among other things,

"the legislative history, construction, and purposes of the law which contains [those

amounts or items, and] . . . any specific sources of information referenced in such law or . . . the best available information

The second is purposive. The clear purpose behind the Act, confirmed by its legislative history, is to promote "greater fiscal accountability" and to "eliminate wasteful federal spending and . . . special tax breaks." . . .

The third is substantive. The President must determine that, to "prevent" the item or amount "from having legal force or effect" will "reduce the Federal budget deficit; . . . not impair any essential Government functions; and . . . not harm the national interest." 2 U.S.C. § 691(a)(A) (1994 ed., Supp. II).

. . . .

In sum, I recognize that the Act before us is novel. In a sense, it skirts a constitutional edge. But that edge has to do with means, not ends. The means chosen do not amount literally to the enactment, repeal, or amendment of a law. Nor, for that matter, do they amount literally to the "line item veto" that the Act's title announces. Those means do not violate any basic Separation of Powers principle. They do not improperly shift the constitutionally foreseen balance of power from Congress to the President. Nor, since they comply with Separation of Powers principles, do they threaten the liberties of individual citizens. They represent an experiment that may, or may not, help representative government work better. The Constitution, in my view, authorizes Congress and the President to try novel methods in this way. Consequently, with respect, I dissent.

MR. JUSTICE SCALIA, with whom MS. JUSTICE O'CONNOR joins, and with whom JUSTICE BREYER joins in part, concurring in part and dissenting in part.

. . . .

The Presentment Clause requires, in relevant part, that "every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it." . . . There is no question that enactment of the Balanced Budget Act complied with these requirements: the House and Senate passed the bill, and the President signed it into law. It was only *after* the requirements of the Presentment Clause had been satisfied that the President exercised his authority under the Line Item Veto Act to cancel the spending item. Thus, the Court's problem with the Act is not that it authorizes the President to veto parts of a bill and sign others into law, but rather that it authorizes him to "cancel" -- prevent from "having legal force or effect" -- certain parts of duly enacted statutes.

Article I, § 7 of the Constitution obviously prevents the President from cancelling a law that Congress has not authorized him to cancel. Such action cannot possibly be considered part of his execution of the law, and if it is legislative action, as the Court observes, "repeal of statutes, no less than enactment, must conform with Art. I." But that is not this case. . . .

. . . .

Insofar as the degree of political, "law-making" power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress's authorizing the President to *cancel* a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the Founding of the Nation. . . .

The short of the matter is this: Had the Line Item Veto Act authorized the President to "decline to spend" any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional. What the Line Item Veto Act does instead -- authorizing the President to "cancel" an item of spending -- is technically different. But the technical difference does *not* relate to the technicalities of the Presentment Clause, which have been fully complied with; and the doctrine of unconstitutional delegation, which *is* at issue here, is preeminently *not* a doctrine of technicalities. The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in

faking out the Supreme Court. The President's action it authorizes in fact is not a line-item veto and thus does not offend Art. I, § 7; and insofar as the substance of that action is concerned, it is no different from what Congress has permitted the President to do since the formation of the Union.

....

C. Presidential Non-Enforcement

Walter Dellinger, "Presidential Authority to Decline to Execute Unconstitutional Statutes" (1994)¹

Early in President Bill Clinton's first term of office, law professor Walter Dellinger was named Assistant Attorney General and head of the Office of Legal Counsel, the primary legal advisor to the attorney general and the president. The Office of Legal Counsel (OLC) helps formulate many of the basic constitutional positions of the administration, especially as regards the powers of the presidency itself.

This memo by Dellinger lays out broad principles for presidential non-enforcement of unconstitutional laws. Dellinger aligned the Clinton administration with previous administrations in supporting the view that presidents did in fact have the authority to refuse to enforce laws that the president regarded as unconstitutional. But Dellinger's memo was centrally concerned with distinguishing the Clinton OLC on this issue from its Republican predecessors. An OLC opinion during the George H.W. Bush administration argued, for example, that "unconstitutional statutes are not laws the President must faithfully execute" and the president was under no obligation to await a judicial determination of a law's constitutionality.² One of Dellinger's colleagues (who would later be named head of Obama's OLC) characterized this approach as one of "routine" non-enforcement.³ Lawyers in and around the Reagan and Bush administration had argued strongly that presidents were obliged by the responsibilities of their office to identify constitutional violations in the statutes that they were charged with implementing and to avoid enforcing laws in a way that would violate constitutional requirements. Liberal critics had charged that such arguments subverted the special role of the courts in saying what the Constitution meant and threatened to set the president up as a kind of dictator who could "defy" the laws of Congress. Dellinger's approach suggested a more flexible response to constitutional doubts about a law and a stronger orientation toward seeking judicial resolution of any such doubts. As you read the memo, consider whether Dellinger's approach tends to replace constitutional limitations on Congress with judicial limitations on Congress.⁴

Memorandum Opinion for the Counsel to the President

I have reflected further on the difficult questions surrounding a President's decision to decline to execute statutory provisions that the President believes are unconstitutional, and I have a few thoughts to share with you. Let me start with a general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.

¹ Excerpt taken from Office of Legal Counsel, "Presidential Authority to Decline to Enforce Unconstitutional Statutes, November 2, 1994," 18 Op. Off. Legal Counsel 199 (1994).

² William P. Barr, "Issues Raised by Foreign Relations Authorization Bill," 14 Op. Off. Legal Counsel 37, 50 (1990).

³ Dawn E. Johnsen, "Presidential Non-Enforcement of Constitutionally Objectionable Statutes," *Law and Contemporary Problems* 63 (2000): 16.

⁴ See also, David Barron, "Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power," *Law and Contemporary Problems* 63 (2000): 61 (Barron became a member of Clinton's Office of Legal Counsel after this Dellinger memo was issued in 1994 and later joined the Obama OLC).

First, there is significant judicial approval of this proposition. Most notable is the Court's decision in *Myers v. United States*, 272 U.S. 52 (1926). There the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute. . . .

Second, consistent and substantial executive practice also confirms this general proposition. Opinions dating to at least 1860 assert the President's authority to decline to effectuate enactments that the President views as unconstitutional. See, e.g., Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469-70 (1860) (asserting that the President need not enforce a statute purporting to appoint an officer) Moreover, as we discuss more fully below, numerous Presidents have provided advance notice of their intention not to enforce specific statutory requirements that they have viewed as unconstitutional, and the Supreme Court has implicitly endorsed this practice. See *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) (noting that Presidents often sign legislation containing constitutionally objectionable provisions and indicate that they will not comply with those provisions).

While the general proposition that in some situations the President may decline to enforce unconstitutional statutes is unassailable, it does not offer sufficient guidance as to the appropriate course in specific circumstances. To continue our conversation about these complex issues, I offer the following propositions for your consideration.

1. The President's office and authority are created and bounded by the Constitution; he is required to act within its terms. Put somewhat differently, in serving as the executive created by the Constitution, the President is required to act in accordance with the laws -- including the Constitution, which takes precedence over other forms of law. This obligation is reflected in the Take Care Clause and in the President's oath of office.

2. When bills are under consideration by Congress, the executive branch should promptly identify unconstitutional provisions and communicate its concerns to Congress so that the provisions can be corrected. Although this may seem elementary, in practice there have been occasions in which the President has been presented with enrolled bills containing constitutional flaws that should have been corrected in the legislative process.

3. The President should presume that enactments are constitutional. There will be some occasions, however, when a statute appears to conflict with the Constitution. In such cases, the President can and should exercise his independent judgment to determine whether the statute is constitutional. In reaching a conclusion, the President should give great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation. Where possible, the President should construe provisions to avoid constitutional problems.

4. The Supreme Court plays a special role in resolving disputes about the constitutionality of enactments. As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.

5. Where the President's independent constitutional judgment and his determination of the Court's probable decision converge on a conclusion of unconstitutionality, the President must make a decision about whether or not to comply with the provision. That decision is necessarily specific to context, and it should be reached after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority. Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue. That is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.

6. The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. If the President does not

challenge such provisions (*i.e.*, by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.

Some legislative encroachments on executive authority, however, will not be justiciable or are for other reasons unlikely to be resolved in court. If resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency. This is usually true, for example, of provisions limiting the President's authority as Commander in Chief. Where it is not possible to construe such provisions constitutionally, the President has the authority to act on his understanding of the Constitution.

....

In accordance with these propositions, we do not believe that a President is limited to choosing between vetoing . . . and executing an unconstitutional provision in it. In our view, the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision.

We recognize that these issues are difficult ones. When the President's obligation to act in accord with the Constitution appears to be in tension with his duty to execute laws enacted by Congress, questions are raised that go to the heart of our constitutional structure. In these circumstances, a President should proceed with caution and with respect for the obligation that each of the branches shares for the maintenance of constitutional government.

Note: The Bush Administration, Presidential Signing Statements, and the Obligation to Faithfully Execute the Law

When President George W. Bush signed legislation into law, he often issued public statements (“signing statements”) at the same time. Signing statements have a long history, and many of the ways in which the Bush administration used signing statements were relatively uncontroversial. Some of their signing statements – both in form and content – were much more controversial.

The Bush administration used presidential signing statements like many other administrations before it had done – to celebrate its legislative achievements and downplay its legislative defeats. The statements that downplay legislative defeats are the more constitutionally interesting. They often seek to provide the president’s favored interpretation of the meaning of the bill being signed by the president. These interpretations crafted by high-level political and legal advisors to the president are the starting point for the administrative process of interpreting and implementing the law within the executive branch. Administration officials also hope that judges will later pick up on these signing statements, either as persuasive interpretations of the law or as authoritative parts of the legislative record that judges might regard themselves as obliged to follow so as to implement the intent of the lawmakers. Signing statements might minimize the legal significance of the compromises that the administration and its allies might have made in the drafting of the text of a piece of legislation or give them the most favorable spin for the administration’s policy objectives.

Presidential signing statements have also been used to raise constitutional objections to legislation. As is evident from several readings in this volume, presidents sometimes veto proposed legislation on constitutional grounds. Andrew Jackson’s veto of the bill to recharter the Second Bank of the United States is perhaps the most famous (see chapter six below). For various reasons, presidents often choose to sign legislation despite possible constitutional objections. President Tyler was the first to voice those constitutional doubts in a signing statement, but he was not the last (see chapter six below). Presidents may regard the legislation as a whole as too valuable to veto, despite the presence of individual provisions that might be constitutionally problematic. The president may realize that the proponents of the constitutionally objectionable measure have a “veto-proof” majority in support of it in Congress, and so the president has no hope of stopping the bill by exercising his veto power in any case. The president

may fear that the constitutionally objectionable provision is politically popular, and thus the president or his allies may pay a political price for opposing the measure in such a visible way as a veto. The president may simply not regard the constitutionally problematic provision as being substantively important enough to warrant the time and trouble involved in using the veto. It may be easier to fix the problem by other means, including by future statutes.

Such signing statements have, in fact, become quite common. In their most moderate form, presidential signing statements may simply observe that there are those who hold in good faith constitutional doubts about the legislation that Congress has passed. In a somewhat more aggressive form, the signing statement may call the judiciary's attention to the potential constitutional problem and invite closer judicial scrutiny of the law. In the most aggressive form, the president may declare his own conviction that the aspects of the law are unconstitutional, or law could be interpreted in ways such that it would be unconstitutional, and that the administration will avoid implementing the law in a manner that would create constitutional difficulties.

The Bush administration issued signing statements that took all of these forms. What was unusual is that it made them routine. Over the course of its first term of office, the Bush administration issued dozens of signing statements that noted hundreds of possible constitutional objections to new federal laws that the president was signing. An individual law could contain a single constitutionally objectionable provision, but more often the administration objected to many particular details in a single large, complex piece of legislation.¹

Unlike prior presidents, George W. Bush chose to use presidential signing statements as a vehicle for articulating and asserting administration beliefs about constitutional issues. Most administrations have chosen to overlook *possible* constitutional problems in legislation, calling attention to them in signing statements only in limited circumstances and often when the objection seemed unavoidable. By contrast, the Bush administration seemed determined to highlight issues that might in previous administrations to have been resolved informally, addressed *sub rosa* administratively, or simply left as a hypothetical difficulty to be ignored for the present.

As with most presidents, Bush's signing statements generally emphasized what the administration saw as encroachments on the constitutional authority of the executive branch. There were exceptions. For example, a 2002 law creating a federal "Institute of Education Sciences" in the Department of Education included among the duties of the director the mandate to create programs to increase the participation of researchers at "historically Black colleges or universities or other institutions of higher education with large numbers of minority students."² This was one of several provisions in the law that was singled out for the presidential warning that it would be implemented "in a manner consistent with . . . the requirements of equal protection and due process under the Due Process Clause of the Fifth Amendment."³ More common, however, were the other types of objections raised to different provisions of that same law. A provision requiring that the Statistics Center being created by the law perform analyses and surveys at the direction of congressional committees was viewed by the administration as running afoul of the principles in *INS v. Chadha* that congressional committees could not themselves issue binding directives to executive officials, for example, and a provision that the director of the Institute could publish research and reports "without the approval of the Secretary [of Education] or any other office of the Department" was, according to the president, to be implemented "subject to the

¹ For discussion, see Philip J. Cooper, "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements," *Presidential Studies Quarterly* 35 (2005): 515; Christopher S. Kelley and Bryan Marshall, "The Last Word: Presidential Power and the Role of Signing Statements," *Presidential Studies Quarterly* 38 (2008): 248; Steven G. Calabresi and David Lev, "The Legal Significance of Presidential Signing Statements," *The Forum* 4 (2006) 8; Curtis A. Bradley and Eric A. Posner, "Presidential Signing Statements and Executive Power," *Constitutional Commentary* 23 (2006): 307.

² 116 Stat. 1947 (2002), PL 107-279.

³ George W. Bush, "Statement on Signing Legislation to Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination, and for Other Purposes, November 5, 2002," *Weekly Compilation of Presidential Documents* (November 8, 1995), 1995.

supervision and direction of the Secretary of Education” so as to accord with the president’s own constitutional authority to supervise the conduct of official government actions.

These signing statements aroused little controversy at first, but became the subject of public and political debate in 2006. The issue first attracted attention when the president signed the hotly contested supplemental appropriations bill on December 30, 2005. The appropriations bill included essential funds for continuing operations by the Department of Defense (during the war in Iraq) and aid to the areas recently affected by Hurricane Katrina (which flooded New Orleans). Because the administration regarded the immediate passage of the appropriations bill as essential, it was a perfect vehicle for Congress to attach amendments that the administration opposed. The result was a lengthy signing statement qualifying how various provisions, ranging from the handling of classified information to requirements of congressional committee consultation before certain appropriated funds are actually spent, would be interpreted and implemented by the executive branch.

Most notably, Senator John McCain had included an amendment prohibiting cruel and degrading treatment of detainees, regardless of where they might be held, by United States personnel. The McCain amendment added legislative pressure in ongoing disputes over the American treatment of detainees in the American military base at Guantanamo Bay in Cuba, as well as detention facilities in Iraq and other countries. The president responded by stating, “The executive branch shall construe [the McCain amendment] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.”¹

Republican Senate Judiciary Committee Chairman Arlen Specter held hearings critical of presidential signing statements in the summer of that year. At the same time, the American Bar Association appointed a task force to examine the practice of presidential signing statements and “how they comport with the Constitution.”² The ABA task force recommended that presidents in the future strive to communicate their constitutional concerns to Congress earlier in the legislative process and that Congress be informed promptly of any signing statements that the president might issue regarding a law. More interesting was the proposal that legislation be enacted to facilitate “judicial resolution” of any presidential claims or interpretations regarding the constitutionality or meaning of a law. (Senator Specter introduced such a bill in the Senate.) Even more controversially was the conclusion that such signing statements were contrary to “our constitutional system of separation of powers.” The president’s only constitutional options are to exercise the veto power or to enforce the law as written. The president should not “usurp [the] judicial authority as the final interpreter of the constitutionality of congressional acts” or preempt its right to issue “definitive constitutional interpretations.”

A number of law professors, many formerly associated with the Office of Legal Counsel in the George H.W. Bush or William Clinton presidencies, objected to the ABA task force report. They argued that the veto-or-enforce-it choice on which the task force insisted ignored longstanding practice, the president’s primary obligation to uphold the Constitution itself, and the realities of modern government. For those who were critical of both the task force and the Bush administration (as some of the former Clinton lawyers were), the difficulty with the Bush signing statements was not in the principle of signing statements or of presidential non-enforcement. Their objections to the Bush signing statements were instead to their lack of clarity in stating exactly what the intended administration actions were and to the administration’s willingness to set aside clear legislative intent while claiming to be engaged in mere statutory interpretation.

¹ George W. Bush, “Statement on Signing H.R. 2863, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, December 30, 2005” *Weekly Compilation of Presidential Documents* 41 (January 2, 2006), 1918.

² American Bar Association, Report of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine (July 24, 2006), 4.

Although the issue was a part of the early campaign season in the summer of 2006, there was little subsequent follow-up on the issue of presidential signing statements after those midterm elections. There was likewise little discussion of presidential signing statements during the 2008 presidential elections. President Obama brought many of the lawyers from the Clinton administration into his own Justice Department, and began his term of office by issuing signing statements that included constitutional objections to legislative provisions. Some Democrats in Congress have voiced their concern over the continuation of the practice.

D. Presidential War and Foreign Affairs Powers

John Yoo, *The President's Constitutional Authority to Conduct Military Operations* (2001)¹

Shortly after the attacks on the World Trade Center and the Pentagon on September 11, 2001, Deputy Assistant Attorney General John Yoo in the Office of Legal Counsel, produced a memorandum opinion for the Deputy Counsel to the President Tim Flanigan laying out the president's authority to take a military response to the attacks. By the time the memo was produced, two weeks after the attacks, Congress had passed a joint resolution authorizing the use of military force. The language of the joint resolution itself was the product of discussions with the White House and Office of Legal Counsel so as to give the president a relatively free hand in responding to the attacks. Although the memo draws on the joint resolution, it primarily relies on inherent presidential power under Article II to launch military operations in the nation's defense, including preemptive military action and military action against governments that were not directly involved in the events of September 11. In doing so, it sketches out the second Bush administration's constitutional supports for the developing war on terror. The memo was not designed for public release, but it did eventually become public and its bold claims on behalf of presidential war powers made it one of the most famous OLC memos ever produced – along with a series of other memos relating to Bush administration war policies. Although the memo took on particular resonance after the invasion of Iraq in 2003 (which received separate congressional authorization), it had more immediate relevance for American military activity in a range of locales, including the Philippines and Yemen in early 2002.²

You have asked for our opinion of the scope of the President's authority to take military action in response to terrorist attacks on the United States on September 11, 2001. We conclude that the President has broad constitutional powers to use military force. Congress has acknowledged this inherent executive power in both the War Powers Resolution . . . and in the Joint Resolution passed by Congress on September 14, 2001. . . . Further, the President has the constitutional power not only to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harboring or supporting such organizations. Finally, the President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.

. . . .

I.

¹ Excerpted from Office of Legal Counsel, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," September 25, 2001.

² Yoo has subsequently expanded on this argument; John Yoo, *The Powers of War and Peace* (Chicago: University of Chicago Press, 2006). A critical account of presidential war powers can be found in Louis Fisher, *Presidential War Powers* (Lawrence: University Press of Kansas, 2004).

The President's constitutional power to defend the United States and the lives of its people must be understood in light of the Founders' express intention to create a federal government "clothed with all the powers requisite to [the] complete execution of its trust." *The Federalist* No. 23 Within the limits that the Constitution itself imposes, the scope and distribution of powers to protect national security must be construed to authorize the most efficacious defense of the Nation and its interests in accordance "with the realistic purposes of the entire instrument." *Lichter v. United States*, 334 U.S. 742, 748 (1948). Nor is the authority to protect the national security limited to actions necessary for "victories in the field." *Application of Yamashita*, 327 U.S. 1, 12 (1946). The authority over national security "carries with it the inherent power to guard against the immediate renewal of the conflict." *Id.*

. . . .

Constitutional Text. The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to use military force in situations of emergency. Article II, Section 2 states that the "President shall be Commander in Chief of the Army and Navy of the United States" He is further vested with all of "the executive Power" and the duty to execute the laws. . . . These powers give the President broad constitutional authority to use military force in response to threats to the national security and foreign policy of the United States. During the period leading up to the Constitution's ratification, the power to initiate hostilities and to control the escalation of conflict had been long understood to rest in the hands of the executive branch.

By their own terms, these provisions vest full control of the military forces of the United States in the President. The power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander-in-Chief is assigned solely to the President. It has long been the view of this Office that the Commander-in-Chief clause is a substantive grant of authority to the President and that the scope of the President's authority to commit the armed forces to combat is very broad. *See, e.g.*, Memorandum for Honorable Charles W. Colson, Special Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970) The President's complete discretion in exercising the Commander-in-Chief power has also been recognized by the courts. In the *Prize Cases*, 67 U.S. 635, 670 (1862), for example, the Court explained that, whether the President "in fulfilling his duties as Commander in Chief" had met with a situation justifying treating the southern States as belligerents and instituting a blockade, was a question "to be *decided by him*" and which the Court could not question, but must leave to "the political department of the Government to which this power was entrusted."

Some commentators have read the constitutional text differently. They argue that the vesting of the power to declare war gives Congress the sole authority to decide whether to make war. This view misreads the constitutional text and misunderstands the nature of a declaration of war. Declaring war is not tantamount to making war – indeed, the Constitutional Convention specifically amended the working draft of the Constitution that had given Congress the power to make war. . . . A State constitution at the time of the ratification included provisions that prohibited the governor from "making" war without legislative approval. [South Carolina] Const. art. XXVI (1776) If the Framers had wanted to require congressional consent before the initiation of military hostilities, they knew how to write such provisions.

. . . .

Constitutional Structure. Our reading of the text is reinforced by analysis of the constitutional structure. First, it is clear that the Constitution secures all federal executive power in the President to ensure a unity of purpose and energy in action. "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than any proceedings of any greater number." *The Federalist* No. 70 The centralization of authority in the president alone is particularly crucial in matters of national defense, war, and foreign policy. . . .

Second, the Constitution makes clear that the process used for conducting military hostilities is different from other government decisionmaking. In the area of domestic legislation, the Constitution creates a detailed, finely wrought procedure in which Congress plays the central role. In foreign affairs,

however, the Constitution does not establish a mandatory, detailed, Congress-driven procedure for taking action. Rather, the Constitution vests the two branches with different powers – the President as Commander in Chief, Congress with control over funding and declaring war – without requiring that they follow a specific process in making war. By establishing this framework, the Framers expected that the process for warmaking would be far more flexible, and capable of quicker, more decisive action, than the legislative process. Thus, the President may use his Commander-in-Chief and executive powers to use military force to protect the Nation, subject to congressional appropriations and control over domestic legislation.

Third, the constitutional structure requires that any ambiguities in the allocation of a power that is executive in nature – such as the power to conduct military hostilities – must be resolved in favor of the executive branch. . . . [T]he enumeration in Article II marks the points at which several traditional executive powers were diluted or reallocated. Any *other*, unenumerated executive powers, however, were conveyed to the President by the Vesting Clause.

There can be little doubt that the decision to deploy military force is “executive” in nature, and was traditionally so regarded. It calls for action and energy in execution, rather than the deliberate formulation of rules to govern the conduct of private individuals. . . .

Conducting military hostilities is a central tool for the exercise of the President’s plenary control over the conduct of foreign policy. There can be no doubt that the use of force protects the Nation’s security and helps it achieve its foreign policy goals. Construing the Constitution to grant such power to another branch could prevent the President from exercising his core constitutional responsibilities in foreign affairs. Even in the cases in which the Supreme Court has limited executive authority, it has also emphasized that we should not construe legislative prerogatives to prevent the executive branch “from accomplishing its constitutionally assigned functions.” *Nixon v. Administration of General Servs.*, 433 U.S. 425, 443 (1977).

II.

Executive Branch Construction and Practice. The position we take here has long represented the view of the executive branch and the Department of Justice. Attorney General (later Justice) Robert Jackson formulated the classic statement of the executive branch’s understanding of the President’s military powers in 1941:

Article II, section 2, of the Constitution provides that the President “shall be Commander in Chief of the Army and Navy of the United States.” By virtue of this constitutional office he has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States. These powers exist in time of peace as well as in time of war.

III.

The historical practice of all three branches confirms the lessons of the constitutional text and structure. The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled. . . .

The historical record demonstrates that the power to initiate military hostilities, particularly in response to the threat of an armed attack, rests exclusively with the President. As the Supreme Court has observed, “[t]he United States frequently employs Armed Forces outside the country – over 200 times in our history – for the protection of American citizens or national security.” *United States v. Verdugo-*

Urquidez, 494 U.S. 259, 273 (1990). On at least 125 such occasions, the President has acted without prior express authorization from Congress. See *Bosnia Opinion*, 19 Op. O.L.C. at 331. Such deployments, based on the President’s constitutional authority alone, have occurred since the Administration of George Washington. . . . Perhaps the most significant deployment without specific statutory authorization took place at the time of the Korean War, when President Truman, without prior authorization from Congress, deployed United States troops in a war that lasted for over three years and caused over 142,000 American casualties. See *Bosnia Opinion*, 19 Op. O.L.C. at 331-32n5.

Recent deployments ordered solely on the basis of the President’s constitutional authority have also been extremely large, representing a substantial commitment of the Nation’s military personnel, diplomatic prestige, and financial resources. On at least one occasion, such unilateral deployment has constituted full-scale war. On March 24, 1999, without any prior statutory authorization and in the absence of an attack on the United States, President Clinton ordered hostilities to be initiated against the Republic of Yugoslavia. . . . In recent decades, no President has unilaterally deployed so much force abroad.

....

The terrorist incidents of September 11, 2001, were surely far graver a threat to the national security of the United States than the 1998 attacks on our embassies (however appalling those events were). The President’s power to respond militarily to the later attacks must be correspondingly broader. Nonetheless, President Clinton’s action in 1998 illustrates some of the breadth of the President’s power to act in the present circumstances.

First, President Clinton justified the targeting of specific groups on the basis of what he characterized as “convincing” evidence of their involvement in the embassy attacks. While that is not a standard of proof appropriate for a criminal trial, it is entirely appropriate for military and political decisionmaking. Second, the President targeted not merely one particular group or leader, but a network of affiliated groups. Moreover, he ordered the action, not only because of particular attacks on United States embassies, but because of a pattern of terrorist activity, aimed at both American and non-Americans, that had unfolded over several years. Third, the President explained that the military action was designed to deter *future* terrorist incidents, not only to punish for past ones. Fourth, the President specifically justified military action on the territory of two foreign states because their governments had “harbor[ed]” and “support[ed]” terrorist groups for years, despite warnings from the United States.

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IV.

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. . . . [T]he President can be said to be acting at the apogee of his powers if he deploys military force in the present situation, for he is operating both under his own Article II authority and with the legislative support of Congress. Under the analysis outlined by Justice Jackson in *Youngstown Sheet & Tube Co.* (and later followed and interpreted by the Court in *Dames & Moore*), the President’s power in this case would be “at its maximum.” . . .

The executive branch consistently “has taken the position from the very beginning that section 2(c) of the [War Powers Resolution] does not constitute a legally binding definition of Presidential authority to deploy our armed forces.” *Overview of the War Powers Resolution*, 8 Op. O.L.C. at 274.¹ Moreover, as our Office has noted, “even the defenders of the WPR concede that this declaration [in

¹ Section 2(c) of the War Powers Resolution states: “The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” [eds. note]

section 2(c)] – found in the ‘Purpose and Policy’ section of the WPR – either is incomplete or is not meant to be binding.” . . .

. . . .

The Joint Resolution of September 14, 2001. Whatever view one may take of the meaning of section 2(c)(3) of the WPR, we think it clear that Congress, in enacting the “Joint Resolution [t]o authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States,” . . . has confirmed that the President has broad constitutional authority to respond, by military means or otherwise, to the incidents of September 11.

First, the findings of the Joint Resolution include an express statement that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” *Id.* This authority is in addition to the President’s authority to respond to *past* acts of terrorism. In including this statement, Congress has provided its explicit agreement with the executive branch’s consistent position, as articulated in Parts I-III of this memorandum, that the President has the plenary power to use force even before an attack upon the United States actually occurs, against targets and using methods of his own choosing.

. . . .

Memoranda on Standards of Conduct of Interrogation (“Torture Memos”)

In the months after the attacks of September 11, 2001, advisors to President George W. Bush asked the Office of Legal Counsel (OLC) within the Department of Justice to provide legal guidance on a variety of questions relating to the rapidly expanding war on terrorism. Among the questions asked were the legal limits on interrogation methods that the United States might use on suspected terrorists and those captured on the battlefields of Afghanistan. The OLC produced two memos to the then-White House legal counsel Alberto Gonzales. One, by Assistant Attorney General Jay Bybee, examined the interpretation and limits of treaty and statutory prohibitions on torture. Another, by Deputy Assistant Attorney General John Yoo, further examined the treaty obligations of the United States and the jurisdiction of the International Criminal Court over the interrogation of al Qaeda operatives. Both offered a relatively narrow interpretation of the treaty and statutory provisions, and both memos offered an additional constitutional analysis that limited the extent to which Congress could direct how the president conducted the military campaign.

The legal interpretation of the political appointees within the OLC was met with some consternation among the career legal staff within the Department of Justice and the Pentagon, as well as from some other political appointees. In the summer of 2004, after revelations of the abuse of prisoners in military custody in Iraq became public, these so-called “torture memos” were leaked to the press. By then, Bybee had left the OLC for a seat on a federal circuit court and Yoo had returned to academia, but the White House was in the midst of a reelection campaign. Under international and domestic pressure, President Bush quickly emphasized that the administration was against torture. Gonzales distanced himself and the White House from the memos and announced that the original memos had been withdrawn and directed the OLC to produce a new opinion on legal standards affecting interrogations. In December 2004, Acting Assistant Attorney General Daniel Levin produced a new opinion, which was made public, offering a broadened definition of torture that was to guide administration policy relating to interrogations. After Levin’s departure in 2005, the OLC produced new opinions that were not publicly released that once again shrank the definition of torture under existing statutes and treaties and indicated that a wider range of interrogation techniques were legally acceptable.¹

¹ On the interrogation memos, see also Jack Goldsmith, *The Terror Presidency* (New York: W.W. Norton, 2008); Jane Mayer, *The Dark Side* (Boston: Anchor Books, 2008); John Yoo, *War by Other Means* (Washington, D.C.: Atlantic Monthly Press, 2006); Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers* (New York: Cambridge University Press, 2005).

The Bybee memo cites the Supreme Court in Johnson v. Eisentrager (1950) as recognizing implied presidential powers that are “necessary and proper” to carrying out the “enumerated powers” in Article II of the U.S. Constitution, a use of language and structure that mirrors the constitutional text in Article I. Given how the Supreme Court has understood the scope of the necessary and proper clause of Article I after the New Deal, what are the implications of that characterization of presidential powers? Are implied powers more confined in the context of separation of powers than they are in the context of federalism? The constitutional authority of Congress to limit how the president may use the military forces that Congress supplies to him has been a recurrent issue. During World War I, former president William Howard Taft argued that “Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another.”¹ After World War II, Cold War liberals beat back conservative proposals to curtail the president’s authority to station troops abroad. During the waning days of the Vietnam War, Congress sought to prevent the use of American air and ground forces in neighboring Cambodia. During the Reagan administration, proposals to prohibit the president from making first use of nuclear weapons were made, and defeated. Having appropriated funds to build weapon systems or create an army, can Congress direct how the president can use those instruments of war?

Jay S. Bybee, Memo to Alberto R. Gonzales, Counsel to the President (2002)²

You have asked for our Office’s views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention

. . . .

V. The President’s Commander-in-Chief Power

Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.

. . . .

B. Interpretation to Avoid Constitutional Problems

. . . . [T]he President enjoys complete discretion [in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces. Because both “[t]he executive power and the command of the military and naval forces is vested in the President,” the Supreme Court has unanimously stated that it is “*the President alone* who is constitutionally invested with the *entire charge*

¹ William Howard Taft, “The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government,” *Yale Law Journal* 25 (1915): 610.

² Excerpted from Office of Legal Counsel, *Re: Standards for Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (August 1, 2002)

of hostile operations.” Hamilton v. Dillin, 88 U.S. 73, 87 (1874) (emphasis added). That authority is at its height in the middle of a war.

In light of the President’s complete authority over the conduct of war, without a clear statement otherwise, we will not read a criminal statute as infringing on the President’s ultimate authority in these areas. We have long recognized, and the Supreme Court has established a canon of statutory construction that statutes are to be construed in a manner that avoids constitutional difficulties so long as a reasonable alternative construction is available. . . . This canon of construction applies especially where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government. . . .

In the area of foreign affairs, and war powers in particular, the avoidance canon has special force. *See, e.g., Dep’t. of Navy v. Egan, 484 U.S. 518, 530 (1988) (“unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”).* . . .

In order to respect the President’s inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. As our Office has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of operations during a war. . . .

. . . .

C. The Commander-in-Chief Power

It could be argued that Congress enacted 18 U.S.C. § 2340A with full knowledge and consideration of the President’s Commander-in-Chief power, and that Congress intended to restrict his discretion in the interrogation of enemy combatants. Even were we to accept this argument, however, we conclude that the Department of Justice could not . . . enforce Section 2340A against federal officials acting pursuant to the President’s constitutional authority to wage a military campaign.

Indeed, in a different context, we have concluded that both courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President’s constitutional powers. This Office, for example, has previously concluded that Congress could not constitutionally extend the congressional contempt statute to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. . . . Although Congress may define federal crimes that the President, through the Take Care Clause, should prosecute, Congress cannot compel the President to prosecute outcomes taken pursuant to the President’s own constitutional authority. If Congress could do so, it could control the President’s authority through the manipulation of federal criminal law.

We have even greater concerns with respect to prosecutions arising out of the exercise of the President’s express authority as Commander in Chief than we do with prosecutions arising out of the assertion of executive privilege. . . . The President’s constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders’ intention to create a federal government “clothed with all the powers requisite to the complete execution of its trust.” *The Federalist* No. 23 Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution’s adoption, because “the circumstances which may affect the public safety” are not “reducible within certain determinate limits,”

it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy.

. . . .

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. . . . This Office has long understood the Commander-in-Chief Clause in particular as an affirmative grant of authority to the President. *See, e.g.,* Memorandum for Charles W. Colson, Special Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970). . . . The implication of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy in action that characterize the Presidency rather than Congress.

As the Supreme Court has recognized, the Commander-in-Chief power and the President's obligation to protect the nation imply the ancillary powers necessary to their successful exercise. "The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, the grant of war power includes all that is necessary and proper for carrying those powers into execution." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950). In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. . . . The President's complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. [See] the *Prize Cases* . . .

One of the core functions of the Commander-in-Chief is that of capturing, detaining, and interrogating members of the enemy. . . .

Any effort of Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

. . . .

John Yoo, Memo to William Haynes II, General Counsel of the Department of Defense (2003)¹

You have asked our Office to examine the legal standards governing military interrogations of alien unlawful combatants held outside the United States. You have requested that we examine both domestic and international law that might be applicable to the conduct of those interrogations.

In Part I, we conclude that the Fifth and Eighth Amendments, as interpreted by the Supreme Court, do not extend to alien enemy combatants held abroad. In Part II, we examine federal criminal law. We explain that several canons of construction apply here. Those canons of construction indicate that federal criminal laws of general applicability do not apply to properly authorized interrogations of enemy combatants, undertaken by military personnel in the course of an armed conflict. Such criminal statutes, if they were misconstrued to apply to the interrogation of enemy combatants, would conflict with the Constitution's grant of the Commander in Chief power solely to the President.

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I. U.S. Constitution

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¹ Excerpt taken from Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003)

. . . . The September 11, 2001 terrorist attacks marked a state of international armed conflict between the United States and the al Qaeda terrorist organization. Pursuant to his Commander-in-Chief power, as supported by an act of Congress, the President has ordered the Armed Forces to carry out military operations against al Qaeda, which includes the power both to kill and to capture members of the enemy. Interrogation arises as a necessary and legitimate element of the detention of al Qaeda and Taliban members during an armed conflict.

. . . . Given the ongoing threat of al Qaeda attacks, the capture and interrogation of al Qaeda operatives is imperative to our national security and defense. Because of the asymmetric nature of terrorist operations, information is perhaps the most critical weapon for defeating al Qaeda. Al Qaeda is not a national-state, and has no single country or geographic area as its base of operations. It has no fixed, large-scale military or civilian infrastructure. It deploys personnel, material, and finances covertly and attacks without warning using unconventional weapons and methods. As the September 11, 2001 attacks and subsequent events demonstrate, it seeks to launch terror attacks against purely civilian targets within the United States, and seeks to acquire weapons of mass destruction for such attacks. Because of the secret nature of al Qaeda's operations, obtaining advance information about the identity of al Qaeda operatives and their plans may prove to be the only way to prevent direct attacks on the United States. Interrogation of captured al Qaeda operatives could provide that information; indeed, in many cases interrogation may be the only method to obtain it. Given the massive destruction and loss of life caused by the September 11 attacks, it is reasonable to believe that information gained from al Qaeda personnel could prevent attacks of a similar (of not greater) magnitude from occurring in the United States.

. . . . [T]he text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to protect the security of the United States. The decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause . . . and by the Commander-in-Chief Clause. . . . The framers understood the Commander-in-Chief Clause to grant the President the fullest range of power recognized at the time of the ratification as belonging to the military commander. In addition, the structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the “executive Power shall be vested in a President of the United States of America.” This sweeping grant vests in the President the “executive power” and contrasts with the specific enumeration of the powers—those “herein”—granted to Congress in Article I. Our reading of the constitutional text and structure are confirmed by historical practice, in which Presidents have ordered the use of military force more than 100 times without congressional authorization, and by the functional consideration that national security decisions require a unity in purpose and energy that characterizes the Presidency alone.

As the Supreme Court has recognized, the Commander-in-Chief power and the President's obligation to protect the nation imply the ancillary powers necessary to their successful exercise. . . . In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. . . . The President's complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. In the *Prize Cases* . . . the Court explained that whether the President “in fulfilling his duties as Commander in Chief” had appropriately responded to the rebellion of the southern states was a question “to be decided *by him*” and which the Court could not question, but must leave to “the political department of the Government to which this power was entrusted.” . . .

One of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy. . . . It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict, and the laws of war make clear that prisoners may be interrogated for information concerning the enemy, its strength, and its plans. . . . Recognizing this authority, Congress has never attempted to restrict or interfere with the President's authority on this score.

. . . . [T]he Fifth Amendment was not designed to restrict the unique war powers of the President as

Commander in Chief. As long ago as 1865, Attorney General Speech explained the unquestioned rule that, as Commander in Chief, the President waging a war may authorize soldiers to engage in combat that could not be authorized as a part of the President's role in enforcing the laws As Attorney General Speed concluded, the Due Process Clause has no application to the conduct of a military campaign:

That portion of the Constitution which declares that 'no person shall be deprived of his life, liberty, or property without due process of law,' has such direct reference to, and connection with, trials for crime or criminal prosecutions that comment upon it would seem to be unnecessary. Trials for offences against the laws of war are not embraced or intended to be embraced in those provisions. . . . The argument that flings around offenders against the laws of war these guarantees would convict all the soldiers of our army of murder; no prisoners could be taken and held; the army could not move. The absurd consequences that would of necessity flow from such an argument show that it cannot be the true construction—it cannot be what was intended by the framers of the instrument. One of the prime motives for the Union and a federal government was to confer the powers of war. If any provisions of the Constitution are so in conflict with the power to carry on war as to destroy and make it valueless, then the instrument, instead of being a great and wise one, is a miserable failure, a *felo de se*.

. . . .

. . . . If each time the President captured and detained enemy aliens outside the United States, those aliens could bring suit challenging the deprivation of their liberty, such a result would interfere with and undermine the President's capacity to protect the Nation and to respond to the exigencies of war.

The Supreme Court has repeatedly refused to apply the Due Process Clause or even the Just Compensation Clause to executive and congressional actions taken in the direct prosecution of a war effort against enemies of the Nation. . . .

. . . .

[E]ven if the Fifth Amendment applied to enemy combatants in wartime, it is clear that . . . the Fifth Amendment does not operate outside the United States to regulate the executive's conduct toward aliens. . . . As the Supreme Court explained in [*Johnson v. Eisentrager*], construing the Fifth Amendment to apply to aliens who are outside the United States and have no connection to the United States:

would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedom of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments. Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view.

. . . .

A second constitutional provision that might be thought relevant to interrogations is the Eighth Amendment. The Eighth Amendment, however, applies solely to those persons upon whom criminal sanctions have been imposed. . . . The Eighth Amendment thus has no application to those individuals who have not been punished as part of a criminal proceeding, irrespective of the fact that they have been detained by the government. . . . The Eighth Amendment therefore cannot extend to the detention of wartime detainees, who have been captured pursuant to the President's power as Commander in Chief. . . .

. . . .

II. Federal Criminal Law

As the Supreme Court has recognized, . . . the President enjoys complete discretion in the exercise of his Commander-in-Chief authority in conducting operations against hostile forces. Because both “[t]he executive power and the command of the military and naval forces is vested in the President,” the Supreme Court has unanimously stated that it is “*the President alone* [] who is constitutionally invested with the *entire charge of hostile operations.*” *Hamilton v. Dillin* (1874).

In light of the President’s complete authority over the conduct of war, in the absence of a clear statement from Congress otherwise, we will not read a criminal statute as infringing on the President’s ultimate authority in these areas. We presume that Congress does not seek to provoke a constitutional confrontation with an equal, coordinate branch of government unless it has unambiguously indicated its intent to do so. . . .

In the area of foreign affairs and war powers in particular, the avoidance canon has special force. In contrast to the domestic realm, foreign affairs and war clearly place the President in the dominant constitutional position due to his authority as Commander in Chief and Chief Executive and his plenary control over diplomatic relations. There can be little doubt that the conduct of war is a matter that is fundamentally executive in nature, the power over which the Framers vested in a unitary executive. . . . Correspondingly, during war Congress plays a reduced role in the war effort and the courts generally defer to executive decisions concerning the conduct of hostilities.

In order to respect the President’s inherent constitutional authority to direct a military campaign against al Qaeda and its allies, general criminal laws must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress cannot interfere with the President’s exercise of his authority as Commander in Chief to control the conduct of operations during a war. . . . As we have discussed above, the President’s power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief. Any construction of criminal laws that regulated the President’s authority as Commander in Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions whether Congress had intruded on the President’s constitutional authority. Moreover, we do not believe that Congress enacted general criminal provisions such as the prohibitions against assault, maiming, interstate stalking, and torture pursue to any express authorization that would allow it to infringe on the President’s constitutional control over the operation of the Armed Forces in wartime. In our view, Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. In fact, the general applicability of these statutes belies any argument that these statutes apply to persons under the direction of the President in the conduct of war.

Even if these statutes were misconstrued to apply to persons acting at the direction of the President during the conduct of war, the Department of Justice could not enforce this law or any of the other criminal statutes applicable to the special maritime and territorial jurisdiction against federal officials acting pursuant to the President’s constitutional authority to direct a war. Even if an interrogation method arguably were to violate a criminal statute, the Justice Department could not bring a prosecution because the statute would be unconstitutional as applied in this context. . . .

. . . . Any effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. Indeed, such operations may be of more importance in a war with an international terrorist organization than one with the conventional armed forces of a nation-state, due to the former’s emphasis on covert operations and surprise attacks against civilians. It may be the case that only successful interrogations can provide the

information necessary to prevent future attacks upon the United States and its citizens. Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that would prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

....

Daniel Levin, Memo to James B. Comey, Deputy Attorney General (2004)¹

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT"); customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.

This Office interpreted the federal criminal prohibition against torture – codified at 18 U.S.C. §§ 2340-2340A. . . The August 2002 Memorandum [the Bybee memo] also addressed a number of issues beyond the interpretation of those statutory provisions, including the President's Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340-2340A.

...

Questions have since been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that "severe" pain under the statute was limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." . . . We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety. Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture.

....

The Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below.

....

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

Yaser Esam Hamdi is an American citizen, having been born in Louisiana, but raised in Saudi Arabia. In 2001, he was captured by Northern Alliance forces in Afghanistan and turned over the American military, which eventually transferred him to a detention facility in Guantanamo Bay, Cuba. Once his status as an American citizen was determined, he was transferred from Guantanamo Bay to a naval brig in Norfolk, Virginia and later to Charleston, South Carolina. The U.S. government designated Hamdi as an "enemy combatant" to be held indefinitely and without trial. Hamdi's father petitioned for a

¹ Excerpt taken from Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (December 30, 2004).

writ of habeas corpus on the son's behalf, contending that as an American citizen Hamdi could not be held without trial and that he had been a relief worker in Afghanistan and not a combatant for the Taliban regime or its al-Qaeda allies. The government submitted a report by Defense Department official Michael Mobbs stating that Hamdi had received military training from the Taliban, carried a rifle, and had been captured with his unit on the battlefield. The federal district court ordered the government to produce more evidence to satisfy judicial review of the legality of Hamdi's detention and the Court of Appeals for the Fourth Circuit reversed that order. Hamdi appealed to the Supreme Court, which vacated the circuit court's order and laid down guidelines governing the battlefield detention of citizens. After the Court's decision, the U.S. government agreed to deport him to Saudi Arabia, and Hamdi agreed to relinquish his American citizenship and accept a variety of international travel restrictions.

Note that Justice Souter and Ginsburg largely rely on statutory grounds to resolve the case, finding that the post-September 11th congressional Authorization for the Use of Military Force did not suspend or alter the 1971 Nondetention Act, which barred the executive branch from indefinitely detaining American citizens except pursuant to an act of Congress.

Hamdi was one of a series of cases on U.S. detention policies. It was issued the same day as Rasul v. Bush (2004), which held federal civilian courts could hear habeas corpus petitions from prisoners detained on a military base in Guantanamo Bay, Cuba. Hamdan v. Rumsfeld (2006) concluded that the administration did not have adequate statutory authority to set up military commissions to try detainees and that the design of the trials were in conflict with both statutory and treaty provisions. In Boumediene v. Bush (2008), Justice Kennedy wrote for the Court in concluding that Congress must provide some form of adequate judicial review for detainees held in Guantanamo, even if Congress means to restrict the writ of habeas corpus.

MS. JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, with which CHIEF JUSTICE REHNQUIST, MR. JUSTICE KENNEDY, and MR. JUSTICE BREYER join.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. . . . We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

. . . .

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" there. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF [Authorization to Use Military Force].

. . . .

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." *Ex parte Quirin*, 317 U.S. 1, 28 (1942). The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. . . .

There is no bar to this Nation's holding one of its own citizens as an enemy combatant. In *Quirin*, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. We held that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war." . . . A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. . . .

Ex parte Milligan, 71 U.S. 2 (1866), does not undermine our holding about the Government's authority to seize enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not comport with the Fifth and Fourteenth Amendments. The Government counters that any more process than was provided below would be both unworkable and "constitutionally intolerable." . . .

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. . . .

. . . [A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. See *Ex parte Milligan* . . . We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. . .

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. See *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'"). . . .

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. . . .

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. . . . While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. *Korematsu v. United States*, 323 U.S. 214, 233-234 (1944) (Murphy, J., dissenting). . . .

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube*, at 587. Whatever power the United States Constitution envisions for

the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. . . .

. . . .

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. . . . We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

. . . .

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

MR. JUSTICE SCALIA, with whom MR. JUSTICE STEVENS joins, dissenting.

...This case brings into conflict the competing demands of national security and our citizens' constitutional right to personal liberty. Although I share the Court's evident unease as it seeks to reconcile the two, I do not agree with its resolution.

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the decision below.

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. Blackstone stated this principle clearly:

"Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities. . . . To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison"

. . . .

The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial. . . .

To be sure, certain types of permissible *noncriminal* detention--that is, those not dependent upon the contention that the citizen had committed a criminal act--did not require the protections of criminal procedure. However, these fell into a limited number of well-recognized exceptions--civil commitment of the mentally ill, for example, and temporary detention in quarantine of the infectious. See *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36-37 (H. L. 1758) (Wilmot, J.). It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an

intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing. . . .

The allegations here, of course, are no ordinary accusations of criminal activity. Yaser Esam Hamdi has been imprisoned because the Government believes he participated in the waging of war against the United States. The relevant question, then, is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime*.

JUSTICE O'CONNOR, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. That is probably an accurate description of wartime practice with respect to enemy *aliens*. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.

. . . .

The Government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts. It places primary reliance upon *Ex parte Quirin*, 317 U.S. 1 (1942), a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Hans Haupt, was a U.S. citizen. The case was not this Court's finest hour. The Court upheld the commission and denied relief in a brief *per curiam* issued the day after oral argument concluded; a week later the Government carried out the commission's death sentence upon six saboteurs, including Haupt. The Court eventually explained its reasoning in a written opinion issued several months later.

. . . .

But even if *Quirin* gave a correct description of *Milligan*, or made an irrevocable revision of it, *Quirin* would still not justify denial of the writ here. In *Quirin* it was uncontested that the petitioners were members of enemy forces. They were "*admitted enemy invaders*," (emphasis added), and it was "undisputed" that they had landed in the United States in service of German forces, *id.*, at 20. The specific holding of the Court was only that, "upon the *conceded* facts," the petitioners were "plainly within [the] boundaries" of military jurisdiction, *id.*, at 46 (emphasis added). But where those jurisdictional facts are *not* conceded -- where the petitioner insists that he is *not* a belligerent -- *Quirin* left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.

It follows from what I have said that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today's opinion prescribes under the Due Process Clause. Cf. Act of Mar. 3, 1863, 12 Stat. 755. But there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so.

. . . .

It should not be thought, however, that the plurality's evisceration of the Suspension Clause augments, principally, the power of Congress. As usual, the major effect of its constitutional improvisation is to increase the power of the Court. Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections *it* thinks appropriate. . . .

. . . . It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to. If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.

There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures -- an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality

seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group. . . . Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. . . . Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. . . .

I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ--which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. . . . If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

. . . .

MR. JUSTICE THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail, and there is no reason to remand the case. . . .

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). The national security, after all, is the primary responsibility and purpose of the Federal Government. . . .

The Founders intended that the President have primary responsibility--along with the necessary power--to protect the national security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." *The Federalist* No. 70

. . . . This Court has long recognized these features and has accordingly held that the President has *constitutional* authority to protect the national security and that this authority carries with it broad discretion. . . .

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive. . . .

. . . .

I acknowledge that the question whether Hamdi's executive detention is lawful is a question properly resolved by the Judicial Branch, though the question comes to the Court with the strongest presumptions in favor of the Government. The plurality agrees that Hamdi's detention is lawful if he is an enemy combatant. But the question whether Hamdi is actually an enemy combatant is "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." . . .

. . . .

In a case strikingly similar to this one, the Court addressed a Governor's authority to detain for an extended period a person the executive believed to be responsible, in part, for a local insurrection. Justice Holmes wrote for a unanimous Court:

"When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what *he deems* the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm." *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (emphasis added).

The Court answered Moyer's claim that he had been denied due process by emphasizing that

"it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus summary proceedings suffice for taxes, and executive decisions for exclusion from the country Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power." *Id.*, at 84-85.

In this context, due process requires nothing more than a good-faith executive determination. To be clear: The Court has held that an executive, acting pursuant to statutory and constitutional authority may, consistent with the Due Process Clause, unilaterally decide to detain an individual if the executive deems this necessary for the public safety *even if he is mistaken*.

. . . .

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government's overriding interest in protecting the Nation. If a deprivation of liberty can be justified by the need to protect a town, the protection of the Nation, *a fortiori*, justifies it.

I acknowledge that under the plurality's approach, it might, at times, be appropriate to give detainees access to counsel and notice of the factual basis for the Government's determination. But properly accounting for the Government's interests also requires concluding that access to counsel and to the factual basis would not always be warranted. Though common sense suffices, the Government thoroughly explains that counsel would often destroy the intelligence gathering function. Equally obvious is the Government's interest in not fighting the war in its own courts

MR. JUSTICE SOUTER, with whom MS. JUSTICE GINSBURG joins, concurring in part and dissenting in part.

. . . .

The threshold issue is how broadly or narrowly to read the Non-Detention Act, the tone of which is severe: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Should the severity of the Act be relieved when the Government's stated factual justification for incommunicado detention is a war on terrorism, so that the Government may be said to act "pursuant" to congressional terms that fall short of explicit authority to imprison individuals? . . .

....

The fact that Congress intended to guard against a repetition of the World War II internments when it repealed the 1950 statute and gave us § 4001(a) provides a powerful reason to think that § 4001(a) was meant to require clear congressional authorization before any citizen can be placed in a cell. It is not merely that the legislative history shows that § 4001(a) was thought necessary in anticipation of times just like the present, in which the safety of the country is threatened. To appreciate what is most significant, one must only recall that the internments of the 1940's were accomplished by Executive action. In requiring that any Executive detention be "pursuant to an Act of Congress," then, Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment.

....

The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other -- that the private interest of every individual may be a sentinel over the public rights." *The Federalist* No. 51. Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.

Under this principle of reading § 4001(a) robustly to require a clear statement of authorization to detain, none of the Government's arguments suffices to justify Hamdi's detention.

....

Since the Government has given no reason either to deflect the application of § 4001(a) or to hold it to be satisfied, I need to go no further; the Government hints of a constitutional challenge to the statute, but it presents none here. I will, however, stray across the line between statutory and constitutional territory just far enough to note the weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war. It is in fact in this connection that the Government developed its argument that the exercise of war powers justifies the detention, and what I have just said about its inadequacy applies here as well. Beyond that, it is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-644 (1952). . . .

....

Whether insisting on the careful scrutiny of emergency claims or on a vigorous reading of § 4001(a), we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by "the law of the land."

Because I find Hamdi's detention forbidden by § 4001(a) and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that § 4001(a) is unconstitutional. I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view.

Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose.

G. Executive Privilege

Cheney v. United States District Court for the District of Columbia, 542 U.S. 367 (2004)

Shortly after taking office, President George W. Bush created the National Energy Policy Development Group (NEPDG), chaired by Vice President Dick Cheney, to develop the administration's national energy policy. The NEPDG was composed entirely of high-level executive branch officials. The NEPDG issued a report five months after its creation and disbanded. Afterwards, two interest groups filed suit in federal district court against Cheney and the other members of the NEPDG contending the group had violated the Federal Advisory Committee Act of 1972 (FACA), part of the Watergate-era reforms. FACA imposed a variety of open meeting and disclosure requirements on "advisory committees" that included any non-governmental employees. The interest groups contended that lobbyists regularly attended meetings of the NEPDG and were de facto members of the group, and they sought an injunction requiring the administration to produce all materials that would have been disclosed if FACA was applicable. Because FACA did not allow private lawsuits to enforce its terms, the district court allowed the suit to proceed against the vice president through a separate statute allowing for a writ of mandamus under limited circumstances.

Since the public record of NEPDG indicted only the official members of the group, the lawsuit began with a discovery motion seeking documents relating to the activities of the NEPDG. The administration responded by claiming that all documents were protected by executive privilege. In the context of a civil lawsuit against the vice president, the administration argued, and the Court ultimately agreed, a claim to executive privilege could properly be quite broad. The district court eventually approved the discovery request of the interest groups, which a divided circuit court affirmed on appeal. By a 7-2 vote, the Supreme Court reversed the lower courts. Although giving an immediate "victory" to the Cheney and the administration, the Court did not directly rule on administration's argument that it was entitled to blanket immunity from discovery proceedings in this case but instead encouraged the lower courts to narrow any discovery so as not to interfere with the functioning of the executive branch. In part to avoid the separation-of-powers concerns identified by the Supreme Court, when the circuit court sitting en banc heard the case on remand it decided that FACA allowed the president to establish advisory groups such as the NEPDG in which government employees were the only "voting members," even if non-government employees were also consulted during the process. Given that ruling, no discovery was necessary, and the lawsuit was dismissed.

MR. JUSTICE KENNEDY delivered the opinion of the Court.

The United States District Court for the District of Columbia entered discovery orders directing the Vice President and other senior officials in the Executive Branch to produce information about a task force established to give advice and make policy recommendations to the President. This case requires us to consider the circumstances under which a court of appeals may exercise its power to issue a writ of mandamus to modify or dissolve the orders when, by virtue of their overbreadth, enforcement might interfere with the officials in the discharge of their duties and impinge upon the President's constitutional prerogatives.

....

Were the Vice President not a party in the case, the argument that the Court of Appeals should have entertained an action in mandamus, notwithstanding the District Court's denial of the motion for certification, might present different considerations. Here, however, the Vice President and his comembers on the NEPDG are the subjects of the discovery orders. The mandamus petition alleges that the orders threaten "substantial intrusions on the process by which those in closest operational proximity to the President advise the President." . . . It is well established that "a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary

individual." *United States v. Nixon*, 418 U.S. 683, 715 (1974). Chief Justice Marshall, sitting as a trial judge, recognized the unique position of the Executive Branch when he stated that "[i]n no case . . . would a court be required to proceed against the president as against an ordinary individual." . . . As *Nixon* explained, these principles do not mean that the "President is above the law." Rather, they simply acknowledge that the public interest requires that a coequal branch of Government "afford Presidential confidentiality the greatest protection consistent with the fair administration of justice," and give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.

. . . .
 The Court's decision was explicit that it was "not . . . concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation"

The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. As the Court explained, the need for information in the criminal context is much weightier because "our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.'" . . .

The Court also observed in *Nixon* that a "primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions." Withholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks "conflict[s] with the function of the courts under Art. III." Such an impairment of the "essential functions of [another] branch," is impermissible. Withholding the information in this case, however, does not hamper another branch's ability to perform its "essential functions" in quite the same way. The District Court ordered discovery here, not to remedy known statutory violations, but to ascertain whether FACA's disclosure requirements even apply to the NEPDG in the first place. Even if FACA embodies important congressional objectives, the only consequence from respondents' inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress' policy objectives under FACA. . . .

A party's need for information is only one facet of the problem. An important factor weighing in the opposite direction is the burden imposed by the discovery orders. This is not a routine discovery dispute. The discovery requests are directed to the Vice President and other senior Government officials who served on the NEPDG to give advice and make recommendations to the President. The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives. As we have already noted, special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated. This Court has held, on more than one occasion, that "[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery," *Clinton v. Jones*, 520 U.S. 681, 707 (1997), and that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in the conduct of litigation against it

Even when compared against *United States v. Nixon's* criminal subpoenas, which did involve the President, the civil discovery here militates against respondents' position. The observation in *Nixon* that production of confidential information would not disrupt the functioning of the Executive Branch cannot be applied in a mechanistic fashion to civil litigation. In the criminal justice system, there are various constraints, albeit imperfect, to filter out insubstantial legal claims. The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion. In contrast, there are no analogous checks in the civil discovery process here. . . .

. . . .
 Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives. This inquiry places courts in the awkward

position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These "occasion[s] for constitutional confrontation between the two branches" should be avoided whenever possible. *United States v. Nixon*

In recognition of these concerns, there is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas. . . . [Here the Court indicated doctrines "to narrow, on its own, the scope of the subpoenas" so as to balance judicial and executive interests.]

....

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

It is so ordered.

MR. JUSTICE STEVENS, concurring.

....

. . . [G]ranted broad discovery in this case effectively prejudged the merits of respondents' claim for mandamus relief--an outcome entirely inconsistent with the extraordinary nature of the writ. Under these circumstances, instead of requiring petitioners to object to particular discovery requests, the District Court should have required respondents to demonstrate that particular requests would tend to establish their theory of the case. . . .

MR. JUSTICE THOMAS, with whom MR. JUSTICE SCALIA joins, concurring in part and dissenting in part.

....

MS. JUSTICE GINSBURG, with whom MR. JUSTICE SOUTER joins, dissenting.

....

The discovery plan drawn by Judicial Watch and Sierra Club was indeed "unbounded in scope." Initial approval of that plan by the District Court, however, was not given in stunning disregard of separation-of-powers concerns. In the order itself, the District Court invited "detailed and precise object[ions]" to any of the discovery requests, and instructed the Government to "identify and explain . . . invocations of privilege with particularity." . . . Anticipating further proceedings concerning discovery, the District Court suggested that the Government could "submit [any privileged documents] under seal for the court's consideration," or that "the court [could] appoint the equivalent of a Special Master, maybe a retired judge," to review allegedly privileged documents.

The Government did not file specific objections; nor did it supply particulars to support assertions of privilege. Instead, the Government urged the District Court to rule that Judicial Watch and the Sierra Club could have no discovery at all. . . .

....

. . . . [I]n remanding for consideration of discovery-tailoring measures, the Court apparently rejects [the] no-discovery position. Otherwise, a remand based on the overbreadth of the discovery requests would make no sense. Nothing in the record, however, intimates lower-court refusal to reduce discovery. . . . In accord with the Court of Appeals, I am "confident that [were it moved to do so] the district court here [would] protect petitioners' legitimate interests and keep discovery within appropriate limits." I would therefore affirm the judgment of the Court of Appeals.

H. Immunity from Judicial Processes

Clinton v. Jones, 520 U.S. 681 (1997)

President William Clinton was dogged by personal scandal throughout his political career. Some of the accusations were financial. Both he and his spouse, Hillary Rodham Clinton, were accused of taking financial advantage of their official status in the Whitewater Affair, involving land deals and loans in Arkansas. Other accusations were personal. Several women claimed that, during his time in government in office, Clinton had either had affairs with them or had sought to initiate affairs. During his presidential campaign in 1992, Clinton was able to overcome claims that he had sexual relations with Gennifer Flowers, a former local television reporter and state employee, while Governor of Arkansas. The Paula Jones affair had different political and constitutional consequences.

Paula Jones was a minor state employee in Arkansas who accused President Clinton of sexually harassing her when he was governor and then libeling her afterwards. Her lawsuit, financed in large part by long-time Clinton rivals, sought more than a half a million dollars in damages. Clinton insisted that the lawsuit be stayed, to be resumed only after he had left the presidency. Relying on past cases, he insisted that presidents could be sued for neither their official nor their unofficial actions while in office. A lower federal court judge in 1994 agreed with Clinton's contention and postponed the trial indefinitely. This postponement was appealed to the Supreme Court of the United States. The Supreme Court allowed the case to go forward during Clinton's term of office. As a result, Clinton was formally deposed under oath by the lawyers for Paula Jones. During his testimony, he lied about the existence of his affair with Monica Lewinsky, a White House intern, arguably hampering the ability of Jones to build her own case. The revelation of the affair and the false testimony led to Clinton's impeachment by the Republican majority in the House of Representatives. He was not convicted by the Senate.

MR. JUSTICE STEVENS delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

. . . . [Respondent] alleges that [an Arkansas state trooper] persuaded her to leave her desk and to visit . . . Governor [Clinton] in a business suite at the hotel, where he made "abhorrent" sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. . . .

. . . . [I]t is perfectly clear that the alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office.

. . . . [O]ur decision rejecting the immunity claim and allowing the case to proceed does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place. We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so.

. . . . The principal rationale for affording certain public servants immunity from suits for money

damages arising out of their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability. . . .

This reasoning provides no support for an immunity for *unofficial* conduct. As we explained in [*Nixon v.*] *Fitzgerald*, "the sphere of protected action must be related closely to the immunity's justifying purposes." . . . Because of the President's broad responsibilities, we recognized in that case an immunity from damages claims arising out of official acts extending to the "outer perimeter of his authority." . . . But we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity. . . .

. . . .
 Speaking in favor of the Constitution's adoption at the Pennsylvania Convention, James Wilson--who had participated in the Philadelphia Convention at which the document was drafted--explained that, although the President "is placed [on] high," "not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." . . . This description is consistent with both the doctrine of presidential immunity as set forth in *Fitzgerald*, and rejection of the immunity claim in this case. With respect to acts taken in his "public character"-- that is official acts--the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts.

. . . .
 Petitioner's strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is "above the law," in the sense that his conduct is entirely immune from judicial scrutiny. The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law. . . .

. . . .
 [I]n this case there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as "executive." Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies. Whatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch. The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power.

Rather than arguing that the decision of the case will produce either an aggrandizement of judicial power or a narrowing of executive power, petitioner contends that--as a by-product of an otherwise traditional exercise of judicial power--burdens will be placed on the President that will hamper the performance of his official duties. . . .

Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. As we have already noted, in the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions. . . . If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

Of greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions. . . . The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. . . . Despite the serious impact of that [the Steel

Seizure] decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law. . . .

Second, it is also settled that the President is subject to judicial process in appropriate circumstances. Although Thomas Jefferson apparently thought otherwise, Chief Justice Marshall, when presiding in the treason trial of Aaron Burr, ruled that a subpoena *duces tecum* could be directed to the President. . . . We unequivocally and emphatically endorsed Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. . . .

. . . .

. . . . Although we have rejected the argument that the potential burdens on the President violate separation of powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

We are not persuaded that either of these risks is serious. . . . Although scheduling problems may arise, there is no reason to assume that the District Courts will be either unable to accommodate the President's needs or unfaithful to the tradition--especially in matters involving national security--of giving "the utmost deference to Presidential responsibilities." Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

MR. JUSTICE BREYER, concurring.

I agree with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct. . . .

In my view, however, once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes. At that point, the Constitution permits a judge to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle--a principle that forbids a federal judge in such a case to interfere with the President's discharge of his public duties. I have no doubt that the Constitution contains such a principle applicable to civil suits, based upon Article II's vesting of the entire "executive Power" in a single individual, implemented through the Constitution's structural separation of powers, and revealed both by history and case precedent.

I recognize that this case does not require us now to apply the principle specifically, thereby delineating its contours; nor need we now decide whether lower courts are to apply it directly or categorically through the use of presumptions or rules of administration. Yet I fear that to disregard it now may appear to deny it. I also fear that the majority's description of the relevant precedents de-emphasizes the extent to which they support a principle of the President's independent authority to control his own time and energy. . . . Further, if the majority is wrong in predicting the future infrequency of private civil litigation against sitting Presidents . . . acknowledgement and future delineation of the constitutional principle will prove a practically necessary institutional safeguard. For these reasons, I think it important to explain how the Constitution's text, history, and precedent support this principle of judicial noninterference with Presidential functions in ordinary civil damages actions.

. . . .

Article II makes a single President responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch, or the entire Judiciary for those of the Judicial Branch. It thereby creates a constitutional equivalence between a single President, on the one hand, and many legislators, or judges, on the other.

The Founders created this equivalence by consciously deciding to vest Executive authority in one person rather than several. They did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many. . . .

. . . .

For present purposes, this constitutional structure means that the President is not like Congress, for Congress can function as if it were whole, even when up to half of its members are absent. . . . It means that the President is not like the Judiciary, for judges often can designate other judges, *e.g.*, from other judicial circuits, to sit even should an entire court be detained by personal litigation. It means that, unlike Congress, which is regularly out of session, the President never adjourns.

More importantly, these constitutional objectives explain why a President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it. And the related constitutional equivalence between President, Congress, and the Judiciary, means that judicial scheduling orders in a private civil case must not only take reasonable account of, say, a particularly busy schedule, or a job on which others critically depend, or an underlying electoral mandate. They must also reflect the fact that interference with a President's ability to carry out his public responsibilities is constitutionally equivalent to interference with the ability of the entirety of Congress, or the Judicial Branch, to carry out their public obligations.

. . . . [T]he Constitution protects the President from judicial orders in private civil cases to the extent that those orders could significantly interfere with his efforts to carry out his ongoing public responsibilities.

. . . .

. . . . A Constitution that separates powers in order to prevent one branch of Government from significantly threatening the workings of another could not grant a single judge more than a very limited power to second guess a President's reasonable determination (announced in open court) of his scheduling needs, nor could it permit the issuance of a trial scheduling order that would significantly interfere with the President's discharge of his duties--in a private civil damage action the trial of which might be postponed without the plaintiff suffering enormous harm. . . . I agree with the majority's determination that a constitutional defense must await a more specific showing of need; I do not agree with what I believe to be an understatement of the "danger." And I believe that ordinary case-management principles are unlikely to prove sufficient to deal with private civil lawsuits for damages unless supplemented with a constitutionally based requirement that district courts schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities.

V. JUDICIAL POWER

Republicans had dominated the nomination of Supreme Court justices from the presidency of Richard Nixon in 1969 to the end of the presidency of George H.W. Bush in 1993. The Republican control of the White House had been interrupted only by Jimmy Carter's single term, and there were no vacancies on the Court during the Carter years. Despite this Republican dominance of the White House, conservative control of the federal courts did not smoothly follow. The Republicans only briefly controlled the Senate during this period, forcing Republican presidents to compromise with or work around Democratic Senates to win confirmation of their judicial selections. When the Democrats did control Congress and the White House during the Carter years, they took the opportunity to dramatically expand the size of the lower federal courts, countering some of the Republican influence below the level of the Supreme Court. Richard Nixon had been guided more by politics than by a conservative constitutional philosophy in picking judges, and the pattern of vacancies did not always create opportunities to dramatically shift the direction of the Court. All told, Nixon immediately put the Court on a more conservative path with his appointments in the early 1970s, transforming the Warren Court into the Burger Court. Conservatives found it difficult to consolidate their gains, however. They often depended on winning the support of more moderate swing justices such as Blackmun or Powell or Stewart.

By the end of the George H.W. Bush administration, the conservatives finally seemed to have a working majority on the Supreme Court and supportive judges in the lower courts. Rehnquist, Thomas and Scalia formed a clear conservative coalition on the late Rehnquist Court. Stevens, Blackmun, and Souter (disappointing conservatives) quickly emerged as a liberal wing. White, O'Connor and Kennedy were swing votes, often joining the conservatives. Subsequent appointments largely maintained this balance. Clinton appointed Breyer and Ginsburg to replace White and Blackmun. George W. Bush appointed Roberts and Alito to replace Rehnquist and O'Connor. Obama appointed Sotomayor to replace Souter. Since the beginning of the Clinton administration, the Court has become more polarized, but it remains divided between liberal and conservative wings and Kennedy is now alone in playing the pivotal role of swing vote.

As a result, both conservatives and liberals have been able to win important cases in the recent Supreme Court, which cannot be readily characterized one way or the other. Kennedy often sides with the conservatives on issues of federalism and separation of powers, but often sides with the liberals on issues of rights and liberties. Either way, however, the contemporary Court has insisted that it has the ultimate say on the meaning of the Constitution and has emphasized the importance of the power of judicial review to the American constitutional system. The Court has proven to be very concerned about maintaining its own power to say what the law is, even as it has frequently offended both conservatives and liberals when exercising that power.

A. The Debate over Judicial Review

City of Boerne v. Flores, 521 U.S. 507 (1997)

In the 1963 case of Sherbert v. Verner, the Warren Court altered the Court's longstanding understanding of the requirements of the Free Exercise Clause of the First Amendment of the Constitution. Under Sherbert, individuals could claim a constitutional exemption from laws that substantially burden religious practices unless they are justified by a compelling government interest. In the 1990, a divided Court led by Justice Scalia returned to the earlier standard in the case of Employment Division v. Smith. By that standard, it is not constitutionally required that individuals be exempted from neutral, generally applicable laws that only incidentally burden religious practices. The Smith decision sparked an immediate outcry from civil libertarians and religious organizations, creating an unusual bipartisan and cross-ideological coalition that passed the Religious Freedom Restoration Act

(RFRA) that imposed the Sherbert standard by statute. There is little difficulty with Congress voluntarily adopting the Sherbert standard as a rule for federal policy. The controversy was over whether Congress could authoritatively interpret the Fourteenth Amendment so as to impose that same rule on the states. When the Catholic Archbishop of San Antonio filed suit under the RFRA to block the application of the city of Boerne's zoning laws, the district court ruled that Congress had exceeded its constitutional authority by extending RFRA to the states. On appeal, the circuit court reversed. In a 6-3 decision, the Supreme Court reversed the circuit court and struck down RFRA.

For members of Congress and the Court as well as outside observers, RFRA was an effort to reverse a constitutional doctrine by statute. The speed and decisiveness with which Congress responded to the Smith decision suggested to some that the justices should defer to that legislative judgment as to how best to understand the principles and requirements of the Free Exercise Clause. Even the justices who disagreed with the Smith standard were reluctant to accept a rebuke from Congress on a matter of constitutional interpretation, however. RFRA instead led the justices to assert once again that it was the judiciary, not the legislature, that was the ultimate interpreter of the Constitution.¹

RFRA and Boerne was only the first round of responses to the Smith decision. Many state legislatures passed their only "mini-RFRA's" that were enforceable in state courts. Congress has explored more targeted legislative options for extending the scope of federal protections in this area. At the same time, there has been a more sustained discussion in Congress and elsewhere about the substantive merits of across-the-board religious exemptions to generally applicable laws and government policies in circumstances ranging from land-use to prison administration.

MR. JUSTICE KENNEDY delivered the opinion of the Court.

A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA). . . . The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power.

. . . .

Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*. . . . (1990). . . .

. . . .

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. . . . 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) The framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

"(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

"(3) governments should not substantially burden religious exercise without compelling justification;

"(4) in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws

¹ See Symposium: Reflections on *City of Boerne v. Flores*, *William and Mary Law Review* 39 (1998) 601.

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."

The Act's stated purposes are: "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*. . . ."

. . . .

Under our Constitution, the Federal Government is one of enumerated powers. . . . 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."

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. . . .

. . . .

In defense of the Act respondent contends . . . that RFRA is permissible enforcement legislation. Congress, it is said, is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process Clause, the free exercise of religion, beyond what is necessary under *Smith*. It is said the congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law's effects accords with the settled understanding that §5 includes the power to enact legislation designed to prevent as well as remedy constitutional violations. It is further contended that Congress' §5 power is not limited to remedial or preventive legislation.

All must acknowledge that §5 is "a positive grant of legislative power" to Congress. . . .

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." . . . 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 . . . as a measure to combat racial discrimination in voting . . . despite the facial constitutionality of the tests. . . .

It is also true, however, that "as broad as the congressional enforcement power is, it is not unlimited." . . . 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." . . .

Congress' power under §5, however, extends only to "enforcing" the provisions of the Fourteenth Amendment. . . . 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.

The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. . . . In February, Republican Representative John Bingham of Ohio reported the following draft amendment to the House of Representatives on behalf of the Joint Committee:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

The proposal encountered immediate opposition, which continued through three days of debate. Members of Congress from across the political spectrum criticized the Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. . . . Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution. Typifying these views, Republican Representative Robert Hale of New York labeled the Amendment "an utter departure from every principle ever dreamed of by the men who framed our Constitution," . . . and warned that under it "all State legislation, in its codes of civil and criminal jurisprudence and procedures . . . may be overridden, may be repealed or abolished, and the law of Congress established instead." . . .

As a result of these objections having been expressed from so many different quarters, the House voted to table the proposal until April. . . . The congressional action was seen as marking the defeat of the proposal. . . . The measure was defeated "chiefly because many members of the legal profession saw in [it] . . . a dangerous centralization of power." Instead, the Joint Committee began drafting a new article of Amendment, which it reported to Congress on April 30, 1866.

Section 1 of the new draft Amendment imposed self-executing limits on the States. Section 5 prescribed that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." . . . Under the revised Amendment, Congress' power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective. Representative Bingham said the new draft would give Congress "the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State." . . .

. . . .

The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. The Bingham draft, some thought, departed from that tradition by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation. . . . As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. . . . The power to interpret the Constitution in a case or controversy remains in the Judiciary.

. . . .

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." . . . Under this approach, it is difficult to conceive of a principle that would limit congressional power. . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

. . . .

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. . . . Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.

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. . . . 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.

MR. JUSTICE STEVENS, concurring.

It is my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a “law respecting an establishment of religion” that violates the First Amendment to the Constitution.

. . . .

MR. JUSTICE SCALIA, with whom MR. JUSTICE STEVENS joins, concurring in part.

I write to respond briefly to the claim of Justice O'Connor's dissent . . . that historical materials support a result contrary to the one reached in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). We held in *Smith* that the Constitution's Free Exercise Clause “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” . . . The material that the dissent claims is at odds with *Smith* either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent's interpretation of the Free Exercise Clause. . . .

. . . .

MS. JUSTICE O'CONNOR, with whom MR. JUSTICE BREYER joins, dissenting.

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act (RFRA) is a proper exercise of Congress' power to enforce §5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument. If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.

I agree with much of the reasoning set forth in . . . the Court's opinion. Indeed, if I agreed with the Court's standard in *Smith*, I would join the opinion. As the Court's careful and thorough historical analysis shows, Congress lacks the “power to decree the substance of the Fourteenth Amendment's restrictions on the States.” Rather, its powers under §5 of the Fourteenth Amendment extends only to enforcing the Amendment's provisions. In short, Congress lacks the ability independently to define or expand the scope of constitutional rights by statute. . . . This recognition does not, of course, in any way diminish Congress' obligation to draw its own conclusions regarding the Constitution's meaning.

Congress, no less than this Court, is called upon to consider the requirements of the Constitution and to act in accordance with its dictates. But when it enacts legislation in furtherance of its delegated powers, Congress must make its judgments consistent with this Court's exposition of the Constitution and with the limits placed on its legislative authority by provisions such as the Fourteenth Amendment.

The Court's analysis of whether RFRA is a constitutional exercise of Congress' §5 power . . . is premised on the assumption that *Smith* correctly interprets the Free Exercise Clause. This is an assumption that I do not accept. . . .

. . . .

Stare decisis concerns should not prevent us from revisiting our holding in *Smith*. “[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213 (1995) . . . This principle is particularly true in constitutional cases where – as this case plainly illustrates – “correction through legislative action is practically impossible.” . . . I believe that, in light of both our precedent and our Nation's tradition of religious liberty, *Smith* is demonstrably wrong. Moreover, it is a recent decision. As such, it has not engendered the kind of reliance on its continued application that would militate against overruling it. Cf. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 533, 855-856 (1992).

. . . .

I respectfully dissent from the Court's disposition of this case.

MR. JUSTICE SOUTER, dissenting.

. . . .

MR. JUSTICE BREYER, dissenting.

. . . .

The Nomination of Samuel Alito to the U.S. Supreme Court (2006)¹

Judge Samuel Alito was known as a well-respected but low-key and professional conservative who had made a career as a prosecutor and judge. He had served in the Reagan administration and been appointed to the Third Circuit Court of Appeals by President George W. Bush. In 2005, he was nominated to fill the vacancy of the retiring Justice Sandra Day O'Connor, and his confirmation hearings were scheduled to follow those of John Roberts, who had been nominated to replace the deceased Chief Justice William Rehnquist. O'Connor's departure had particular significance because she had cast a critical vote to uphold abortion rights in the 1992 Casey v. Planned Parenthood decision, which had emphasized the importance of stare decisis or following precedent in such cases. Alito's confirmation hearings then became an opportunity for the senators and the nominee to articulate their varying views on the importance of following established precedent in future cases and the conditions under which precedent should be followed and might be set aside. Recent confirmation hearings have also become an opportunity for senators to attempt to influence Supreme Court nominees, as well as showcase their own views for their political supporters and constituents in a very public event. The members of the Senate Judiciary Committee tend to be drawn from the ideological extremes, since they have the most interest in

¹ Excerpt from United States Senate Judiciary Committee, Hearings on the Nomination of Judge Samuel Alito to the U.S. Supreme Court, January 10-11, 2006.

the issues that come before the committee. Committee Chairman Arlen Specter was an exception in being a relative moderate from a swing state. By contrast, Republican Sam Brownback was preparing to run a presidential campaign as a social conservative, and Democrat Charles Schumer, a sharp-elbowed liberal, was organizing the national Democratic campaign for the 2006 midterm Senate elections.

Senator SPECTER [Republican, Pennsylvania]

....

Let me move directly into *Casey v. Planned Parenthood*

How would you weigh that consideration [stare decisis] on the woman's right to choose?

Judge ALITO: Well, I think the doctrine of stare decisis is a very important doctrine. It's a fundamental part of our legal system.

And it's the principle that courts in general should follow their past precedents. And it's important for a variety of reasons. It's important because it limits the power of the judiciary. It's important because it protects reliance interests. And it's important because it reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions.

It's not an exorable command, but it is a general presumption that courts are going to follow prior precedents.

....

SPECTER: Let me move on to another important quotation out of *Casey*.

Quote: "A terrible price would be paid for overruling *Casey* -- or overruling *Roe*. It would seriously weaken the court's capacity to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law. And to overrule *Roe* under fire would subvert the court's legitimacy."

Do you see the legitimacy of the court being involved in the precedent of *Casey*?

ALITO: Well, I think that the court and all the courts -- the Supreme Court, my court, all of the federal courts -- should be insulated from public opinion. They should do what the law requires in all instances.

That's why the members of the judiciary are not elected. We have a basically democratic form of government, but the judiciary is not elected. And that's the reason: so that they don't do anything under fire. They do what the law requires.

....

SPECTER: Judge Alito, let me move to the dissenting opinion by Justice Harlan in *Poe v. Ullman* where he discusses the constitutional concept of liberty and says, quote, "The traditions from which liberty developed, that tradition is a living thing."

Would you agree with Justice Harlan that the Constitution embodies the concept of a living thing?

ALITO: I think the Constitution is a living thing in the sense that matters, and that is that it is -- it sets up a framework of government and a protection of fundamental rights that we have lived under very successfully for 200 years. And the genius of it is that it is not terribly specific on certain things. It sets out -- some things are very specific, but it sets out some general principles and then leaves it for each generation to apply those to the particular factual situations that come up.

....

The liberty component of the Fifth Amendment and the 14th Amendment, which I was talking about earlier, embody the deeply-rooted traditions of a country. And it's up to each -- those traditions and those rights apply to new factual situations that come up. As times change, new factual situations come up, and the principles have to be applied to those situations.

The principles don't change. The Constitution itself doesn't change. But the factual situations change. And, as new situations come up, the principles and the rights have to be applied to them.

SPECTER: Judge Alito, the commentators have characterized *Casey* as a super-precedent.

....

Do you agree that *Casey* is a super-precedent . . . ?

ALITO: Well, I personally would not get into categorizing precedents as super-precedents or super-duper precedents or any...

SPECTER: Did you say super-duper?

ALITO: Right.

(LAUGHTER)

SPECTER: Good. I like that.

ALITO: Any sort of categorization like that sort of reminds me of the size of the laundry detergent in the supermarket.

I agree with the underlying thought that when a precedent is reaffirmed . . . each time it's reaffirmed that is a factor that should be taken into account in making the judgment about stare decisis. And when a precedent is reaffirmed on the ground that stare decisis precludes or counsels against reexamination of the merits of the precedent, then I agree that that is a precedent on precedent.

Now, I don't want to leave the impression that stare decisis is an inexorable command because the Supreme Court has said that it is not. But it is a judgment that has to be based -- taking into account all the factors that are relevant and that are set out in the Supreme Court's cases.

....

Senator SCHUMER [Democrat, New York] . . .

Now you've tried to reassure us that stare decisis means a great deal to you. You point out that prior Supreme Court precedents, like *Roe*, will stand because of the principle.

....

I just want to ask you this. Stare decisis is not an immutable principle, right?

ALITO: It is a strong principle. And in general courts follow precedence. The Supreme Court needs a special justification for overruling a prior case.

SCHUMER: But they have found them. . . .

In recent years the court has overruled various cases in a rather short amount of time. You mentioned I think it was *National League of Cities* about fair labor standards, and it was overruled just nine years later by *Garcia*. . . . *Bowers v. Hardwick* was overruled by *Lawrence v. Texas*. And of course. . . . *Plessy* was overruled by *Brown*. . . .

So the only point I'm making is that despite stare decisis, it doesn't mean a Supreme Court justice who strongly believes in stare decisis won't ever overrule a case. Is that correct? You can give me a yes or no.

ALITO: Yes.

....

SCHUMER: OK. . . . And remember what [Justice Thomas] said when he was sitting in the same chair

you're sitting in. He pledged fealty to stare decisis.

Justice Scalia said Justice Thomas, "doesn't believe in stare decisis, period. If a constitutional line of authority is wrong, he would say, 'Let's get it right.'"

Then Justice Scalia said, "I wouldn't" – speaking of himself – "I wouldn't do that."

....

And I'm not saying Justice Thomas was disingenuous with the committee when he was here. I'm just saying that stare decisis is something of an elastic concept that different judges apply in different ways.

....

Senator DURBIN [Democrat, Illinois]:

....

But let me just ask you this. John Roberts said that *Roe v. Wade* is the settled law of the land. Do you believe it is the settled law of the land?

ALITO: *Roe v. Wade* is an important precedent of the Supreme Court. It was decided in 1973, so it's been on the books for a long time. It has been challenged on a number of occasions, and I discussed those yesterday. And it is my -- and the Supreme Court has reaffirmed the decision, sometimes on the merits, sometimes -- in *Casey*, based on stare decisis.

And I think that when a decision is challenged and it is reaffirmed, that strengthens its value as stare decisis, for at least two reasons. First of all, the more often a decision is reaffirmed, the more people tend to rely on it. And secondly, I think stare decisis reflects the view that there is wisdom embedded in decisions that have been made by prior justices, who take the same oath and are scholars and are conscientious. And when they examine a question and they reach a conclusion, I think that's entitled to considerable respect. And of course the more times that happens, the more respect the decision is entitled to. And that's my view of that.

So it is -- it's very important precedent that is obviously --

DURBIN: Is it the settled law of the land?

ALITO: It is a -- if "settled" means that it is -- it can't be reexamined, then that's one thing. If "settled" means that it is a precedent that is entitled to respect as stare decisis -- and all of the factors that I've mentioned come into play, including the reaffirmation and all of that -- then it is a precedent that is protected, entitled to respect under the doctrine of stare decisis, in that way.

DURBIN: How do you see it?

ALITO: I have explained, Senator, as best I can, how I see it. It is a precedent that has now been on the books for several decades. It has been challenged. It has been reaffirmed. But it is an issue that is involved in litigation now, at all levels. There is an abortion case before the Supreme Court this term.

There are abortion cases in the lower courts. I've sat on three of them on the Court of Appeals for the 3rd Circuit. I'm sure there are others in other courts of appeals or working their way toward the courts of appeals right now. So it's an issue that is involved and a considerable amount of litigation that is going on.

....

Senator BROWNBACK [Republican, Kansas]

Judge Alito, the Supreme Court has gotten a number of things wrong at times, too. That would be correct. And the answer when the court gets things wrong is to overturn the case. Is that -- that's the way it works, isn't that correct?

ALITO: Well, when the court gets something wrong and there's a prior precedent, then you have to analyze the doctrine of stare decisis. It is an important doctrine, and I've said a lot about it –

BROWNBACK: Wait. Let me just ask you. Was *Plessy* wrong, *Plessy v. Ferguson*?

ALITO: *Plessy* was certainly wrong.

BROWNBACK: OK, I mean, and you've gone through this. *Brown v. Board of Education*, which is in my hometown of Topeka, Kansas. . . . Fifty years ago, that overturned *Plessy*. *Plessy* had stood on the books since 1896. I don't know if you knew the number. And I've got a chart up here. It was depended upon by a number of people for a long period of time. You've got it sitting on the books for 60 years, twice the length of time of *Roe v. Wade*. You've got these number of cases that considered *Plessy* and uphold *Plessy* to the dependency. And yet *Brown* comes long . . . And the court looks at this and they say unanimously, that's just not right.

Now, stare decisis would say in the *Brown* case you should uphold *Plessy*. Is that correct?

ALITO: It was -- it was -- certainly it would be a factor that you would consider in determining whether to overrule it. It's a doctrine that you would consider.

BROWNBACK: But obviously -- obviously, *Brown* overturned it. And thank goodness it did, correct?

ALITO: Certainly.

BROWNBACK: That it overturned all these super-duper precedents that had been dependent upon in this case because the court got it wrong in *Plessy*. Is that correct?

ALITO: The court certainly got it wrong in *Plessy*, and it got it spectacularly wrong in *Plessy*, and it took a long time for that erroneous decision to be overruled.

. . . .

BROWNBACK: I want to give you another number. And that is that in over 200 other cases, the court has revisited and revised earlier judgments. In other words, in some portion or in all the cases, the court got it wrong in some 200 cases. And thank goodness the court's willing to review various cases.

. . . .

Settled law? Super-duper precedents? I think there's places where the court gets it wrong, and hopefully they will continue to be willing to revisit it.

. . . .

Note: The Most Activist Court Ever?

There is an argument to be had that the contemporary U.S. Supreme Court is “most activist” in American history. That was indeed the provocative title of a book by the political scientist Thomas Keck in 2004, and other scholars have made similar suggestions.¹ The language of “judicial activism” is politically loaded, of course, but it is also hard to pin down. It has been used in a myriad of ways over time. Judges might be accused of “activism” whenever they strike down a law as unconstitutional. Or they might be activist when they overturn established precedents. Or when they seem to be engaging in policymaking, or when they cannot provide an adequate rationale for their decisions. Or even when they refuse to take any action at all. Many of these possible ideas about judicial activism are in conflict with

¹ Thomas M. Keck, *The Most Activist Supreme Court in History* (Chicago: University of Chicago Press, 2004).

one another, and there is unlikely to be broad agreement about when judges have crossed the line and become activist. But one relatively objective measure of how active, if not necessarily how *activist*, the Supreme Court is focuses on how many times it has struck down laws as unconstitutional. All things being equal, more active Court might strike down relatively more laws than a relatively deferential or passive Court.

Insert Figure 11-3 about here

Figure 11-3 tracks the number of U.S. Supreme Court cases that invalidate the application of state and federal laws on constitutional grounds since 1970. It continues the story of judicial review by the Court where Figure 8-5 left off. As Figure 8-5 indicated, the Warren and early Burger Courts reached historically unprecedented levels of activity in striking down state laws in the 1960s and 1970s, resulting in a strong political backlash in Congress and elsewhere. When he ran for office in 1968, Richard Nixon pledged to appoint justices who would behave differently, and Ronald Reagan did the same in 1980. Once conservatives won a majority on the Court, especially with the appointment of the Reagan justices in the 1980s, the Court dramatically decreased the number of state laws that it struck down. In terms of invalidations of state laws, the Court eventually returned to numbers that it had not seen since the early 1950s. Meanwhile, the Rehnquist Court in the late 1990s briefly turned its attention to Congress, striking down more federal statutory provisions over a five year period than it had during any similar window since the New Deal. For a short time, the Court even found itself in the historically unusual circumstance of striking down federal laws in more cases than state laws.

What caught the attention of many scholars and journalists in the late 1990s was the notable increase in the number of cases in which the Court struck down acts of Congress. A large number of those decisions – though certainly not all of them – were decided on federalism or separation of powers grounds. The conservative justices led the way in many of those cases. Liberals began to debate whether it was the conservatives who were engaged in judicial activism, and whether judicial restraint or even the elimination of judicial review might not be a good thing after all. The pace of invalidations of federal laws began to fall off after the 1990s, however, and the Court’s review of Congress during that period never had the same kind of huge impact on politics or public policy that it had had during some earlier periods, such as the 1930s.

As Keck noted, one of the interesting features of the contemporary Court that made it surprisingly active in striking down laws is that invalidated state and federal laws from both the left and the right. Swing justices such as Sandra Day O’Connor and Anthony Kennedy joined both liberal coalitions to strike down statutes that the conservatives thought should be upheld and conservative coalitions to strike down statutes that the liberals thought should be upheld. As a result, a wide range of legislation has come under fire from the contemporary Supreme Court.

B. Justiciability and Political Questions

Doe v. Bush, 323 F.3d 133 (1st Cir. 2003)

In 2003, a large group of plaintiffs that included military personnel and their parents (the “John Doe” that provides the name for the case) and Democratic congressmen such as Dennis Kucinich, a candidate for the 2004 Democratic presidential nomination filed suit in a federal district court in Massachusetts seeking an injunction against President George W. Bush and Secretary of Defense Donald Rumsfeld to prevent them taking military action in Iraq. Such suits have been common since the Vietnam era, but have met with little success in the courts. After the district court dismissed the suit, the plaintiffs appealed to the U.S. Court of Appeals for the First Circuit, which affirmed the dismissal. The three-judge panel for the circuit court included two judges appointed by Republican presidents and one appointed by a Democratic president. The U.S. Supreme Court did not hear the case. The case, like others before it

seeking to declare military actions unconstitutional and illegal, was dismissed as not presenting a justiciable "case or controversy." Often such cases have been dismissed as "political questions," precluding the possibility of judicial review. In Doe, the circuit court took a somewhat different approach and put off the case as not yet ripe for judicial resolution, leaving open the possibility that judicial intervention might be a possibility in a different case.

MR. JUDGE LYNCH delivered the opinion of the Court.

In October 2002, Congress passed the Authorization for Use of Military Force Against Iraq Resolution of 2002 (the "October Resolution") Plaintiffs argue that the October Resolution is constitutionally inadequate to authorize the military offensive that defendants are now planning against Iraq. See U.S. Const. art. I, § 8, cl. 11 (granting Congress the power "to declare war"). They base this argument on two theories. They argue that Congress and the President are in collision -- that the President is about to act in violation of the October Resolution. They also argue that Congress and the President are in collusion -- that Congress has handed over to the President its exclusive power to declare war.

. . . .

The case before us is a somber and weighty one. We have considered these important concerns carefully, and we have concluded that the circumstances call for judicial restraint. The theory of collision between the legislative and executive branches is not suitable for judicial review, because there is not a ripe dispute concerning the President's acts and the requirements of the October Resolution passed by Congress. By contrast, the theory of collusion, by its nature, assumes no conflict between the political branches, but rather a willing abdication of congressional power to an emboldened and enlarged presidency. That theory is not fit for judicial review for a different, but related, reason: Plaintiffs' claim that Congress and the President have transgressed the boundaries of their shared war powers, as demarcated by the Constitution, is presently insufficient to present a justiciable issue. Common to both is our assessment that, before courts adjudicate a case involving the war powers allocated to the two political branches, they must be presented with a case or controversy that clearly raises the specter of undermining the constitutional structure.

. . . .

The Constitution reserves the war powers to the legislative and executive branches. This court has declined the invitation to become involved in such matters once before. Over thirty years ago, the First Circuit addressed a war powers case challenging the constitutionality of the Vietnam War on the basis that Congress had not declared war. *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971). The court found that other actions by Congress, such as continued appropriations to fund the war over the course of six years provided enough indication of congressional approval to put the question beyond the reach of judicial review:

The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view. This question we do not face.

. . . .

The lack of a fully developed dispute between the two elected branches, and the consequent lack of a clearly defined issue, is exactly the type of concern which causes courts to find a case unripe. In his concurring opinion in *Goldwater v. Carter*, 444 U.S. 996 (1979), Justice Powell stated that courts should decline, on ripeness grounds, to decide "issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse." *Id.* at 997 (Powell, J., concurring). A number of courts have adopted Justice Powell's ripeness reasoning in cases involving military powers. See *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34, 37 (2d Cir. 1985) (per curiam); *Dellums v. Bush*, 752 F. Supp. 1141, 1150 & nn.23-25 (D.D.C. 1990); see also *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210-11 (D.C. Cir. 1985) (R. Ginsburg, J., concurring).

....
 Two factors are used to evaluate ripeness: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). Ordinarily, both factors must be present. *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995).

The hardship prong of this test is most likely satisfied here; the current mobilization already imposes difficulties on the plaintiff soldiers and family members, so that they suffer "present injury from a future contemplated event." . . .

The fitness inquiry here presents a greater obstacle. Fitness "typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *Ernst & Young*, at 535. . . . "The question of fitness does not pivot solely on whether a court is capable of resolving a claim intelligently, but also involves an assessment of whether it is appropriate for the court to undertake the task." *Ernst & Young*, at 537. These prudential considerations are particularly strong in this case, which presents a politically-charged controversy involving momentous issues, both substantively (war and peace) and constitutionally (the powers of coequal branches). See *Dellums*, at 1149.

....
 The [United Nations] Security Council, now divided on the issue, may reach a consensus. To evaluate this claim now, the court would need to pile one hypothesis on top of another. We would need to assume that the Security Council will not authorize war, and that the President will proceed nonetheless. See *id.* at 72-73 (outlining chain of uncertain events necessary to make case ripe); *Ernst & Young*, at 538 (same).

Thus, even assuming that plaintiffs correctly interpret the commands of the legislative branch, it is impossible to say yet whether or not those commands will be obeyed. As was the situation in *Goldwater*, "in the present posture of this case, we do not know whether there will ever be an actual confrontation between the Legislative and Executive Branches." at 998 (Powell, J., concurring).

Our analysis is based on ripeness rather than the political question doctrine.¹ The political question doctrine -- that courts should not intervene in questions that are the province of the legislative and executive branches -- is a famously murky one. . . . It has also been used fairly infrequently to block judicial review. The modern definition of the doctrine was established in the landmark case of *Baker v. Carr*, 369 U.S. 186 (1962). In the forty years since that case, the Supreme Court has found a case nonjusticiable on the basis of the political question doctrine only twice. See *Nixon v. United States*, 506 U.S. 224, 236 (1993) (Senate procedures for impeachment of a federal judge); *Gilligan v. Morgan*, 413 U.S. 1, 12 (1973) (training, weaponry, and orders of Ohio National Guard). Our court has been similarly sparing in its reliance on the political question doctrine.

Ultimately, however, the classification matters less than the principle. If courts may ever decide whether military action contravenes congressional authority, they surely cannot do so unless and until the available facts make it possible to define the issues with clarity.

....
 According to this second argument, the Constitution deliberately vested power to declare war in the legislative branch as a necessary check on the power of the executive branch, and Congress is not free

¹ While the Supreme Court has not considered a modern war powers case, lower courts have, and they have reached differing conclusions about the applicability of the political question doctrine. Compare, e.g., *Campbell v. Clinton*, 203 F.3d 19, 37-41 (D.C. Cir. 2000) (Tatel, J., concurring) (arguing that challenge to air campaign in Yugoslavia would not pose a political question); *Berk v. Laird*, 429 F.2d 302, 306 (2d Cir. 1970) (holding that challenge to Vietnam War did not necessarily raise political question and remanding); *Dellums*, at 1150 (rejecting argument that political question doctrine foreclosed challenge to Persian Gulf War); with *Campbell*, 203 F.3d at 24-28 (Silberman, J., concurring) (arguing that courts lack manageable standards to adjudicate such cases); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309-11 (2d Cir. 1973) (challenge to hostilities in Cambodia rejected as political question); *Ange*, 752 F.Supp. at 512 (same for Persian Gulf War). See generally *Laird*, at 29 n.2 (collecting cases).

to upset this careful balance by giving power to the President. This claim of collusion does not align precisely with the test that the political branches have yet to reach a "constitutional impasse"; the claim is that the branches have agreed to an unconstitutional transfer of the "war declaration" powers from Congress to the President. Some initial review of the merits of the claim is "inherent when the constitutional issue is posed in terms of scope of authority." *Laird*, at 33-34.

The Supreme Court has been willing to adjudicate other cases concerning the distribution of constitutional authority between the legislative and executive branches, notwithstanding the call for restraint embodied in the political question doctrine. . . .

The Supreme Court has recognized a role for judicial review of these types of separation of powers claims even when Congress appears to have agreed to the challenged arrangement. In *Clinton v. City of New York*, a claim was brought by citizens deprived of the benefits of an appropriation that the President cancelled under the procedures in the Line Item Veto Act, 2 U.S.C. §§ 691-692 (2000). These citizens argued that Congress had unconstitutionally delegated to the President its authority under the Presentment Clause, U.S. Const. art. I, § 7, cl. 2. The Court reviewed the constitutionality of the Act despite apparent support for it from both of the other branches, which had jointly enacted the statute and used its procedures. See *Clinton*, at 428-36 (reviewing jurisdiction extensively without consideration of political question doctrine); see also *Chadha*, at 941 (judicial review of legislative veto that had similarly been enacted and used).

. . . .

There are also, however, significant differences between *Clinton* and the case before us. For one, in *Clinton* the President had fully exercised the power that was at issue, which "removed any concern" about ripeness. For another, the Line Item Veto Act contained specific provisions, accepted by both Congress and the President when they enacted the law, which not only permitted judicial review of the statute's validity but created a special expedited process for it. . . .

Perhaps the most important difference is the shared nature of the powers in question here. The Constitution explicitly divides the various war powers between the political branches. . . .

Given this "amalgam of powers," the Constitution overall "envisages the *joint* participation of the Congress and the executive in determining the scale and duration of hostilities." *Laird*, at 31-32 (emphasis added). "The great ordinances of the Constitution do not establish and divide fields of black and white." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring). Rather, there is sometimes a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Youngstown*, at 637 (Jackson, J., concurring).

. . . .

. . . . The Supreme Court recently and forcefully reiterated that, notwithstanding the Constitution's vesting of "all legislative power" in Congress, U.S. Const. art. I, § 1 (emphasis added), enactments which leave discretion to the executive branch are permissible as long as they offer some "intelligible principle" to guide that discretion. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001). War powers, in contrast to "all legislative power," are shared between the political branches. Furthermore, the Supreme Court has also suggested that the nondelegation doctrine has even less applicability to foreign affairs. See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)

Nor is there clear evidence of congressional abandonment of the authority to declare war to the President. To the contrary, Congress has been deeply involved in significant debate, activity, and authorization connected to our relations with Iraq for over a decade, under three different presidents of both major political parties, and during periods when each party has controlled Congress. It has enacted several relevant pieces of legislation expressing support for an aggressive posture toward Iraq

It is true that "courts possess power to review either legislative or executive action that transgresses identifiable textual limits" on constitutional power. *Nixon*, at 238. Questions about the structure of congressional power can be justiciable under the proper circumstances. See, e.g., *Clinton*, at 428-36; *Chadha*, at 941-44. But courts are rightly hesitant to second-guess the form or means by which

the coequal political branches choose to exercise their textually committed constitutional powers. See *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971). As the circumstances presented here do not warrant judicial intervention, the appropriate recourse for those who oppose war with Iraq lies with the political branches.

Dismissal of the complaint is *affirmed*.

Massachusetts v. Environmental Protection Agency, 549 U.S. ___, 127 S. Ct. 1438 (2007)

The Clean Air Act requires the Environmental Protection Agency (EPA) to regulate “the emission of any air pollutant.” Numerous environmental organizations in 1999 asked the EPA to regulate those greenhouse gas emissions which the scientific evidence indicated were responsible for increased global warming. While Clinton administration officials were sympathetic, the new Bush administration was not. The EPA in 2003 declared that no authority existed under the Clean Air Act to regulate greenhouse gases and that regulation would not be wise policy. Several states, local governments, and environmental groups brought suit to challenge this ruling. The EPA insisted that the suit could not be heard, both because the state governments were not proper parties to the case and because no party was suffering the particularized injury necessary for satisfying the case or controversy requirement.

*Does Justice Stevens make a convincing case that Massachusetts was an appropriate party and had suffered the constitutionally appropriate particularized injury or does Chief Justice Roberts correctly claim that this is a matter best settled by the elected branches of government? To what extent do you believe the difference between the justices is over legal questions of standing or the actual existence of global warming? Notice the effort Justice Stevens makes in his majority opinion to appeal to Justice Kennedy, the crucial fifth vote in this case. Chief Justice Roberts does not seem to make a similar effort? Note that both Chief Justice Roberts and Justice Alito seemed to have been more accommodating to Justice Kennedy in *Hein v. Freedom from Religion Foundation, Inc.*, discussed in note 1. Why might explain this difference in strategy?*

JUSTICE STEVENS delivered the opinion of the Court.

Calling global warming “the most pressing environmental challenge of our time,” a group of States, local governments, and private organizations, alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked us to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.

In response, EPA, supported by 10 intervening States and six trade associations, correctly argued that we may not address those two questions unless at least one petitioner has standing to invoke our jurisdiction under Article III of the Constitution. . . .

. . . .
Article III of the Constitution limits federal-court jurisdiction to “Cases” and “Controversies.” Those two words confine “the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” *Flast v. Cohen*. . . . It is therefore familiar learning that no justiciable “controversy” exists when parties seek adjudication of a political question, . . . when they ask for an advisory opinion, . . . or when the question sought to be adjudicated has been mooted by subsequent developments. . . . This case suffers from none of these defects.

The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. That authorization is of critical importance to the standing inquiry: Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Lujan*, 504 U.S., at 580 . . . (KENNEDY, J., concurring in part and concurring in judgment). "In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Ibid.* We will not, therefore, "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."

EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree. At bottom, "the gist of the question of standing" is whether petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker v. Carr*. As JUSTICE KENNEDY explained in his *Lujan* concurrence:

While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury. . . . However, a litigant to whom Congress has "accorded a procedural right to protect his concrete interests," . . . -- here, the right to challenge agency action unlawfully withheld, -- "can assert that right without meeting all the normal standards for redressability and immediacy." . . . When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. . . .

. . . . Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the "emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." . . . Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. . . . Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.

With that in mind, it is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent." . . . There is, moreover, a "substantial likelihood that the judicial relief requested" will prompt EPA to take steps to reduce that risk. . . .

The Injury

The harms associated with climate change are serious and well recognized. Indeed, the NRC Report itself -- which EPA regards as an "objective and independent assessment of the relevant science," . . . -- identifies a number of environmental changes that have already inflicted significant harms, including

“the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years”

. . . .

That these climate-change risks are “widely shared” does not minimize Massachusetts’ interest in the outcome of this litigation. . . . [R]ising seas have already begun to swallow Massachusetts’ coastal land. . . . Because the Commonwealth “owns a substantial portion of the state’s coastal property,” . . . it has alleged a particularized injury in its capacity as a landowner. . . .

Causation

EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA’s refusal to regulate such emissions “contributes” to Massachusetts’ injuries.

EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners’ injuries that the agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.

But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. See *Williamson v. Lee Optical of Okla., Inc.*, They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed. . . .

. . . .

In sum -- at least according to petitioners’ uncontested affidavits -- the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA’s denial of their rulemaking petition.

[After finding standing, Justice Stevens ruled that federal statutes required the Environmental Protection Agency to regulate greenhouse gases]

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

. . . .

. . . . I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court’s standing jurisprudence simply recognizes that redress of grievances of the sort at issue here “is the function of Congress and the Chief Executive,” not the federal courts. *Lujan v. Defenders of Wildlife*. . . .

. . . .

Our modern framework for addressing standing is familiar: “A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” . . . Applying that standard here, petitioners bear the burden of alleging an injury that is fairly traceable to the Environmental Protection Agency’s failure to promulgate new motor vehicle

greenhouse gas emission standards, and that is likely to be redressed by the prospective issuance of such standards.

. . . .

When the Court actually applies the three-part test, it focuses . . . on the State's asserted loss of coastal land as the injury in fact. If petitioners rely on loss of land as the Article III injury, however, they must ground the rest of the standing analysis in that specific injury. That alleged injury must be "concrete and particularized," . . . and "distinct and palpable." . . . Central to this concept of "particularized" injury is the requirement that a plaintiff be affected in a "personal and individual way." . . .

The very concept of global warming seems inconsistent with this particularization requirement. Global warming is a phenomenon "harmful to humanity at large" . . . and the redress petitioners seek is focused no more on them than on the public generally -- it is literally to change the atmosphere around the world.

. . . . [A]side from a single conclusory statement, there is nothing in petitioners' 43 standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th century global sea level increases. It is pure conjecture.

The Court's attempts to identify "imminent" or "certainly impending" loss of Massachusetts coastal land fares no better. . . . One of petitioners' declarants predicts global warming will cause sea level to rise by 20 to 70 centimeters by the year 2100. . . . Another uses a computer modeling program to map the Commonwealth's coastal land and its current elevation, and calculates that the high-end estimate of sea level rise would result in the loss of significant state-owned coastal land. . . . But the computer modeling program has a conceded average error of about 30 centimeters and a maximum observed error of 70 centimeters. . . . [A]ccepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless. . . .

. . . .

Petitioners view the relationship between their injuries and EPA's failure to promulgate new motor vehicle greenhouse gas emission standards as simple and direct: Domestic motor vehicles emit carbon dioxide and other greenhouse gases. Worldwide emissions of greenhouse gases contribute to global warming and therefore also to petitioners' alleged injuries. Without the new vehicle standards, greenhouse gas emissions -- and therefore global warming and its attendant harms -- have been higher than they otherwise would have been; once EPA changes course, the trend will be reversed.

The Court ignores the complexities of global warming, and does so by now disregarding the "particularized" injury it relied on in step one, and using the dire nature of global warming itself as a bootstrap for finding causation and redressability. First, it is important to recognize the extent of the emissions at issue here. Because local greenhouse gas emissions disperse throughout the atmosphere and remain there for anywhere from 50 to 200 years, it is global emissions data that are relevant. . . . According to one of petitioners' declarations, domestic motor vehicles contribute about 6 percent of global carbon dioxide emissions and 4 percent of global greenhouse gas emissions. . . . The amount of global emissions at issue here is smaller still; § 202(a)(1) of the Clean Air Act covers only new motor vehicles and new motor vehicle engines, so petitioners' desired emission standards might reduce only a fraction of 4 percent of global emissions.

This gets us only to the relevant greenhouse gas emissions; linking them to global warming and ultimately to petitioners' alleged injuries next requires consideration of further complexities. . . .

Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards. In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury -- the loss of Massachusetts coastal land -- the connection is far too speculative to establish causation.

. . . . [T]he Court reasons, because any decrease in domestic emissions will "slow the pace of global emissions increases, no matter what happens elsewhere." . . . Every little bit helps, so Massachusetts can sue over any little bit.

The Court's sleight-of-hand is in failing to link up the different elements of the three-part standing test. What must be likely to be redressed is the particular injury in fact. The injury the Court looks to is the asserted loss of land. The Court contends that regulating domestic motor vehicle emissions will reduce carbon dioxide in the atmosphere, and therefore redress Massachusetts's injury. But even if regulation does reduce emissions -- to some indeterminate degree, given events elsewhere in the world -- the Court never explains why that makes it likely that the injury in fact -- the loss of land -- will be redressed. Schoolchildren know that a kingdom might be lost "all for the want of a horseshoe nail," but "likely" redressability is a different matter. The realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will likely prevent the loss of Massachusetts coastal land.

. . . [P]etitioners' true goal for this litigation may be more symbolic than anything else. The constitutional role of the courts, however, is to decide concrete cases -- not to serve as a convenient forum for policy debates. . . .

. . . . Today's decision recalls the previous high-water mark of diluted standing requirements, *United States v. Students Challenging Regulatory Agency Procedures*...

Over time, SCRAP became emblematic not of the looseness of Article III standing requirements, but of how utterly manipulable they are if not taken seriously as a matter of judicial self-restraint. SCRAP made standing seem a lawyer's game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches. Today's decision is SCRAP for a new generation.

. . . .
I respectfully dissent.

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

[Justice Scalia's dissent insisted that federal statutes did not require the Environmental Protection Agency regulate greenhouse gases]

Notes and Queries

1. In another 5-4 decision, the Roberts Court in *Hein v. Freedom from Religion Foundation, Inc.* limited *Flast v. Cohen* to cases in which the taxpayer challenged a federal statute that explicitly allocated funds to religious organizations. Justice Samuel Alito's plurality opinion sustaining President Bush's Faith-Based and Community Initiatives Program held that taxpayers lacked standing to make an Establishment Clause claim when religious organizations obtained federal funds as a consequence of discretionary spending by the President. "Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment," he wrote, "respondents' lawsuit is not directed at an exercise of congressional power, . . . and thus lacks the requisite "logical nexus" between taxpayer status "and the type of legislative enactment attacked." Justice Kennedy's concurrence explicitly reaffirmed *Flast* and the distinction between legislative and presidential allocations, insisting that "[t]he Court should not authorize the constant intrusion upon the executive realm that would result from granting taxpayer standing in the instant case." Six justices thought the *Flast* and *Hein* indistinguishable. Justice Scalia's concurrence, joined by Justice Thomas, insisted that *Hein* could not be distinguished from *Flast*, and that *Flast* ought to be overruled. Justice Souter's dissent, joined by Justices Breyer, Ginsburg, and Stevens, agreed that there was "no basis for [the Court's] distinction in either logic or precedent," but concluded that standing ought to be granted on the authority of *Flast*.

Were Justices Alito and Kennedy making a good faith effort to distinguish *Flast* from *Hein* or do you believe *Hein* is merely a step on the way to the eventual overruling of *Flast*. Are there sound legal or political reasons for refraining from overruling *Flast* at this time. How do you explain the difference

between Justice Kennedy's decision to vote for standing in *Massachusetts* and his rejection of standing in *Hein*?

C. Contemporary Judicial Politics

Note: Judicial Appointments and Confirmations

The president nominates judicial candidates, and the Senate confirms them. In order to be confirmed, a candidate must receive a majority of the votes cast in the Senate. In the modern Senate, there are two key thresholds that must be passed: the Judiciary Committee, which votes whether to recommend that the full Senate confirm a judicial nominee, and the full Senate, which votes whether to confirm the nominee. Every federal judicial nominee must go through the same process, whether they have been appointed to a district court or the U.S. Supreme Court. Traditionally, the U.S. Supreme Court nominations have attracted the most attention from the full Senate, from the media, and from interest groups, given the importance of that office. Although most Supreme Court nominations are successful and raise little controversy, it has been those nominations that have sometimes led to contentious battles on the floor of the Senate or in committee hearings. In recent years, however, the controversy over judicial appointments has seeped down into the process of filling vacancies on the lower courts as well.

Over the course of American history, there have been twenty-seven failed Supreme Court nominations. In total, 18 percent of the presidential nominations submitted to the Senate for vacancies on the Supreme Court have been withdrawn, voted down, or permanently postponed.¹ Most of those failures occurred in the nineteenth century, and they often occurred when the same party at least nominally held both the White House and the Senate. After a long period of unequaled presidential success, failed nominations have become somewhat more common again in recent decades. Lyndon Johnson, Richard Nixon, Ronald Reagan, and George W. Bush all lost Supreme Court nominees, with Robert Bork's rejection by a Democratic Senate in 1987 being perhaps the most notable.

Perhaps as significant as the reemergence of failed Supreme Court nominations has been the new level of contestation surrounding each vacancy on the Court. Interest groups now routinely mobilize their supporters in the general public and on capital hill whenever a vacancy occurs. The media closely covers the process, and senators are expected to be visible. Potential nominees are carefully scrutinized by the White House both to ensure that they are aligned with the beliefs of the president and to ensure that they do not have any "skeletons in the closet" or an unflattering "paper trail" that might create controversy during the confirmation hearings. Since the 1960s it has become common for even successful Supreme Court nominees to receive a significant number of no votes at their confirmation.²

Lower court nominees, especially nominees to the U.S. circuit courts, now get something like the same treatment as Supreme Court nominees. They are carefully vetted by the White House and the Senate. Interest groups mobilize to support or block their nominations. It is now recognized that many important legal decisions are made in the circuit courts, and that the nominees for the circuit courts are both important intellectual and legal figures in their own right and potential future Supreme Court nominees. There are many more ways to block circuit court nominations than Supreme Court nominations, however. Supreme Court nominations are high-profile, and there is a great deal of pressure on senators to move those nominations toward a vote by the full Senate in a timely way. The most effective way to kill a nomination, however, is to delay it. For most low-profile executive and judicial

¹ Keith E. Whittington, "Presidents, Senates, and Failed Supreme Court Nominations," *The Supreme Court Review* 2006 (2007): 401.

² See Lee Epstein and Jeffrey A. Segal, *Advice and Consent* (New York: Oxford University Press, 2005); Michael J. Gerhardt, *The Federal Appointments Process* (Durham, NC: Duke University Press, 2003).

nominations, opponents of the nomination prefer to obstruct the process and avoid a final vote on confirmation for as long as possible. This might involve a filibuster by a minority of senators to prevent a floor vote on the confirmation. But long before such tactics are necessary it might involve delaying committee hearings through a variety of formal or informal means, or simply delaying the scheduling of a floor vote by the majority party in the Senate. As a result, the time between nomination and successful confirmation of a circuit court judge approached a year during the second half of the Clinton administration and the George W. Bush administration. But, as Figure 11-3 illustrates, successful nominations were hard to come by. The increasing polarization of the parties and activist focus on the lower courts has led to a near gridlock over circuit court appointments as each party has sought to aggressively block the nominees of the other.¹

[Insert Figure 11-3 about here]

Senate Debate on the “Nuclear Option” (2005)²

In George W. Bush’s first term of office as president, the Republican Party held (at most) a slender one-seat majority in the Senate. Given both the circumstances of the contested 2000 presidential election and the increasing polarization of the political parties and judicial nominations of the prior several years, Democrats in the Senate resolved to make the ideological fitness of judicial nominees an explicitly relevant consideration in confirmation votes and to make use of procedural tools to obstruct votes on nominees that were sufficiently objectionable to the Democratic caucus. This applied not only to any potential Supreme Court vacancies (none appeared during the first term) but also to vacancies on the lower federal courts.

Of particular significance, liberal Democrats were willing to filibuster ideologically objectionable nominees. A “filibuster” is an extended debate by one or more senators on a given subject of Senate business, preventing further action by the Senate on that or other business. In practice, the mere threat of a filibuster is sufficient to prevent an item from coming to the floor because the modern Senate cannot afford to have its schedule tied up in an extended debate. According to current Senate rules, both legislative bills and nominations are subject to filibusters. Debate on any subject can be ended by a successful “cloture” vote, which by current rule requires the support of 60 senators. This means that a minimum of 40 senators can maintain a filibuster and prevent a final vote on a piece of legislation or a nomination from taking place.

The cloture rule is itself set by Senate majority and has been changed over time. Until the mid-twentieth century, it was not possible to end debate without the unanimous consent of all the senators. The cloture rule was gradually lowered to the current 60 percent of the senators. At the same time, filibusters became more important as the Senate became busier and the legislative calendar more crowded. The modern Senate could not afford the delay of even a short filibuster, and so even a credible filibuster threat can be enough to block legislation or a nomination. As a result, a modern “filibuster” is less likely to involve someone actually talking on the Senate floor for hours at a time than someone simply announcing that they intend to block a nominee or bill and have enough votes to prevent cloture.

After George Bush won reelection in 2004 and Republicans won a larger Senate majority (55 seats), the Democrats continued to filibuster several of the president’s judicial nominees, and there was an expectation that they might likewise filibuster a Supreme Court nominee. Senate majority leader Bill Frist responded by proposing the “nuclear option,” changing the Senate rule so that a simple majority could invoke cloture on judicial nominations – effectively eliminating the possibility of a minority filibuster of judicial nominees. Although this particular use of the filibuster was arguably a new one, the idea of the filibuster is deeply rooted in Senate tradition, and its elimination would take a weapon away

¹ See Nancy Scherer, *Scoring Points* (Stanford, CA: Stanford University Press, 2005).

² Excerpted from *Congressional Record*, 109th Cong. (15 April 2005; 27 April 2005), S3762-64, S4366-68.

from the Democrats and future Republicans when they again found themselves in the minority. It was uncertain if Frist had the Republican votes to trigger the nuclear option, but it was also uncertain that the liberals could hold 40 Democrat votes together against the risk that the elimination of the filibuster might be the response. The stand-off was resolved when a bipartisan group of centrist senators agreed to abandon both sides – the Democrats would agree to vote for cloture on most of the nominees and the Republicans would agree to vote against the nuclear option. As a result, the filibuster remained an option as the Democrats took over the White House and the Republicans moved into the minority in the Senate.

Mr. DURBIN (Democrat, Illinois)¹ . . .

First, let me say there is one thing that binds every Member of the Senate, Republican or Democrat or Independent. . . . That oath of office, where we stand solemnly before the Nation, before our colleagues, is an oath where we swear to uphold and defend the Constitution of the United States, this tiny little publication which has guided our Nation and our values for over two centuries.

Though we may disagree on almost everything else, we swear to uphold this document. We swear that at the end of the day we will be loyal to this Constitution of the United States. That, I think, is where this debate should begin, because this Constitution makes it very clear that when it comes to the rules of the Senate, it is the responsibility and authority of the Senate itself to make its rules. I refer specifically to article I, section 5. I quote from the Constitution:

Each House may determine the rules of its proceedings. . . .

Because of that, most courts take a hands-off attitude. It is their belief that we decide how we conduct business in this Chamber, as the House of Representatives will decide about theirs. That is our constitutional right.

When this Constitution was written, there was a question about whether we could bring together 13 different colonies and they would agree to have one Federal Government. The first suggestion was that we create a House of Representatives with one Congressman for each American person who will be counted. . . . But when the smaller States took a look at the House of Representatives, they were concerned. . . . The Great Compromise said let us resolve this by creating a Senate which will give to every State, large and small, the same number of Senators. . . . so the Senate would observe the rights of the minority, the smaller populated States, and give them an equal voice on the floor of the Senate.

The Senate rules were written to reflect that unique and peculiar institutional decision. We said within the Senate, following this same value and principle, that our rules would be written so the minority within the Senate would always be respected. We created something called a filibuster, a filibuster which is unique to the Senate but is consistent with the reason for its creation.

. . . . [I]t was part of checks and balances. It said we are saying to the legislative branch of Government: You are independent, you have your own power, and within that legislative branch you make your own rules. You define who you will be and how you will conduct your business.

We said to the executive branch: We respect you, but you are separate. You don't make our rules; the legislature makes its own rules. The Senate makes its own rules. The House makes its own rules. It is because of that difference, because each branch--the executive with the President, the congressional branch of Government and the judicial branch of Government--is separate and coequal, that we have this great Nation we have today.

It was an amazing stroke of genius that in this tiny publication these Founding Fathers understood how to create a government that would endure.

. . . .

The reason I tell you this is because at this moment there are those who are planning what I consider to be an assault on the very principles of this Constitution. There are those who wish to change

¹ Democratic Whip and member of the Senate Judiciary Committee.

the rules of the Senate and in changing the rules of the Senate, defy tradition, change the rules in the middle of the game, and have a full frontal assault on the unique nature of this institution. That, I think, is an abuse of power. I think it goes way too far. It ignores our Founding Fathers. This nuclear option ignores the Constitution. It ignores the rules of the Senate. For what? So the President of the United States can have every single judicial nominee approved by the Senate.

What is the scorecard? How has President Bush done in sending judicial nominees to the Senate? I can tell you the score as of this moment. Since he was elected President, he has had 215 nominees on the floor for a vote in the Senate and 205 have been approved. That is 205 to 10; over 95 percent of President Bush's judicial nominees have come to the floor and been approved. Only 10 have not been approved. They have been subject to a filibuster, part of the Senate rules.

But this White House and majority party in the Senate have decided 95 percent is not enough. They want it all. They want every nominee. Sadly, they are about to assault this Constitution and the rules of the Senate to try to achieve that goal.

This so-called nuclear option is a power grab. It is an attempt to change the rules of the Senate. It is an assault on the principle and value of checks and balances. It is an attempt by the majority party in the Senate to ram through nominees who will not pledge to protect the most important rights of the American people. It is an attempt to say we cannot demand of the President's nominees that each person be balanced and moderate and committed to the goals of ordinary Americans. . . .

This is not the first President in history who has decided in his second term to take on the courts of our country, to say he wanted to put into that court system men and women who agreed with him politically at any cost. The first was one of our greatest Americans, Thomas Jefferson. Full of victory in his second term, he decided to attempt to impeach a Supreme Court Justice who disagreed with him politically, to show he had the political power, having just been re-elected. His efforts were rejected. They were rejected by his own party, his own party in the Senate, who said: Mr. President, we may be part of your party, but we disagree with this power grab.

We are going to protect the constitutional rights and power of our institution of the Senate.

More recently, President Franklin Delano Roosevelt--one of the greatest in our history--as his second term began, became so frustrated by a Supreme Court that would not agree with him, that he sent to the Senate a proposal to change the composition of the Court to make certain that we filled the bench across the street in the Supreme Court with people who were sympathetic to his political agenda. He sent that legislative proposal to a Congress dominated by his political party, by his Democratic Party. What was their response? They rejected it. They said we stood by you in the election, we will stand by your policies, but we will not allow you to abuse this Constitution. We will not allow you to change the rules so you can have more power over our judges. That was the principle at issue. Frankly, Roosevelt lost the debate when men and women of his own party stood up and opposed him in the Congress.

....

Here we go, again. For the third time in our Nation's history, a President, as he begins his second term, is attempting to change the rules of the Senate to defy the Constitution and to give the Office of the President more power to push through judges, to defy the checks and balances in our Constitution.

....

Mr. HATCH (Republican, Utah) . . . ¹

All we are asking is that the 214-year tradition of the Senate that judicial nominees not be filibustered be followed. That has been the tradition of the Senate up until President Bush became President. All we are asking is that every one of these qualified nominees who have reached the floor receive an up-or-down vote. That is all we are asking.

¹ Former chairman of the Senate Judiciary Committee.

These are highly qualified nominees. The ABA has ruled they are qualified in every case. They all have a majority bipartisan vote in their favor. If our colleagues on the other side do not want to vote for them, they can vote against them. That will be their right. . . .

The actions of our colleagues on the other side amount to changing that 214-year traditional history of this Senate.

By the way, we never called this the nuclear option. It was called the nuclear option by the Democrats. We called it the constitutional option because the Constitution says the President has the right to appoint and nominate these people for judicial positions. We have the right to advise and – it is sometimes left off in this body – consent, which means a vote up and down.

. . . .

This principle has constitutional roots, historical precedent, and citizen support. I begin with the Constitution because that is where we should always begin. . . .

. . . .

Giving judicial nominations reaching the floor an up-or-down vote, that is, exercising our role of advice and consent through voting on nominations, helps us resist the temptation of turning our check on the President's power into a force that can destroy the President's power and upset the Constitution's balance.

Historically, we have followed this standard of everybody who reaches the floor getting an up-or-down vote. When Republicans ran the Senate under President Clinton, we gave each of his judicial nominations reaching the floor a final confirmation decision, an up-or-down vote. We took cloture votes, that is, votes to end debate, on four of the hundreds of nominees reaching us here. All four were confirmed. As a matter of fact, we confirmed 377 judges nominated by President Clinton, almost the same number as the all-time confirmation champion and that was Ronald Reagan, who got 382. But Ronald Reagan had 6 years of a Republican Senate to help him. President Clinton only had 2 years of a Democrat Senate to help him. Yet, with the aid of Republicans on the Judiciary Committee and in this body, he got 377 approved.

In fact, even on the most controversial appeals courts nominations by President Clinton, the Republican leadership used closure votes to prevent filibusters and ensure up-or-down votes, exactly the opposite of how cloture votes are being used during President Bush's Presidency.

. . . .

The purveyors of this fantasy would have us look to President Franklin Delano Roosevelt who, they tell us, wanted to pack the Supreme Court. The Senate rejected his legislative proposal to expand the Court so he could appoint more Justices. By taking this stand, the storytellers say, the Senate kept one-party rule from packing the Court.

Well, as Paul Harvey might say: Here is the rest of the story.

The Senate, even though dominated by President Roosevelt's own party, did not support this legislative plan. And it turns out President Roosevelt did not need any legislative innovations to pack the Supreme Court. He packed it all right, doing it the old-fashioned way, by appointing eight out of nine justices in 6 years. Mind you, during the 75th to the 77th Congress, Democrats outnumbered Republicans by an average of 70 to 20. Now, that is one-party rule.

In those years, from 1937 to 1943, our cloture rule applied only to bills. This meant that ending debate on other things, such as nominations, required unanimous consent. A single Senator in that tiny, beleaguered minority could conduct a filibuster of President Roosevelt's nominations and thwart the real court packing that was in full swing.

Now, if the filibuster were the only thing preventing one-party rule from packing the courts, and the filibuster were so easily used, surely there must be in history filibusters of President Roosevelt's Supreme Court nominations. If the warnings, frantic pleas, and hysterical fundraising appeals we hear today make any sense at all, the filibuster would certainly have been used in FDR's time.

I hate to burst anyone's bubble, but there were no bubble, but there were no filibusters, not even by a single Senator, not against a single nominee. . . .

Last week, here on the Senate floor, the distinguished Senator from Illinois repeated a selective version of this FDR story and asked what would happen today in a Senate dominated by the President's party. He asked:

Will they rise in the tradition of Franklin Roosevelt's Senate?

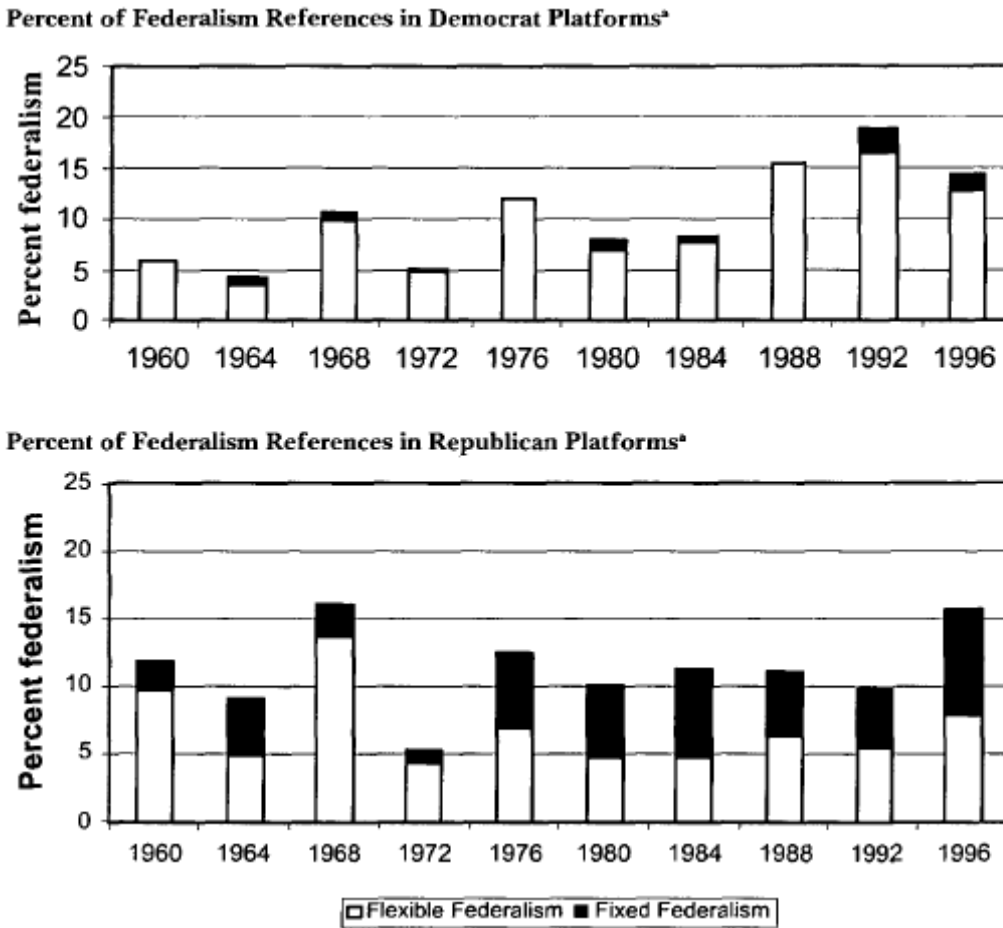
Well, I hope we do. I hope the Senate does exactly what Franklin Roosevelt's Senate did, by debating and voting on the President's judicial nominations. Franklin Roosevelt's Senate did not use the filibuster, even when the minority was much smaller and the filibuster much easier to use, and this Senate should not do so, either.

. . . .

Suggested Readings:

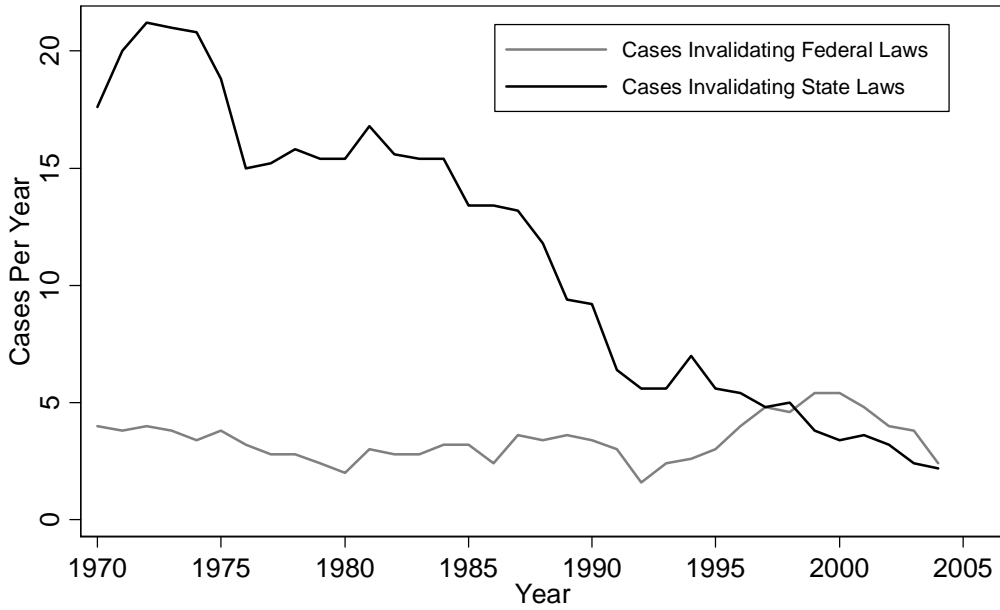
- Brisbin, Jr., Richard A. *Justice Antonin Scalia and the Conservative Revival* (Baltimore, MD: Johns Hopkins University Press, 1997).
- Colucci, Frank J. *Justice Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty* (Lawrence: University Press of Kansas, 2009).
- Fisher, Louis. *Constitutional Conflicts between Congress and the President* (Lawrence: University Press of Kansas, 1997).
- Gerhardt, Michael. *The Federal Appointments Process: A Constitutional and Historical Analysis* (Durham, NC: Duke University Press, 2000).
- Gibson, James L., and Gregory A. Caldeira. *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* (Princeton: Princeton University Press, 2009).
- Gillman, Howard. *The Votes that Counted: How the Court Decided the 2000 Presidential Election* (Chicago: University of Chicago Press, 2000).
- Keck, Tom. *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004).
- Maltz, Earl M. *Rehnquist Justice: Understanding the Court Dynamic* (Lawrence: University Press of Kansas, 2003).
- Rosen, Jeffrey. *The Most Democratic Branch: How the Courts Serve America* (New York: Oxford University Press, 2006).
- Tushnet, Mark. *A Court Divided* (New York: W.W. Norton, 2005).
- Tushnet, Mark. *The New Constitutional Order* (Princeton: Princeton University Press, 2003).
- Tushnet, Mark, ed. *The Constitution in Wartime: Beyond Alarmism and Complacency* (Durham, NC: Duke University Press, 2005).
- Yarbrough, Tinsley E. *The Rehnquist Court and the Constitution* (New York: Oxford University Press, 2000).
- Yarbrough, Tinsley E. *David Hackett Souter: Traditional Republican on the Supreme Court* (New York: Oxford University Press, 2005).

Figure 11-1: Federalism References in Party Platforms, 1960-1996



Source: Cornell W. Clayton and J. Mitchell Pickerill, "Guess What Happened on the Way to Revolution? Precursors to the Supreme Court's Federalism Revolution," *Publius* 34:3 (2004): 85.
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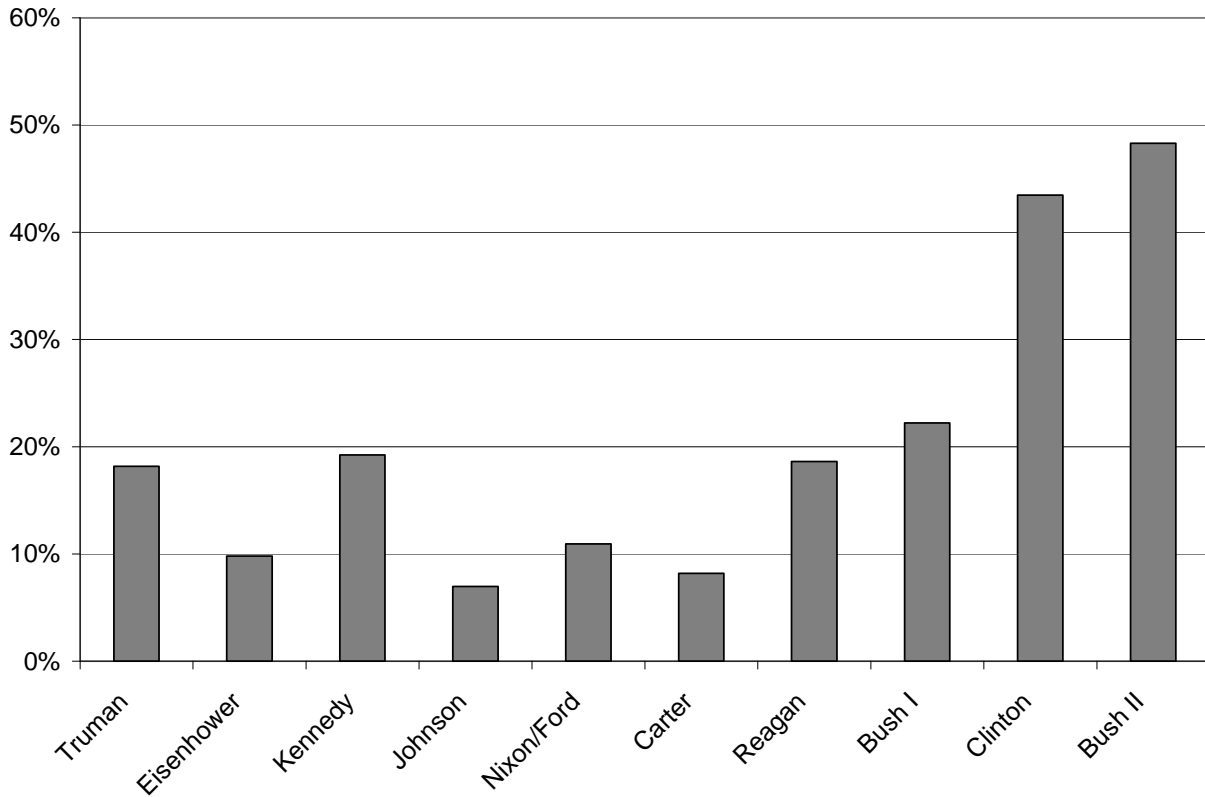
Figure 11-2: Supreme Court Invalidation of State and Federal Laws, 1970-2004



Note: Cases represented by centered, five-year moving average.

Source: Congressional Research Service (state laws); Judicial Review of Congress Database (federal laws).

Figure 11-3: Percentage of Federal Circuit Court Nominations Not Confirmed, 1945-2008



Source: Congressional Research Service, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1945-1976*; Congressional Research Service, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003*; American Bar Association, “Article III Judicial Vacancies/Nominations/Confirmations.”

Table 11-1: Major Issues and Decisions of the Contemporary Era

Major Political Issues	Major Constitutional Issues	Major Court Decisions
Deficit Reduction	Presidential War Powers	United States v. Lopez (1995)
Welfare Reform	Independent Counsel	United States v. Morrison (2000)
Health Care Reform	Impeachment Power	Alden v. Maine (1999)
Terrorism	State Sovereign Immunity	Hamdi v. Rumsfeld (2004)
Iraq War	Interstate Commerce Clause	City of Boerne v. Flores (1997)
Immigration Reform	Judicial Supremacy Executive Privilege	Hamdan v. Rumsfeld (2006)

Box 11-1: A Partial Cast of Characters of the Contemporary Era

Stevens, John Paul	Republican, Chicago antitrust lawyer, appointed by Richard Nixon to the federal circuit court (1970-1975), appointed by Gerald Ford to the U.S. Supreme Court (1975-present), a consensus, non-political choice for the Court after Watergate, Stevens is not known for a distinctive judicial philosophy but has become a vocal member of the liberal wing as the Court has generally become more conservative over time
Dellinger, Walter	Democrat, Duke law professor and litigator, assistant attorney general and head of the Office of Legal Counsel in the Clinton administration (1993-1996), authored a number of opinions on defending presidential power, acting U.S. solicitor general (1996-1997)
Kennedy, Anthony	Republican, moderate conservative, California lawyer and lobbyist, appointed by Gerald Ford to federal circuit court (1975-1988), appointed by Ronald Reagan to U.S. Supreme Court (1988-present) after Robert Bork's nomination failed, became pivotal swing vote on late Rehnquist and Roberts Courts, often votes with conservatives on government powers issues and with liberals on rights and liberties issues
Scalia, Antonin	Republican, conservative law professor, assistant attorney general and head of the Office of Legal Counsel in the Nixon and Ford administrations (1974-1977), appointed to the D.C. circuit court by Ronald Reagan (1982-1986) and to the U.S. Supreme Court (1986-present), first Italian-American appointed to the Court, an influential leader of the conservative legal movement since the 1970s, since joining the Court Scalia has become a vocal advocate for "originalism" and a proponent of a formalistic approach to the separation of powers
Souter, David	Republican, moderate, New Hampshire prosecutor and judge, New Hampshire attorney general (1976-1978), New Hampshire Supreme Court (1983-1990), appointed by George H.W. Bush to the federal circuit court (1990) and quickly appointed to the U.S. Supreme Court (1990-2009), known as a "stealth nominee" with little public record on national or constitutional issues, he was easily nominated by a Democratic Senate to replace liberal icon William Brennan, emphasizing caution and respect for precedent in his opinions he soon joined the liberal wing of the Court
Thomas, Clarence	Republican, conservative lawyer, assistant secretary of education (1981) and director of the Equal Employment Opportunity Commission (1981-1990) during the Reagan and Bush administrations, appointed by George H.W. Bush to the D.C. circuit court (1990-1991) and to the U.S. Supreme Court (1991-present), a bruising battle in the Senate ended in one of the closest successful confirmation votes in history, Thomas became the second African-American to serve on the Court, he soon emerged as one of the most conservative members of the Court and a strong advocate for a less deferential brand of originalism than that favored by some of the other conservative justices
Yoo, John	Republican, Berkeley law professor, general counsel to the U.S. Senate Judiciary Committee (1995-1996), deputy assistant attorney general in the Office of Legal Counsel (2001-2003), authored a number of memos defending presidential power in foreign policy during the George W. Bush administration