tain activities, but whose application to other behavior is uncertain, to which statutes the concept of a "hardcore violator" may be applicable, that concept is not applicable to a state statute imposing criminal liability on one who publicly "treats contemptuously" the flag of the United States, since such statute is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.

[***LEdHN10]

STATUTES §18

vagueness --

Headnote:[10]

The central vagueness question concerning a state statute imposing criminal liability on one who publicly "treats contemptuously" the flag of the United States is not resolved even if the statute applies only to "actual" flags since there remains an absence of any standard for defining contemptuous treatment.

[***LEdHN11]

STATUTES §18

vagueness --

Headnote:[11]

A state court decision restricting to intentional contempt the scope of a state statute imposing criminal liability on one who publicly "treats contemptuously" the flag of the United States does not make the statute constitutional as against a challenge on the ground of vagueness since such restriction does not clarify what conduct constitutes contempt, whether intentional or inadvertent.

SYLLABUS

Appellee, for wearing a small United States flag sewn to the seat of his trousers, was convicted of violating the provision of the Massachusetts flag-misuse statute that subjects to criminal liability anyone who "publicly . . . treats contemptuously the flag of the United States . . . ." The Massachusetts Supreme Judicial Court affirmed. The District Court in appellee's habeas corpus action found the "treats contemptuously" phrase of the statute unconstitutionally vague and overbroad. The Court of Appeals affirmed. *Held*:

1. The challenged statutory language, which had received no narrowing state court interpretation, is void for vagueness under the *Due Process Clause of the Fourteenth Amendment*, since by failing to draw reasonably clear lines between the kinds of nonceremonial treatment of the flag that are criminal and those that are not it does not provide adequate warning of forbidden conduct and sets forth a standard so indefinite that police, court, and jury are free to react to nothing more than their own preferences for treatment of the flag. Pp. 572-576, 578.

2. By challenging in state courts the vagueness of the "treats contemptuously" phrase as applied to him, appellee preserved his due process claim for purposes of federal habeas corpus jurisdiction, *Picard v. Connor, 404 U.S. 270*, since the challenged language is void for vagueness as applied to appellee or to anyone else. A "hard-core" violator concept has little meaning with regard to the challenged language, because the phrase at issue is vague not in the sense of requiring a person to conform his conduct to an imprecise but comprehensible standard, but in the sense of not specifying any ascertainable standard of conduct at all. Pp. 576-578.

3. Even if, as appellant contends, the statute could be said to deal only with "actual" flags of the United States, this would not resolve the central vagueness deficiency of failing to define contemptuous treatment. Pp. 578-579.

4. That other words of the desecration and contempt portion of the statute address more specific conduct (mutilation, trampling, and defacing of the flag) does not assist appellant, since appellee was tried solely under the "treats contemptuously" phrase, and the highest state court in this case did not construe the challenged phrase as taking color from more specific accompanying language. Pp. 579-580.

5. Regardless of whether restriction by that court of the scope of the challenged phrase to intentional contempt may be held against appellee, such an interpretation nevertheless does not clarify what conduct constitutes contempt of the flag, whether intentional or inadvertent. P. 580.

COUNSEL: Charles E. Chase, Assistant Attorney General of Massachusetts, argued the cause for appellant. With him on the briefs were Robert H. Quinn, Attorney General, John J. Irwin, Jr., and David A. Mills, Assistant Attorney General, and William T. Buckley.

Evan T. Lawson argued the cause for appellee. With him on the brief were Matthew Feinberg and Burt Neuborne.

JUDGES: Powell, J., delivered the opinion of the Court, in which Douglas, Brennan, Stewart, and Marshall, JJ., joined. White, J., filed an opinion concurring in the judgment, post, p. 583. Blackmun, J., post, p. 590, and

Rehnquist, J., post, p. 591, filed dissenting opinions, in which Burger, C. J., joined.

OPINION BY: POWELL

OPINION

[*567] [***609] [**1244] MR. JUSTICE POWELL delivered the opinion of the Court.

[***LEdHR1] [1]The sheriff of Worcester County, Massachusetts, appeals from a judgment of the United States Court of Appeals for the First Circuit holding the contempt provision of the Massachusetts flag-misuse statute unconstitutionally vague and overbroad. *471 F.2d 88 (1972)*, aff'g *343 F.Supp. 161* (Mass). We noted probable jurisdiction. *412 U.S. 905 (1973)*. We affirm on the vagueness [*568] ground. We do not reach the correctness of the holding below on overbreadth or other *First Amendment* grounds.

I

The slender record in this case reveals little more than that Goguen wore a small cloth version of the United States flag sewn to the seat of his trousers. [1] [**1245] The flag was approximately four by six inches and was displayed at the left rear of Goguen's blue jeans. On January 30, 1970, two police officers in Leominster, Massachusetts, saw Goguen bedecked in that fashion. The first officer encountered Goguen standing and talking with a group of persons on a public street. The group apparently was not engaged in any demonstration or other protest associated with Goguen's apparel. [2] No disruption of traffic or breach of the peace occurred. When this officer approached Goguen to question him about the flag, the other persons present laughed. Some time later, the second officer observed Goguen in the same attire walking in the downtown business district of Leominster.

1 The record consists solely of the amended bill of exceptions Goguen filed in the Massachusetts Supreme Judicial Court, the opposing briefs before that court, the complaint under which Goguen was prosecuted, and Goguen's federal habeas corpus petition. App. 1-36, 42-43. We do not have a trial transcript, although Goguen's amended bill of exceptions briefly summarizes some of the testimony given by witnesses for the prosecution at his state trial. Goguen did not take the stand. Thus we do not have of record his account of what transpired at the time of his arrest or of his purpose in wearing a flag on the seat of his trousers.

2 Tr. of Oral Arg. 5-6, 35-36.

The following day the first officer swore out a complaint against Goguen under the contempt provision of the Massachusetts flag-misuse statute. The relevant part of the statute then read:

"Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the [*569] United States . . . , whether such flag is public or private property . . . , shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. . . ." [3]

[*570] [***610] [**1246] Despite the first six words of the statute, Goguen was not charged with any act of physical desecration. [4] As permitted by the disjunctive structure of the portion of the statute dealing with discretion and contempt, the officer charged specifically and only that Goguen "did publicly treat contemptuously the flag of the United States . . . ." [5]

3 *Mass. Gen. Laws Ann., c. 264, § 5.* Omitting several sentences protecting the ceremonial activities of certain veterans' groups, the statute read as follows at the time of Goguen's arrest and conviction:

"*§ 5.* Flag; penalty for misuse

"Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a representation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall

for the purposes of this section be deemed to be upon such flag."

The statute is an amalgam of provisions dealing with flag desecration and contempt (the first 26 words) and with commercial misuse or other exploitation of flags of the State and National Governments. This case concerns only the "treats contemptuously" phrase of the statute, which has apparently been in the statute since its enactment in 1899. *471 F.2d 88, 90 n. 2 (1972).*

In 1971, subsequent to Goguen's prosecution, the desecration and contempt portion of the statute was amended twice. On March 8, 1971, the legislature, per Stats. 1971, c. 74, modified the first sentence by inserting "burns or otherwise" between the terms "publicly" and "mutilates," and, in addition, by increasing the fine. *Mass. Gen. Laws Ann., c. 264, § 5* (Supp. 1973). On August 12, 1971, per Stats. 1971, c. 655, the legislature appended a new sentence defining "the flag of the United States" phrase appearing in the first sentence: "For the purposes of this section the term 'flag of the United States' shall mean any flag which has been designated by Act or Resolution of the Congress of the United States as the national emblem, whether or not such designation is currently in force." *Ibid.* The 1971 amendments are relevant to this case only in the tangential sense that they indicate a recognition by the legislature of the need to tighten up this imprecise statute.

4 Perhaps this was because of the difficulty of the question whether Goguen's conduct constituted physical desecration of the flag. Cf. *471 F.2d, at 91 n. 4* ("We are not so sure that sewing a flag to a background clearly affects 'physical integrity'").

5 App. 4.

After jury trial in the Worcester County Superior Court, Goguen was found guilty. The court imposed a sentence of six months in the Massachusetts House of Corrections. Goguen appealed to the Massachusetts Supreme Judicial Court, which affirmed. *Commonwealth v. Goguen, Mass. , 279 N. E. 2d 666 (1972).* That court rejected Goguen's vagueness argument with the comment that "whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here." *Id., at , 279 N. E. 2d, at 667.* The court cited no Massachusetts precedents [*571] interpreting the "treats contemptuously" phrase of the statute. [6]

6 Appellant correctly conceded at oral argument that Goguen's case is the first recorded Massachusetts court reading of this language. Tr. of Oral Arg. 17-18. Indeed, with the exception of one case at the turn of the century involving one of the statute's commercial-misuse provisions, *Commonwealth v. R. I. Sherman Mfg. Co., 189 Mass. 76, 75 N. E. 71 (1905)*, the entire statute has been essentially devoid of state court interpretation.

After Goguen began serving his [***611] sentence, he was granted bail and then ordered released on a writ of habeas corpus by the United States District Court for the District of Massachusetts. *343 F.Supp. 161.* The District Court found the flag-contempt portion of the Massachusetts statute impermissibly vague under the *Due Process Clause of the Fourteenth Amendment* as well as overbroad under the *First Amendment.* In upholding Goguen's void-for-vagueness contentions, the court concluded that the words "treats contemptuously" did not provide a "readily ascertainable standard of guilt." *Id., at 167.* Especially in "these days when flags are commonly displayed on hats, garments and vehicles . . . ," the words under which Goguen was convicted "leave conjectural, in many instances, what conduct may subject the actor to criminal prosecution." *Ibid.* The Court also found that the statutory language at issue "may be said to encourage arbitrary and erratic arrests and convictions." *Ibid.*

The Court of Appeals, with one judge concurring, affirmed the District Court on both *First Amendment* and vagueness grounds. *471 F.2d 88.* With regard to the latter ground, the Court of Appeals concluded that "resolution of [Goguen's void-for-vagueness] challenge to the statute as applied to him necessarily adjudicates the statute's facial constitutionality . . . ." *Id., at 94.* Treating [*572] as-applied and on-the-face vagueness attacks as essentially indistinguishable in light of the imprecision of the statutory phrase at issue, *id., at 92, 94*, the court found that the language failed to provide adequate warning to anyone, contained insufficient guidelines for law enforcement officials, and set juries and courts at large. *Id., at 94-96.* Senior Circuit Judge Hamley, sitting by designation from the Ninth Circuit, concurred solely in the void-for-vagueness holding. *Id., at 105.* Judge Hamley saw no need to reach the "far broader constitutional ground" of *First Amendment* overbreadth relied on by the majority, noting the "settled principle of appellate adjudication that constitutional questions are not to be dealt with unless this is necessary to dispose of the appeal." *Ibid.*

II

[***LEdHR2] [2] [***LEdHR3] [3]We agree with the holdings of the District Court and the Court of Appeals [**1247] on the due process doctrine of va-

gueness. The settled principles of that doctrine require no extensive restatement here. [7] The doctrine incorporates notions of fair notice or warning. [8] Moreover, it requires [*573] [***612] legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." [9] Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the *First Amendment*, the doctrine demands a greater degree of specificity than in other contexts. [10] The statutory language at issue here, "publicly . . . treats contemptuously the flag of the United States . . . ," has such scope, *e. g., Street v. New York, 394 U.S. 576 (1969)* (verbal flag contempt), and at the relevant time was without the benefit of judicial clarification. [11]

7 The elements of the void-for-vagueness doctrine have been developed in a large body of precedent from this Court. The cases are categorized in, *e. g., Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)*. See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

8 *E. g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)*; *Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)* ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids") (citations omitted); *Connally v. General Construction Co., 269 U.S. 385, 391 (1926)* ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law") (citations omitted).

9 *E. g., Grayned, supra, at 108*; *United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921)* ("To attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury"); *United States v. Reese, 92 U.S. 214, 221 (1876)* ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large").

10 *E. g., Grayned, supra, at 109*; *Smith v. California, 361 U.S. 147, 151 (1959)*. Compare the less stringent requirements of the modern vagueness cases dealing with purely economic regulation. *E. g., United States v. National Dairy Products Corp., 372 U.S. 29 (1963)* (Robinson-Patman Act).

11 See n. 6, *supra*.

[***LEdHR4] [4]Flag contempt statutes have been characterized as void for lack of notice on the theory that "what is contemptuous to one man may be a work of art to another." [12] Goguen's behavior can hardly be described as art. Immaturity or "silly conduct" [13] probably comes closer to the mark. But we see the force of the District Court's observation that the flag has become [*574] "an object of youth fashion and high camp . . . ." *343 F.Supp., at 164*. As both courts below noted, casual treatment of the flag in many contexts has become a widespread contemporary phenomenon. *Id., at 164, 167*; *471 F.2d, at 96*. Flag wearing in a day of relaxed clothing styles may be simply for adornment or a ploy to attract attention. It and many other current, careless uses of the flag nevertheless constitute unceremonial treatment that many people may view as contemptuous. Yet in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag. The statutory language [**1248] under which Goguen was charged, however, fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not. Due process requires that all "be informed as to what the State commands or forbids," *Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)*, and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. *Connally v. General Construction Co., 269 U.S. 385, 391* [***613] *(1926)*. Given today's tendencies to treat the flag unceremoniously, those notice standards are not satisfied here.

12 Note, 66 Mich. L. Rev. 1040, 1056 (1968).

13 *343 F.Supp. 161, 166*.

We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. [14] In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies.

14 Note, 109 U. Pa. L. Rev., *supra*, n. 7, at 82 n. 79.

[*575] [***LEdHR5] [5] [***LEdHR6] [6] [***LEdHR7] [7]In its terms, the language at issue is

sufficiently unbounded to prohibit, as the District Court noted, "any public deviation from formal flag etiquette . . . ." *343 F.Supp., at 167.* Unchanged throughout its 70-year history, [15] the "treats contemptuously" phrase was also devoid of a narrowing state court interpretation at the relevant time in this case. [16] We are without authority to cure that defect. [17] Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law. *E. g., Papachristou v. City of Jacksonville, 405 U.S. 156, 165-169 (1972).* In *Gregory v. City of Chicago, 394 U.S. 111, 120 (1969)*, Mr. Justice Black, in a concurring opinion, voiced a concern, which we share, against entrusting lawmaking "to the moment-to-moment judgment of the policeman on his beat." The aptness of his admonition is evident from appellant's candid concession during oral argument before the Court of Appeals regarding state enforcement standards for that portion of the statute under which Goguen was convicted:

"As counsel [for appellant] admitted, a war protestor [*576] who, while attending a rally at which it begins to rain, evidences his disrespect for the American flag by contemptuously covering himself with it in order to avoid getting wet, would be prosecuted under the Massachusetts statute. Yet a member of the American Legion who, caught in the same rainstorm while returning from an 'America -- Love It or Leave It' rally, similarly uses the flag, but does so regrettably and without a contemptuous attitude, would *not* be prosecuted." *471 F.2d, at 102* (emphasis in original).

[**1249] Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.

15 See n. 3, *supra.*

16 See n. 6, *supra.* The contempt portion of the Massachusetts statute seems to have lain fallow for almost its entire history. Apparently there have been about a half dozen arrests under this part of the statute in recent years, but none has produced a reported decision. Tr. of Oral Arg. 28-29. In 1968, a teenager in Lynn, Massachusetts, was charged, apparently under the present statute, with desecrating the United States flag by sewing pieces of it into his trousers. New York Times, Sept. 1, 1968, p. 31, col. 1. The teenager was ordered by a state district court to prepare and deliver an essay on the flag. The court continued the case without a finding, depriving it of any precedential value.

17 *E. g., United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971).*

III

[***614] [***LEdHR8A] [8A] Appellant's arguments that the "treats contemptuously" phrase is not impermissibly vague, or at least should not be so held in this case, are unpersuasive. Appellant devotes a substantial portion of his opening brief, as he did his oral argument, to the contention that Goguen failed to preserve his present void-for-vagueness claim for the purposes of federal habeas corpus jurisdiction. Appellant concedes that the issue of "vagueness as applied" is properly before the federal courts, [18] but contends that Goguen's only arguable claim is that the statute is vague on its face. The latter claim, appellant insists, was not presented to the state courts with the requisite fair precision. *Picard v. Connor, 404 U.S. 270 (1971).* This exhaustion-of-remedies argument is belatedly raised, [19] and it fails to take the full measure of [*577] Goguen's efforts to mount a vagueness attack in the state courts. [20] We do not deal with the point at length, however, for we find the relevant statutory language impermissibly vague as applied to Goguen. Without doubt the "substance" of this claim was "fairly presented" to the state courts under the exhaustion standards of *Picard, supra, at 275, 278.*

18 Reply Brief for Appellant 4.

19 Goguen filed his federal habeas corpus petition subsequent to *Picard v. Connor, 404 U.S. 270 (1971).* Yet it appears that appellant did not raise his present exhaustion-of-remedies argument before the District Court. That court commented specifically on this omission: "No contention is now made that [Goguen] has not exhausted state remedies, nor that the constitutional issues presented here were not raised appropriately in state proceedings." *343 F.Supp., at 164.*

20 [***LEdHR8B] [8B]

Goguen filed in State Superior Court an unsuccessful motion to dismiss the complaint in which he cited the *Fourteenth Amendment* and alleged that the statute under which he was charged was "impermissibly vague and incapable of fair and reasonable interpretation by public officials." App. 1. This motion was also before the Massachusetts Supreme Judicial Court, since it was incorporated in Goguen's amended bill of exceptions. *Ibid.* In addition, Goguen's brief before that court raised vagueness points and cited vagueness cases. *Id.*, at 19, 26-27, citing *Lanzetta v. New Jersey, 306 U.S. 451 (1939)*, and *Parker v. Morgan, 322 F.Supp. 585 (WDNC 1971)* (three-judge court) (North Carolina flag

contempt statute void for vagueness and overbreadth). Appellant is correct in asserting that Goguen failed to compartmentalize in his state court brief the due process doctrine of vagueness and *First Amendment* concepts of overbreadth. See App. 19-24. But permitting a degree of leakage between those particular adjoining compartments is understandable. Cf. Note, The *First Amendment* Overbreadth Doctrine, 83 Harv. L. Rev. 844, 871-875 (1970). The highest state court's opinion, which dealt separately with Goguen's *First Amendment* and vagueness claims, *Commonwealth v. Goguen, Mass. , , 279 N. E. 2d 666, 667 (1972)*, indicates that that court was well aware that Goguen raised both sets of arguments.

[***LEdHR9] [9]Appellant's exhaustion-of-remedies argument is premised on the notion that Goguen's behavior rendered him a hard-core violator as to whom the statute was not vague, whatever its implications for those engaged in different conduct. To be sure, there are statutes that [*578] by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain. The hard-core violator concept makes some sense with regard to such statutes. The present statute, however, is not in that category. This criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the [***615] sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)*. Such a provision simply has *no* core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered [**1250] latitude thereby accorded law enforcement officials and triers of fact. Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language. In our opinion the defect exists in this case. The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag.

[***LEdHR10] [10]Turning from the exhaustion point to the merits of the vagueness question presented, appellant argues that any notice difficulties are ameliorated by the narrow subject matter of the statute, *viz.*, "actual" flags of the United States. [21] Appellant contends that this "takes some of the vagueness away from the phrase, 'treats contemptuously . . . .'" [22] Anyone who "wants notice as to what conduct this statute proscribes . . . , immediately knows that it has something to do with flags and if he [*579] wants to stay clear of violating this statute, he just has to stay clear of doing something to the United States flag." [23] Apart from the ambiguities presented by the concept of an "actual" flag, [24] we fail to see how this alleged particularity resolves the central vagueness question -- the absence of any standard for defining contemptuous treatment.

21 Brief for Appellant 17; Tr. of Oral Arg. 9.

22 *Ibid.*

23 *Ibid.*

24 At the time of Goguen's prosecution, the statute referred simply to "the flag of the United States . . . ," without further definition. That raises the obvious question whether Goguen's miniature cloth flag constituted "the flag of the United States . . . ." Goguen argued unsuccessfully before the state courts that the statute applied only to flags that met "official standards" for proportions, such as relation of height to width and the size of stripes and the field of stars, and that the cloth he wore did not meet those standards. Tr. of Oral Arg. 11-12, 24-26; App. 2. There was no dispute that Goguen's adornment had the requisite number of stars and stripes and colors. Tr. of Oral Arg. 11-12. The Massachusetts Supreme Judicial Court found Goguen's cloth flag to be covered by the statute, noting that "the statute does not require that the flag be 'official,'" *Commonwealth v. Goguen, Mass., at , 279 N. E. 2d, at 668*. The lower federal courts did not address this holding, nor do we. We note only that the Massachusetts Legislature apparently sensed an ambiguity in this respect, because subsequent to Goguen's prosecution it amended the statute in an effort to define what it had meant by the "flag of the United States." See n. 3, *supra*.

[***LEdHR11] [11]Appellant's remaining arguments are equally unavailing. It is asserted that the first six words of the statute add specificity to the "treats contemptuously" phrase, and that the Massachusetts Supreme Judicial Court customarily construes general language to take on color from more specific accompanying language. But it is conceded that Goguen was convicted under the general phrase alone, and that the highest state court did not rely on any general-to-specific principle of statutory [*580] interpretation in this case. [25] Appellant further argues [***616] that the Supreme Judicial Court in Goguen's case has restricted the scope of the statute to intentional contempt. [26] Aside from the problems presented by an appellate court's limiting construction in the very case in which a defendant has been tried under a previously unnarrowed statute, [27] this [**1251]

holding still does not clarify what conduct constitutes contempt, whether intentional or inadvertent.

25 Tr. of Oral Arg. 48.

26 The Massachusetts court commented simply that "the jury could infer that the violation was intentional without reviewing any words of the defendant." *Commonwealth v. Goguen, supra, at , 279 N. E. 2d, at 668.* Thus, the court held that the jury could infer intent merely from Goguen's conduct. This is apparently also a holding that the jury *must* find contemptuous intent under the statute, although the requirement amounts to very little since it is so easily satisfied. The court's reference to verbal communication reflected Goguen's reliance on *Street v. New York, 394 U.S. 576 (1969).*

27 *E. g., Ashton v. Kentucky, 384 U.S. 195, 198 (1966).*

Finally, appellant argues that state law enforcement authorities have shown themselves ready to interpret this penal statute narrowly and that the statute, properly read, reaches only direct, immediate contemptuous acts that "actually impinge upon the physical integrity of the flag . . . ." [28] There is no support in the record for the former point. [29] Similarly, nothing in the state [*581] court's opinion in this case or in any earlier opinion of that court sustains the latter. In any event, Goguen was charged only under the wholly open-ended language of publicly treating the flag "contemptuously." There was no allegation of physical desecration.

28 Brief for Appellant 22.

29 With regard to prosecutorial policies, appellant cites two published opinions of the Massachusetts Attorney General. 4 Op. Atty. Gen. 470-473 (1915) (reproduced in Brief for Appellant 30); Report of Atty. Gen., Pub. Doc. No. 12, p. 192 (1968) (reproduced in Jurisdictional Statement App. 53). Appellant concedes that neither deals with the contempt portion of the statute under which Goguen was convicted. Thus, they are not in point here. They provided guidance to no one on the relevant statutory language. Nevertheless, appellant is correct that they show a tendency on the part of the State Attorney General to read other portions of the statute narrowly. At the same time, they reflect the lack of precision recurring throughout the Massachusetts flag-misuse statute. The 1915 opinion noted that a literal reading of one portion of the statute, prohibiting exhibition of engravings of the flag on certain articles, would make it a criminal offense to display the flag itself "in many of its cheaper and more common forms." Brief for Appellant 31-32. The State Attorney General concluded that this would be a "manifest absurdity." *Id., at 32.* The 1968 opinion advised that a flag representation painted on a door was not "a flag of the United States" within the meaning of the statute. Jurisdictional Statement App. 53-55. A contrary interpretation would "raise serious questions under the *First* and *Fourteenth Amendments* . . . ," given the requirement that behavior made criminal must be "plainly prohibited by the language of the statute." *Id., at 54.*

There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order. Cf. *Colten v. Kentucky, 407 U.S. 104 (1972).* But there is no comparable reason for committing broad discretion to law enforcement officials in the area of flag contempt. Indeed, because display of the flag is so common and takes so many forms, changing from one [***617] generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw. Certainly nothing prevents a legislature from defining with substantial specificity what [*582] constitutes forbidden treatment of United States flags. [30] The statutory [**1252] language at issue here fails to approach that goal and is void for vagueness. [31] The judgment is affirmed. [32]

30 The federal flag desecration statute, for example, reflects a congressional purpose to do just that. In response to a warning by the United States Attorney General that to use such unbounded terms as "defies" or "casts contempt . . . either by word or act" is "to risk invalidation" on vagueness grounds, S. Rep. No. 1287, 90th Cong., 1st Sess., 5 (1968); H. R. Rep. No. 350, 90th Cong., 1st Sess., 7 (1967), the bill which became the federal statute was amended, 113 Cong. Rec. 16449, 16450 (1967), to reach only acts that physically damage the flag. The desecration provision of the statute, *18 U. S. C. § 700 (a)*, declares:

"(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $ 1,000 or imprisoned for not more than one year, or both."

The legislative history reveals a clear desire to reach only defined physical acts of desecration.

"The language of the bill prohibits intentional, willful, not accidental or inadvertent public physical acts of desecration of the flag." H. R. Rep. No. 350, *supra*, at 3; S. Rep. No. 1287, *supra*, at 3. The act has been so read by the lower federal courts, which have upheld it against vagueness challenges. *United States v. Crosson, 462 F.2d 96* (CA9) cert. denied, *409 U.S. 1064 (1972)*; *Joyce v. United States, 147 U. S. App. D. C. 128, 454 F.2d 971 (1971)*, cert. denied, *405 U.S. 969 (1972)*. See *Hoffman v. United States, 144 U. S. App. D. C. 156, 445 F.2d 226 (1971)*.

31 We are aware, of course, of the universal adoption of flag desecration or contempt statutes by the Federal and State Governments. See n. 30, *supra*. The statutes of the 50 States are synopsized in Hearings on H. R. 271 et al., before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 1st Sess., ser. 4, pp. 324-346 (1967). Most of the state statutes are patterned after the Uniform Flag Law of 1917, which in § 3 provides:

"No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."

Compare 9B Uniform Laws Ann. 52-53 (1966), with Hearings on H. R. 271 et al., *supra, at 321-346*. Because it is stated in the disjunctive, this language, like that before us, makes possible criminal prosecution solely for casting contempt upon the flag. But the validity of statutes utilizing this language, insofar as the vagueness doctrine is concerned, will depend as much on their judicial construction and enforcement history as their literal terms.

32 We have not addressed Goguen's *First Amendment* arguments because, having found the challenged statutory language void for vagueness, there is no need to decide additional issues. Moreover, the skeletal record in this case, see n. 1, *supra*, affords a poor opportunity for the careful consideration merited by the importance of the *First Amendment* issues Goguen has raised.

It is so ordered.

CONCUR BY: WHITE

CONCUR

[*583] MR. JUSTICE WHITE, concurring in the judgment.

It is a crime in Massachusetts if one mutilates, tramples, defaces or "treats contemptuously" the flag of the United States. Appellee Goguen was convicted of treating the flag contemptuously, the evidence being that he wore a likeness of the flag on the seat of his pants. The Court holds this portion of the statute too vague to provide an ascertainable [***618] standard of guilt in any situation, including this one. Although I concur in the judgment of affirmance for other reasons, I cannot agree with this rationale. [1]

1 There has been recurring litigation, with diverse results, over the validity of flag use and flag desecration statutes. Representative of the federal and state cases are the following: *Thoms v. Heffernan, 473 F.2d 478 (CA2 1973)*; *Long Island Vietnam Moratorium Committee v. Cahn, 437 F.2d 344 (CA2 1970)*; *United States v. Crosson, 462 F.2d 96* (CA9), cert. denied, *409 U.S. 1064 (1972)*; *Joyce v. United States, 147 U. S. App. D. C. 128, 454 F.2d 971 (1971)*, cert. denied, *405 U.S. 969 (1972)*; *Deeds v. Beto, 353 F.Supp. 840 (ND Tex. 1973)*; *Oldroyd v. Kugler, 327 F.Supp. 176 (NJ 1970)*, rev'd, *461 F.2d 535 (CA3 1972)*, abstention on remand, *352 F.Supp. 27*, aff'd, *412 U.S. 924 (1973)*; *Sutherland v. DeWulf, 323 F.Supp. 740 (SD Ill. 1971)*; *Parker v. Morgan, 322 F.Supp. 585 (WDNC 1971)*; *Crosson v. Silver, 319 F.Supp. 1084 (Ariz. 1970)*; *Hodsdon v. Buckson, 310 F.Supp. 528 (Del. 1970)*, rev'd on other grounds *sub nom. Hodsdon v. Stabler, 444 F.2d 533 (CA3 1971)*; *United States v. Ferguson, 302 F.Supp. 1111 (ND Cal. 1969)*; *State v. Royal, 113 N. H. 224, 305 A. 2d 676 (1973)*; *State v. Zimmelman, 62 N. J. 279, 301 A. 2d 129 (1973)*; *State v. Spence, 81 Wash. 2d 788, 506 P. 2d 293*, probable jurisdiction noted, *414 U.S. 815 (1973)* (*sub judice*); *City of Miami v. Wolfenberger, 265 So. 2d 732 (Fla. Dist. Ct. App. 1972)*; *State v. Mitchell, 32 Ohio App. 2d 16, 288 N. E. 2d 216 (1972)*; *State v. Liska, 32 Ohio App. 2d 317, 291 N. E. 2d 498 (1971)*; *State v. Van Camp, 6 Conn. Cir. 609, 281 A. 2d 584 (1971)*; *State v. Waterman, 190 N. W. 2d 809 (Iowa 1971)*; *State v. Saulino, 29 Ohio Misc. 25, 277 N. E. 2d 580 (1971)*; *Deeds v. State, 474 S. W. 2d 718 (Crim. App. Tex. 1971)*; *People v. Radich, 26 N. Y. 2d 114, 257 N. E. 2d 30 (1970)*, aff'd by an equally divided court, *401 U.S. 531*, rehearing denied, *402 U.S. 989 (1971)*; *People v. Cowgill, 274 Cal. App. 2d 923, 78 Cal. Rptr. 853 (1969)*, appeal dismissed, *396 U.S. 371 (1970)*; *Hinton v. State, 223 Ga. 174, 154 S. E. 2d 246 (1967)*, rev'd on other grounds *sub nom. Anderson v. Georgia, 390 U.S. 206 (1968)*.

[*584] I

[**1253] It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is contemptuous conduct and that would be covered by the statute if directed at the flag. In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed contemptuous by the State, but unpredictability in those situations does not change the certainty in others.

I am also confident that the statute was not vague with respect to the conduct for which Goguen was arrested and convicted. It should not be beyond the reasonable comprehension of anyone who would conform his conduct to the law to realize that sewing a flag on the seat of his pants is contemptuous of the flag. The [*585] Supreme Judicial Court of Massachusetts, in affirming the conviction, stated that the "jury could infer that the violation was intentional . . . ." If he thus intended the very act which the statute forbids, Goguen can hardly complain that he did not realize his acts were in violation of the statute. "The requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . Where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Screws v. United States, 325 U.S. 91, 101-102 (1945).*

[***619] If it be argued that the statute in this case merely requires an intentional act, not a willful one in the sense of intending what the statute forbids, then it must be recalled that appellee's major argument is that wearing a flag patch on his trousers was conduct that "clearly expressed an idea, albeit unpopular or unpatriotic, about the flag or about the country it symbolizes . . . . Goguen may have meant to show that he believed that America was a fit place only to sit on, or the proximity to that portion of his anatomy might have had more vulgar connotations. Nonetheless, the strong and forceful communication of ideas is unmistakable." App. 13. Goguen was under no misapprehension as to what he was doing and as to whether he was showing contempt for the flag of the United States. As he acknowledges in his brief here, "it was necessary for the jury to find that appellee conveyed a contemptuous attitude in order to convict him." I cannot, therefore, agree that the Massachusetts statute is vague as to Goguen; and if not vague as to his conduct, it is irrelevant that it may be vague in other contexts with respect to other [*586] conduct. "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States v. National Dairy Products Corp., 372 U.S. 29, 33 (1963).* Statutes are not "invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Id., at 32.*

The unavoidable inquiry, therefore, becomes whether the "treats contemptuously" provision of the statute, as applied in this case, is unconstitutional under the *First Amendment.* That Amendment, of course, applies to speech and not to conduct without substantial communicative intent and impact. Even though particular conduct may be expressive and is understood to be of this nature, it may be prohibited if necessary to further a nonspeech interest of the Government that is within the power of the Government to implement. *United States v. O'Brien, 391 U.S. 367 (1968).*

There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and [**1254] to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the common defense, and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag. It would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, Act of Jan. 13, 1794, 1 Stat. 341, c. 1, just as they had for the Union under the Articles of Confederation. 8 Journals of the Continental Congress 464 (June 14, 1777). It is a fact of history that flags have been associated with nations and with government at all levels, [*587] as well as with tribes and families. It is also a historical fact that flags, including ours, have played an important and useful role in human affairs. One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important [***620] symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition. The United States has created its own flag, as it may. The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it.

I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence. Neither would I find it beyond congressional power, or that of state legislatures, to forbid attaching to or putting on the flag any words, symbols, or advertisements. [2] All of these objects, whatever their nature, are foreign to the flag, change its physical character, and interfere with its de-

sign and function. There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a monument, subject to similar protection.

2 For a treatment of statutes protective of the flag, see Rosenblatt, Flag Desecration Statutes: History and Analysis, 1972 Wash. U.L.Q. 193.

II

I would affirm Goguen's conviction, therefore, had he been convicted for mutilating, trampling upon, or defacing the flag, or for using the flag as a billboard for [*588] commercial advertisements or other displays. The Massachusetts statute, however, does not stop with proscriptions against defacement or attaching foreign objects to the flag. It also makes it a crime if one "treats contemptuously" the flag of the United States, and Goguen was convicted under this part of the statute. To violate the statute in this respect, it is not enough that one "treat" the flag; he must also treat it "contemptuously," which, in ordinary understanding, is the expression of contempt for the flag. In the case before us, as has been noted, the jury must have found that Goguen not only wore the flag on the seat of his pants but also that the act -- and hence Goguen himself -- was contemptuous of the flag. To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature. [3]

3 Massachusetts has not construed its statute to eliminate the communicative aspect of the proscribed conduct as a crucial element of the violation. In *State v. Royal, 113 N. H. 224, 305 A. 2d 676 (1973)*, the New Hampshire Supreme Court, noting among other things that the State has a valid interest in the physical integrity of the flag, rejected a facial attack on its flag desecration statute, which made it a crime to publicly mutilate, trample upon, defile, deface, or cast contempt upon the flag. The court construed the statute to be "directed at acts upon the flag and not 'at the expression of and mere belief in particular ideas.'" *Id., at 230, 305 A. 2d, at 680.* The proscription against casting contempt upon the flag was to be understood as a general prohibition of acts of the same nature as the previously forbidden acts of mutilation and defacement, not as a proscription of the expression of ideas. Thus:

"Our statute is more narrowly drawn than some flag statutes. It deals only with the flag itself or any 'flag or ensign evidently purporting to be' the flag. *State v. Cline, [113 N. H. 245], 305 A. 2d 673*, decided this date. Also, as we construe it, our statute prohibits only acts of mutilation and defilement inflicted directly upon the flag itself and does not prohibit acts which are directed at the flag without touching it. The statute enumerates specific acts of flag desecration, namely 'mutilate, trample upon, defile, deface,' all of which involve physical acts upon the flag. The general term 'cast contempt' follows these enumerated specific acts. We hold that the phrase 'or cast contempt by . . . acts' as used in RSA 573:4 is limited to physical abuse type of acts similar to those previously enumerated in the statute. 2 Sutherland, Statutory Construction § 4909 (3d rev. ed. Horack 1943); *State v. Small, 99 N. H. 349, 111 A. 2d 201 (1955)*; *State v. N. H. Gas & Electric Co., 86 N. H. 16, 163 A. 724 (1932)*." *Id., at 227, 305 A. 2d, at 679.*

[*589] [***621] [**1255] Neither the United States nor any State may require any individual to salute or express favorable attitudes toward the flag. *West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)*. It is also clear under our cases that disrespectful or contemptuous spoken or written words about the flag may not be punished consistently with the *First Amendment. Street v. New York, 394 U.S. 576 (1969)*. Although neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the *First Amendment, Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)*, and may not be forbidden by law except when incidental to preventing unprotected conduct or unless the communication is itself among those that fall outside the protection of the *First Amendment*. In *O'Brien, supra*, the Court sustained a conviction for draft card burning, although admittedly the burning was itself expressive. There, destruction of draft cards, whether communicative or not, was found to be inimical to important governmental considerations. But the Court made clear that if the concern of the law was with the expression associated with the act, the result would be otherwise:

"The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct [*590] arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California, 283 U.S. 359 (1931)*, for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." *391 U.S., at 382.*

It would be difficult, therefore, to believe that the conviction in *O'Brien* would have been sustained had the statute proscribed only contemptuous burning of draft cards.

Any conviction under the "treats contemptuously" provision of the Massachusetts statute would suffer from the same infirmity. This is true of Goguen's conviction. And if it be said that the conviction does not violate the *First* and *Fourteenth Amendments* because Goguen communicated nothing at all by his conduct and did not intend to do so, there would then be no evidentiary basis whatsoever for convicting him of being "contemptuous" of the flag. I concur in the Court's judgment.

DISSENT BY: BLACKMUN; REHNQUIST

DISSENT

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with MR. JUSTICE WHITE in his conclusion that the Massachusetts [***622] flag statute is not unconstitutionally [**1256] vague. I disagree with his conclusion that the words "treats contemptuously" are necessarily directed at protected speech and that Goguen's conviction for his immature antic therefore cannot withstand constitutional challenge.

[*591] I agree with MR. JUSTICE REHNQUIST when he concludes that the *First Amendment* affords no shield to Goguen's conduct. I reach that result, however, not on the ground that the Supreme Judicial Court of Massachusetts "would read" the language of the Massachusetts statute to require that "treats contemptuously" entails physical contact with the flag and the protection of its physical integrity, but on the ground that that court, by its unanimous rescript opinion, has in fact already done exactly that. The court's opinion states that Goguen "was not prosecuted for being 'intellectually . . . diverse' or for 'speech,' as in *Street v. New York, 394 U.S. 576, 593-594* . . . ." Having rejected the vagueness challenge and concluded that Goguen was not punished for speech, the Massachusetts court, in upholding the conviction, has necessarily limited the scope of the statute to protecting the physical integrity of the flag. The requisite for "treating contemptuously" was found and the court concluded that punishment was not for speech -- a communicative element. I, therefore, must conclude that Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants. I accept the Massachusetts court's opinion at what I regard as its face value.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with the concurring opinion of my Brother WHITE insofar as he concludes that the Massachusetts law is not unconstitutionally vague, but I do not agree with him that the law under which appellee Goguen was convicted violates the *First* and *Fourteenth Amendments*. The issue of the application of the *First Amendment* to expressive conduct, or "symbolic speech," is [*592] undoubtedly a difficult one, and in cases dealing with the United States flag it has unfortunately been expounded only in dissents and concurrences. See *Street v. New York, 394 U.S. 576, 594 (1969)* (Warren, C. J., dissenting), 609 (Black, J., dissenting), 610 (WHITE, J., dissenting), 615 (Fortas, J., dissenting); and *Cowgill v. California, 396 U.S. 371 (1970)* (Harlan, J., concurring). Nonetheless, since I disagree with the Court's conclusion that the statute is unconstitutionally vague, I must, unlike the Court, address appellant's *First Amendment* contentions.

The question whether the State may regulate the display of the flag in the circumstances shown by this record appears to be an open one under our decisions. *Halter v. Nebraska, 205 U.S. 34 (1907)*; *Street v. New York, supra; Cowgill v. California, supra* (Harlan, J., concurring); *People v. Radich, 26 N. Y. 2d 114, 257 N. E. 2d 30*, aff'd by an equally divided *Court, 401 U.S. 531 (1971)*.

[***623] What the Court rightly describes as "the slender record in this case," *ante*, at 568, shows only that Goguen wore a small cloth version of the United States flag sewn to the seat of his blue jeans. When the first police officer questioned him, he was standing with a group of people on Main Street in Leominster, Massachusetts. The people with him were laughing. When the second police officer saw him, he was "walking in the downtown business district of Leominster, wearing a short coat, casual type [**1257] pants and a miniature American flag sewn on the left side of his pants." Goguen did not testify, and there is nothing in the record before us to indicate what he was attempting to communicate by his conduct, or, indeed, whether he was attempting to communicate anything at all. The record before us does not even conclusively reveal whether Goguen sewed the flag on the [*593] pants himself, or whether the pants were manufactured complete with flag; his counsel here, however, who was also his trial counsel, stated in oral argument that of his own knowledge the pants were not manufactured with the flag on them. Finally, it does not appear whether appellee said anything during his journey through the streets of Leominster; his amended bill of exceptions to the Supreme Judicial Court of Massachusetts made no mention of any testimony indicating that he spoke at all.

Goguen was prosecuted under the Massachusetts statute set forth in the opinion of the Court, and has as-

serted here not only a claim of unconstitutional vagueness but a claim that the statute infringes his right under the *First* and *Fourteenth Amendments*.

I

There is a good deal of doubt on this record that Goguen was trying to communicate any particular idea, and had he been convicted under a statute which simply prohibited improper display of the flag I would be satisfied to conclude that his conduct in wearing the flag on the seat of his pants did not come within even the outermost limits of that sort of "expressive conduct" or "symbolic speech" which is entitled to any *First Amendment* protection. But Goguen was convicted of treating the flag contemptuously by the act of wearing it where he did, and I have difficulty seeing how Goguen could be found by a jury to have treated the flag contemptuously by his act and still not to have expressed any idea at all. There are, therefore, in my opinion, at least marginal elements of "symbolic speech" in Goguen's conduct as reflected by this record.

Many cases which could be said to involve conduct no less expressive than Goguen's, however, have never been thought to require analysis in *First Amendment* [*594] terms because of the presence of other factors. One who burns down the factory of a company whose products he dislikes can expect his *First Amendment* defense to a consequent arson prosecution to be given short shrift by the courts. The arson statute safeguards the government's substantial interest in preventing the destruction of property by means dangerous to human life, and an arsonist's motive is quite irrelevant. The same fate would doubtless await the *First Amendment* claim of one prosecuted for destruction of government property after he defaced a speed limit sign in order to protest the stated speed limit. Both the arsonist and [***624] the defacer of traffic signs have infringed on the property interests of others, whether of another individual or of the government. Yet Goguen, unlike either, has so far as this record shows infringed on the ordinary property rights of no one.

That Goguen owned the flag with which he adorned himself, however, is not dispositive of the *First Amendment* issue. Just as the government may not escape the reach of the *First Amendment* by asserting that it acts only in a proprietary capacity with respect to streets and parks to which it has title, *Hague v. CIO, 307 U.S. 496, 514-516 (1939)*, a defendant such as Goguen may not escape the reach of the police power of the State of Massachusetts by asserting that his act affected only his own property. Indeed, there are so many well-established exceptions to the proposition that one may do what he likes with his own property that it cannot be said to have even the status of a general rule.

[**1258] The very substantial authority of state and local governing bodies to regulate the use of land, and thereby to limit the uses available to the owner of the land, was established nearly a half century ago in *Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)*. Land-use regulations [*595] in a residential zoning district typically do not merely exclude malodorous and unsightly rendering plants; they often also prohibit erection of buildings or monuments, including ones open to the public, which might itself in an aesthetic sense involve substantial elements of "expressive conduct." The performance of a play may well constitute expressive conduct or "pure" speech, but a landowner may not for that reason insist on the right to construct and operate a theater in an area zoned for noncommercial uses. So long as the zoning laws do not, under the guise of neutrality, actually prohibit the expression of ideas because of their content, they have not been thought open to challenge under the *First Amendment*.

As may land, so may other kinds of property be subjected to close regulation and control. A person with an ownership interest in controlled drugs, or in firearms, cannot use them, sell them, and transfer them in whatever manner he pleases. The copyright laws, *17 U. S. C. § 1 et seq.*, limit what use the purchaser of a copyrighted book may make of his acquisition. A company may be restricted in what it advertises on its billboards, *Packer Corp.* v. *Utah, 285 U.S. 105 (1932)*.

The statute which Goguen violated, however, does not purport to protect the related interests of other property owners, neighbors, or indeed any competing ownership interest in the same property; the interest which it protects is that of the Government, and is not a traditional property interest.

Even in this, however, laws regulating use of the flag are by no means unique. A number of examples can be found of statutes enacted by Congress which protect only a peculiarly governmental interest in property otherwise privately owned. Title *18 U. S. C. § 504* prohibits the printing or publishing in actual size or in actual [*596] color of any United States postage or revenue stamp, or of any obligation or security of the United States. It likewise prohibits the importation [***625] of any plates for the purpose of such printing. Title *18 U. S. C. § 331* prohibits the alteration of any Federal Reserve note or national bank note, and *18 U. S. C. § 333* prohibits the disfiguring or defacing of any national bank note or coin. Title *18 U. S. C. § 702* prohibits the wearing of a military uniform, any part of such uniform, or anything similar to a military uniform or part thereof without proper authorization. Title *18 U. S. C. § 704* prohibits the unauthorized wearing of service medals. It is not without significance that many of these statutes,

though long on the books, have never been judicially construed or even challenged.

My Brother WHITE says, however, that whatever may be said of neutral statutes simply designed to protect a governmental interest in private property, which in the case of the flag may be characterized as an interest in preserving its physical integrity, the Massachusetts statute here is not neutral. It punishes only those who treat the flag contemptuously, imposing no penalty on those who "treat" it otherwise, that is, those who impair its physical integrity in some other way.

II

Leaving aside for the moment the nature of the governmental interest in protecting the physical integrity of the flag, I cannot accept the conclusion that the Massachusetts statute must be invalidated for punishing only some conduct that impairs the flag's physical integrity. It is true, as the Court observes, that we do not have in so many words a "narrowing construction" of the statute from the Supreme Judicial Court of Massachusetts. But the first of this [**1259] Court's decisions cited in the short [*597] rescript opinion of the Supreme Judicial Court is *Halter v. Nebraska, 205 U.S. 34 (1907)*, which upheld against constitutional attack a Nebraska statute which forbade the use of the United States flag for purposes of advertising. We also have the benefit of an opinion of the Attorney General of the Commonwealth of Massachusetts that the statute under which Goguen was prosecuted, being penal, "'is not to be enlarged beyond its plain import, and as a general rule is strictly construed.'" Report of Atty. Gen., Pub. Doc. No. 12, pp. 192-193 (1968). With this guidance, and the further assistance of the content of the entire statutory prohibition, I think the Supreme Judicial Court would read the language "whoever publicly mutilates, tramples upon, defaces, or treats contemptuously the flag of the United States . . ." as carrying the clear implication that the contemptuous treatment, like mutilation, trampling upon, or defacing, must involve some actual physical contact with the flag itself. Such a reading would exclude a merely derogatory gesture performed at a distance from the flag, as well as purely verbal disparagement of it. *

> * To the extent that counsel for appellant who argued the cause in the Court of Appeals may have intimated a broader construction in the colloquy in that court quoted in this Court's opinion, *ante*, at 575-576. I would attach little weight to it. We have previously said that we are "loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument," *Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 170 (1972)*, and if that be the case surely even less weight should be ascribed by us to a colloquy which took place in another court.

If [***626] the statute is thus limited to acts which affect the physical integrity of the flag, the question remains whether the State has sought only to punish those who impair the flag's physical integrity for the purpose of disparaging it as a symbol, while permitting impairment [*598] of its physical integrity by those who do not seek to disparage it as a symbol. If that were the case, holdings like *Schacht v. United States, 398 U.S. 58 (1970)*, suggest that such a law would abridge the right of free expression.

But Massachusetts metes out punishment to anyone who publicly mutilates, tramples, or defaces the flag, regardless of his motive or purpose. It also punishes the display of any "words, figures, advertisements or designs" on the flag, or the use of a flag in a parade as a receptacle for depositing or collecting money. Likewise prohibited is the offering or selling of any article on which is engraved a representation of the United States flag.

The variety of these prohibitions demonstrates that Massachusetts has not merely prohibited impairment of the physical integrity of the flag by those who would cast contempt upon it, but equally by those who would seek to take advantage of its favorable image in order to facilitate any commercial purpose, or those who would seek to convey any message at all by means of imprinting words or designs on the flag. These prohibitions are broad enough that it can be fairly said that the Massachusetts statute is one essentially designed to preserve the physical integrity of the flag, and not merely to punish those who would infringe that integrity for the purpose of disparaging the flag as a symbol. While it is true that the statute does not appear to cover one who simply wears a flag, unless his conduct for other reasons falls within its prohibitions, the legislature is not required to address every related matter in an area with one statute. *Katzenbach v. Morgan, 384 U.S. 641, 656-658 (1966)*. It may well be that the incidence of such conduct at the time the statute was enacted was not thought to warrant legislation [**1260] in order to preserve the physical integrity of the flag.

[*599] In *United States v. O'Brien, 391 U.S. 367 (1968)*, the Court observed:

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id., at 376.*

Then, proceeding "on the assumption that the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the *First Amendment*," the Court held that a regulation of conduct was sufficiently justified

"if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential [***627] to the furtherance of that interest." *Id., at 377.*

While I have some doubt that the first enunciation of a group of tests such as those established in *O'Brien* sets them in concrete for all time, it does seem to me that the Massachusetts statute substantially complies with those tests. There can be no question that a statute such as the Massachusetts one here is "within" the constitutional power of a State to enact. Since the statute by this reading punishes a variety of uses of the flag which would impair its physical integrity, without regard to presence or character of expressive conduct in connection with those uses, I think the governmental interest is unrelated to the suppression of free expression. The question of whether the governmental interest is "substantial" is not easy to sever from the question of whether the restriction is "no greater than is essential to the furtherance of that interest," and I therefore treat those [*600] two aspects of the matter together. I believe that both of these tests are met, and that the governmental interest is sufficient to outweigh whatever collateral suppression of expressive conduct was involved in the actions of Goguen. In so concluding, I find myself in agreement not only with my Brother WHITE in this case, but with those members of the Court referred to earlier in this opinion who dissented from the Court's disposition in the case of *Street v. New York, 394 U.S. 576 (1969).*

My Brother WHITE alludes to the early legislation both of the Continental Congress and of the Congress of the new Nation dealing with the flags, and observes: "One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition." I agree.

On September 17, 1787, as the last members of the Constitutional Convention were signing the instrument, James Madison in his "Notes" describes the occurrence of the following incident:

"Whilst the last members were signing it Doctor Franklin looking towards the President's Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have said he, often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting sun." 4 Writings of James Madison 482-483 (Hunt ed. 1903).

[*601] [**1261] Writing for this Court more than one hundred years later, Mr. Justice Holmes made the familiar statement:

"When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough [***628] for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri v. Holland, 252 U.S. 416, 433 (1920).*

From its earliest days, the art and literature of our country have assigned a special place to the flag of the United States. It figures prominently in at least one of Charles Willson Peale's portraits of George Washington, showing him as leader of the forces of the 13 Colonies during the Revolutionary War. No one who lived through the Second World War in this country can forget the impact of the photographs of the members of the United States Marine Corps raising the United States flag on the top of Mount Suribachi on the Island of Iwo Jima, which is now commemorated in a statute at the Iwo Jima Memorial adjoining Arlington National Cemetery.

Ralph Waldo Emerson, writing 50 years after the battles of Lexington and Concord, wrote:

"By the rude bridge that arched the flood

Their flag to April's breeze unfurled

Here once the embattled farmers stood

And fired the shot heard 'round the world."

[*602] Oliver Wendell Holmes, Senior, celebrated the flag that had flown on "Old Ironsides" during the War of 1812, and John Greenleaf Whittier made Barbara

Frietchie's devotion to the "silken scarf" in the teeth of Stonewall Jackson's ominous threats the central theme of his familiar poem. John Philip Sousa's "Stars and Stripes Forever" and George M. Cohan's "It's a Grand Old Flag" are musical celebrations of the flag familiar to adults and children alike. Francis Scott Key's "Star Spangled Banner" is the country's national anthem.

While most of the artistic evocations of the flag occur in the context of times of national struggle, and correspondingly greater dependence on the flag as a symbol of national unity, the importance of the flag is by no means limited to the field of hostilities. The United States flag flies over every federal courthouse in our Nation, and is prominently displayed in almost every federal, state, or local public building throughout the land. It is the one visible embodiment of the authority of the National Government, through which the laws of the Nation and the guarantees of the Constitution are enforced.

It is not empty rhetoric to say that the United States Constitution, even the *First* and *Fourteenth Amendments* under which Goguen seeks to upset his conviction, does not invariably in the world of practical affairs enforce itself. Going back no further than the memories of most of us presently alive, the United States flag was carried by federal troops summoned by the President to enforce decrees of federal courts in Little Rock, Arkansas, in 1957, and in Oxford, Mississippi, in 1962.

The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in [***629] the two dimensions of a lawyer's brief or of a judicial opinion. But if the Government [*603] may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws, I [**1262] see no reason why it may not, for all of the reasons mentioned, create a similar governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity. For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood -- a history compiled by generations of our forebears and contributed to by streams of immigrants from the four corners of the globe, which has traveled a course since the time of this country's origin that could not have been "foreseen . . . by the most gifted of its begetters."

The permissible scope of government regulation of this unique physical object cannot be adequately dealt with in terms of the law of private property or by a highly abstract, scholastic interpretation of the *First Amendment*. Massachusetts has not prohibited Goguen from wearing a sign sewn to the seat of his pants expressing in words his low opinion of the flag, of the country, or anything else. It has prohibited him from wearing there a particular symbol of extraordinary significance and content, for which significance and content Goguen is in no wise responsible. The flag of the United States is not just another "thing," and it is not just another "idea"; it is not primarily an idea at all.

Here Goguen was, so far as this record appears, quite free to express verbally whatever views it was he was seeking to express by wearing a flag sewn to his pants, on the streets of Leominster or in any of its parks or commons where free speech and assembly were customarily permitted. He was not compelled in any way to salute the flag, pledge allegiance to it, or make any [*604] affirmative gesture of support or respect for it such as would contravene *West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)*. He was simply prohibited from impairing the physical integrity of a unique national symbol which has been given content by generations of his and our forebears, a symbol of which he had acquired a copy. I believe Massachusetts had a right to enact this prohibition.

REFERENCES

21 Am Jur 2d, Criminal Law 17 ; 35 Am Jur 2d, Flag 5

US L Ed Digest, Statutes 18

ALR Digests, Statutes 29

L Ed Index to Annos, Certainty and Definiteness; Criminal Law; Due Process of Law; Flag

ALR Quick Index, Certainty and Definiteness; Due Process of Law; Flag

Federal Quick Index, Certainty and Definiteness; Due Process of Law; Flag

Annotation References:

Constitutionality of statutes, ordinances, or administrative provisions prohibiting defiance, disrespect, mutilation, or misuse of American flag. *22 L Ed 2d 972.*

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. *96 L Ed 374*; *16 L Ed 2d 1231.*

What constitutes violation of flag desecration statutes. *41 ALR3d 502.*

EXHIBIT "12"

UNITED STATES v. HARRISS ET AL.

No. 32

SUPREME COURT OF THE UNITED STATES

347 U.S. 612; 74 S. Ct. 808; 98 L. Ed. 989; 1954 U.S. LEXIS 2657

October 19, 1953, Argued
June 7, 1954, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

DISPOSITION: *109 F.Supp. 641*, reversed.

SUMMARY:

The issue before the Supreme Court was the constitutionality of the disclosure provisions of the Federal Lobbying Act (*2 USC 261 et seq.*).

In an opinion by Warren, Ch. J., five members of the Court construed these provisions as applicable only to persons who solicited, collected, or received contributions, where one of the main purposes is to influence the passage or defeat of congressional legislation and the intended method of accomplishing this purpose is through direct communication with members of Congress. So construed, the disclosure provisions were held not to be unconstitutionally vague nor to violate the freedom of speech and press or the freedom to petition the government.

Douglas, J., joined by Black, J., dissented. So did Jackson, J. The dissents were based primarily on the ground that the act was unconstitutionally vague and could not be saved by construction such as attempted by the majority.

Clark, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

APPEAL AND ERROR §103

dismissal of information -- review by government -- scope. --

Headnote:[1]

On appeal from a decision of a district court dismissing an information for violation of the Federal Lobbying Act (*2 USC 261 et seq.*) on the ground that the act is unconstitutional, the Supreme Court is not concerned with the sufficiency of the information as a criminal pleading. Its review is limited to a decision on the alleged invalidity of the statute; in making this decision the court judges the statute on its face.

[***LEdHN2]

STATUTES §18

indefiniteness -- criminal statute. --

Headnote:[2]

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

[***LEdHN3]

STATUTES §18

indefiniteness -- criminal statute. --

Headnote:[3]

If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be

struck down as vague even though marginal cases could be put where doubts might arise.

[***LEdHN4]

STATUTES §106

construction -- f voring constitutionality. --

Headnote:[4]

If the general class of offenses to which a statute is directed can be made constitutionally definite by a reasonable construction of the statute, the Supreme Court is under a duty to give the statute that construction.

[***LEdHN5]

STATUTES §107

construction -- favoring constitutionality. --

Headnote:[5]

The Supreme Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality.

[***LEdHN6]

UNITED STATES §13.5

Lobbying Act -- construction. --

Headnote:[6]

Section 307 of the Federal Lobbying Act (*2 USC 261 et seq.*), entitled "Persons to whom applicable," modifies the substantive provisions of the act, including the disclosure requirements of 305 and 308. Unless a "person" falls within the category established by 307, the disclosure requirements of 305 and 308 are inapplicable.

[***LEdHN7]

STATUTES §81

construction -- impairing effectiveness. --

Headnote:[7]

In construing the Federal Lobbying Act (*2 USC 261 et seq.*) narrowly to avoid constitutional doubts, the Supreme Court must also avoid a construction that would seriously impair the effectiveness of the act in coping with the problem it is designed to alleviate.

[***LEdHN8]

UNITED STATES §13.5

Lobbying Act -- persons covered. --

Headnote:[8]

To come within the scope of the Federal Lobbying Act (*2 USC 261 et seq.*), a person must meet three prerequisites under 307 of the act: (1) he must have solicited, collected, or received contributions; (2) one of his main purposes, or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; and (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress.

[***LEdHN9]

STATUTES §18

indefiniteness -- Lobbying Act. --

Headnote:[9]

The constitutional requirements of definiteness are met by the disclosure requirements of the Federal Lobbying Act (*2 USC 261 et seq.*), construed to be limited to the reporting of all contributions and expenditures having the purpose of attempting to influence legislation through direct communication with Congress (305 of the act) and to registration of those who are covered by 307 and who, in addition, engage themselves for pay or any other valuable consideration for the purpose of so influencing legislation (308 of the act).

[***LEdHN10]

CONSTITUTIONAL LAW §925

freedom of speech and petition -- Lobbying Act. --

Headnote:[10]

The freedoms guaranteed by the *First Amendment* freedom to speak, publish, and petition the government are not violated by the disclosure requirements of the Federal Lobbying Act (*2 USC 261 et seq.*), construed to be limited to the reporting of all contributions and expenditures having the purpose of attempting to influence legislation through direct communication with Congress (305 of the act) and to registration of those who are covered by 307 and who, in addition, engage themselves for pay or any other valuable consideration for the purpose of so influencing legislation (308 of the act).

[***LEdHN11]

UNITED STATES §13.5

Lobbying Act -- purpose. --

Headnote:[11]

The Federal Lobbying Act (*2 USC 261 et seq.*) is designed to aid in preventing the voice of the people from being drowned out by the voice of special interest

groups seeking favored treatment while masquerading as proponents of the public weal. The act is designed to maintain the integrity of the legislative process.

[***LEdHN12]

CONSTITUTIONAL LAW §925

freedom of speech and petition -- Lobbying Act. --

Headnote:[12]

That the Federal Lobbying Act (*2 USC 261 et seq.*), with respect to persons other than those to whom it is applicable, may, as a practical matter, operate as a deterrent to exercise their *First Amendment* rights is a hazard too remote to require striking down the act, which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

[***LEdHN13]

COURTS §95.3

avoiding review of constitutionality -- Lobbying Act. --

Headnote:[13]

In determining the validity of the Federal Lobbying Act (*2 USC 261 et seq.*) on appeal from a decision of a district court dismissing an information for violation of the act, the Supreme Court will not pass on a contention that the penalty provided in 310(b) of the act (restraint from lobbying for three years from the date of conviction) violates the *First Amendment* guaranties, since the penalty has not yet been applied to the defendants, and it will never be so applied if they are found innocent, and, moreover, the elimination of the penalty provisions, if ultimately declared unconstitutional, would still leave the balance of the statute effective.

[***LEdHN14]

STATUTES §58

separability -- Lobbying Act. --

Headnote:[14]

If 310(b) of the Federal Lobbying Act (*2 USC 261 et seq.*), providing that any person convicted of a violation of the act should be prohibited from lobbying for three years from the date of his conviction, should be declared unconstitutional, its elimination would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty; consequently the separability clause of the act could be given effect.Point from Separate Opinion

[***LEdHN15]

STATUTES §18

indefiniteness. --

Headnote:[15]

In determining whether a criminal statute is unconstitutionally vague, the Supreme Court will consider the statute on its face. [Per Douglas and Black, JJ.]

SYLLABUS

1. As here construed, §§ 305, 307 and 308 of the Federal Regulation of Lobbying Act are not too vague and indefinite to meet the requirements of due process. Pp. 617-624.

(a) If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. P. 618.

(b) If this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, the Court is under a duty to give the statute that construction. P. 618.

(c) Section 307 limits the coverage of the Act to those "persons" (except specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if one of the main purposes of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). Pp. 618-620, 621-623.

(d) The purposes set forth in § 307 (a) and (b) are here construed to refer only to "lobbying in its commonly accepted sense" -- to direct communication with members of Congress on pending or proposed legislation. Pp. 620-621.

(e) The "principal purpose" requirement was adopted merely to exclude from the scope of § 307 those contributions and persons having only an "incidental" purpose of influencing legislation. It does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. Pp. 621-623.

(f) There are three prerequisites to coverage under §§ 307, 305 and 308: (1) the "person" must have solicited, collected or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; and (3) the intended method of accomplishing this purpose must

have been through direct communication with members of Congress. P. 623.

2. As thus construed, §§ 305 and 308 do not violate the freedoms guaranteed by the *First Amendment* -- freedom to speak, publish and petition the Government. Pp. 625-626.

3. In this case, it is unnecessary for the Court to pass on the contention that the penalty provision in § 310 (b) violates the *First Amendment*. Pp. 626-627.

(a) Section 310 (b) has not yet been applied to appellees, and it will never be so applied if appellees are found innocent of the charges against them. P. 627.

(b) The elimination of § 310 (b) would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty, and the separability provision of the Act can be given effect if § 310 (b) should ultimately be found invalid. P. 627.

COUNSEL: Oscar H. Davis argued the cause for the United States. With him on the brief were Robert L. Stern, then Acting Solicitor General, Assistant Attorney General Olney, Beatrice Rosenberg and John R. Wilkins. Walter J. Cummings, Jr., then Solicitor General, filed the Statement as to Jurisdiction.

Burton K. Wheeler argued the cause for Harriss, appellee. With him on the brief was Edward K. Wheeler.

Hugh Howell argued the cause for Linder, Commissioner of Agriculture of Georgia, appellee. With him on the brief was Victor Davidson.

Ralph W. Moore, appellee, submitted on brief pro se.

JUDGES: Warren, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton

OPINION BY: WARREN

OPINION

[*613] [**810] [***994] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The appellees were charged by information with violation of the Federal Regulation of Lobbying Act, 60 Stat. 812, 839, *2 U. S. C. §§ 261-270.* Relying on its previous [*614] decision in *National Association of Manufacturers v. McGrath, 103 F.Supp. 510*, vacated as moot, *344 U.S. 804*, the District Court dismissed the information on the ground that the Act is unconstitutional. *109 F.Supp. 641.* The case is here on direct appeal under the Criminal Appeals Act, *18 U. S. C. § 3731.*

Seven counts of the information are laid under § 305, which requires designated reports to Congress from every person "receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of any legislation by Congress. [1] One such count charges the National Farm Committee, a [***995] Texas corporation, [*615] with failure to report the solicitation and receipt of contributions to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and the defeat of legislation which would cause a decline in those prices. The remaining six counts under § 305 charge defendants Moore and Harriss with failure to report expenditures having the same single purpose. Some of the alleged expenditures consist of the payment of compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings, concerning legislation affecting agricultural [**811] prices; the other alleged expenditures relate largely to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on such legislation.

1 Section 305 provides:

"(a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing --

"(1) the name and address of each person who has made a contribution of $ 500 or more not mentioned in the preceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of $ 500 or more to such person since the effective date of this title;

"(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

"(3) the total sum of all contributions made to or for such person during the calendar year;

"(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $ 10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

"(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);

"(6) the total sum of expenditures made by or on behalf of such person during the calendar year.

"(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward."

The following are "the purposes designated in subparagraph (a) or (b) of section 307":

"(a) The passage or defeat of any legislation by the Congress of the United States.

"(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

The other two counts in the information are laid under § 308, which requires any person "who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation" to register with Congress and to make specified disclosures. [2] These two counts allege [***996] in considerable [*616] detail that defendants Moore and Linder were hired to express certain views to Congress as to agricultural prices or to cause others to do so, for the purpose of attempting to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and a defeat of legislation which would cause a decline in such prices; and that pursuant to this undertaking, without having registered as required by [*617] § 308, they arranged to have members of Congress contacted on behalf of these views, either directly by their own emissaries or through an artificially stimulated letter campaign. [3]

2 Section 308 provides:

"(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

"(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record."

3 A third count under § 308 was abated on the death of the defendant against whom the charge was made.

[***LEdHR1] [1]We are not concerned here with the sufficiency of the information as a criminal pleading. Our review under the Criminal Appeals Act is limited to a decision on the alleged "invalidity" of the statute on which the information is based. [4] In making this decision, we judge the statute on its face. See *United* [**812] *States v. Petrillo, 332 U.S. 1, 6, 12.* The "invalidity" of the Lobbying Act is asserted on three grounds: (1) that §§ 305, 307, and 308 are too vague and indefinite to meet the requirements of due process; (2) that §§ 305

and 308 violate the *First Amendment* guarantees of freedom of speech, freedom of the press, and the right to petition the Government; (3) that the penalty provision of § 310 (b) violates the right of the people under the *First Amendment* to petition the Government.

4 *18 U. S. C. § 3731.* See *United States v. Petrillo, 332 U.S. 1, 5.* For "The Government's appeal does not open the whole case." *United States v. Borden Co., 308 U.S. 188, 193.*

I.

[***LEdHR2] [2]The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. [5]

5 See *Jordan v. De George, 341 U.S. 223, 230-232*; Quarles, Some Statutory Construction Problems and Approaches in Criminal Law, 3 Vand. L. Rev. 531, 539-543; Note, 62 Harv. L. Rev. 77.

[*618] [***LEdHR3] [3] [***LEdHR4] [4]On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States v. Petrillo, 332 U.S. 1, 7.*Cf. *Jordan v. De George, 341 U.S. 223, 231.* And if this general class of offenses can be made constitutionally definite by a reasonable [***997] construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in *Screws v. United States, 325 U.S. 91*, upholding the definiteness of the Civil Rights Act. [6]

[5]

6 Cf. *Fox v. Washington, 236 U.S. 273*; *Musser v. Utah, 333 U.S. 95*; *Winters v. New York, 333 U.S. 507, 510.*

This rule as to statutes charged with vagueness is but one aspect of the broader principle that this Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality. *United States v. Delaware & Hudson Co., 213 U.S. 366, 407-408*; *United States v. Congress of Industrial Organizations, 335 U.S. 106, 120-121*; *United States v. Rumely, 345 U.S. 41, 47.* Thus, in the *C. I. O.* case, *supra*, this Court held that expenditures by a labor organization for the publication of a weekly periodical urging support for a certain candidate in a forthcoming congressional election were not forbidden by the Federal Corrupt Practices Act, which makes it unlawful for ". . . any labor organization to make a contribution or expenditure in connection with any [congressional] election . . . ." Similarly, in the *Rumely* case, *supra*, this Court construed a House Resolution authorizing investigation of "all lobbying activities intended to influence, encourage, promote, or retard legislation" to cover only "'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees.'"

The same course is appropriate here. The key section of the Lobbying Act is § 307, entitled "Persons to Whom Applicable." Section 307 provides:

> "The provisions of this title shall apply to any person (except a political committee as defined in [*619] the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:
>
> "(a) The passage or defeat of any [**813] legislation by the Congress of the United States.
>
> "(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

[***LEdHR6] [6]This section modifies the substantive provisions of the Act, including § 305 and § 308. In other words, unless a "person" falls within the category established by § 307, the disclosure requirements of § 305 and § 308 are inapplicable. [7] Thus coverage under the Act is limited to those persons (except for the specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if "the principal purpose" of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). In any event, the

solicitation, collection, or receipt of money or other thing of value is a prerequisite to coverage under the Act.

7 Section 302 (c) defines the term "person" as including "an individual, partnership, committee, association, corporation, and any other organization or group of persons."

The Government urges a much broader construction -- namely, that under § 305 a person must report his expenditures to influence legislation even though he does not solicit, collect, or receive contributions as provided in [*620] § 307. [8] Such a construction, we believe, would do violence to the title and language of § 307 as [***998] well as its legislative history. [9] If the construction urged by the Government is to become law, that is for Congress to accomplish by further legislation.

8 The Government's view is based on a variance between the language of § 307 and the language of § 305. Section 307 refers to any person who "solicits, collects, or receives" contributions; § 305, however, refers not only to "receiving any contributions" but also to "expending any money." It is apparently the Government's contention that § 307 -- since it makes no reference to expenditures -- is inapplicable to the expenditure provisions of § 305. Section 307, however, limits the application of § 305 as a whole, not merely a part of it.

9 Both the Senate and House reports on the bill state that "This section [§ 307] defines the application of the title . . . ." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 28; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 34. See also the remarks of Representative Dirksen in presenting the bill to the House: "The gist of the antilobbying provision is contained in section 307." 92 Cong. Rec. 10088.

We now turn to the alleged vagueness of the purposes set forth in § 307 (a) and (b). As in *United States v. Rumely, 345 U.S. 41, 47*, which involved the interpretation of similar language, we believe this language should be construed to refer only to "lobbying in its commonly accepted sense" -- to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign. [10] It is likewise clear that Congress would have [*621] intended the Act [**814] to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible. [11]

10 The Lobbying Act was enacted as Title III of the Legislative Reorganization Act of 1946, which was reported to Congress by the Joint Committee on the Organization of Congress. The Senate and House reports accompanying the bill were identical with respect to Title III. Both declared that the Lobbying Act applies "chiefly to three distinct classes of so-called lobbyists:

"First. Those who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.

"Second. The second class of lobbyists are those who are employed to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress. These individuals spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested, but carefully conceal from Members of Congress whom they happen to contact the purpose of their presence. The title in no wise prohibits or curtails their activities. It merely requires that they shall register and disclose the sources and purposes of their employment and the amount of their compensation.

"Third. There is a third class of entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation, many of whom serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them. They will likewise be required to register and state their compensation and the sources of their employment."

S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., pp. 32-33. See also the statement in the Senate by Senator La Follette, who was Chairman of the Joint Committee, at 92 Cong. Rec. 6367-6368.

11 See the Act's separability clause, note 18, *infra*, providing that the invalidity of any application of the Act should not affect the validity of its application "to other persons and circumstances."

[***LEdHR7] [7]There remains for our consideration the meaning of "the principal purpose" and "to be used principally to [*622] aid." The legislative history of the Act indicates that the term "principal" was adopted merely to exclude from the scope of § 307 those contributions and persons having only an "incidental" purpose of influencing legislation. [12] Conversely, [***999] the "principal purpose" requirement does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. [13] If it [**815] were otherwise -- if an organization, for example, were exempted [*623] because lobbying was only one of its main activities -- the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process. In construing the Act narrowly to avoid constitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate.

12 Both the Senate and House reports accompanying the bill state that the Act ". . . does not apply to organizations formed for other purposes whose efforts to influence legislation are merely incidental to the purposes for which formed." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 32. In the Senate discussion preceding enactment, Senator Hawkes asked Senator La Follette, Chairman of the Joint Committee in charge of the bill, for an explanation of the "principal purpose" requirement. In particular, Senator Hawkes sought assurance that multi-purposed organizations like the United States Chamber of Commerce would not be subject to the Act. Senator La Follette refused to give such assurance, stating: "So far as any organizations or individuals are concerned, I will say to the Senator from New Jersey, it will depend on the type and character of activity which they undertake. . . . I cannot tell the Senator whether they will come under the act. It will depend on the type of activity in which they engage, so far as legislation is concerned. . . . *It* [the Act] *affects all individuals and organizations alike if they engage in a covered activity.*" (Italics added.) 92 Cong. Rec. 10151-10152. See also Representative Dirksen's remarks in the House, 92 Cong. Rec. 10088.

13 Such a criterion is not novel in federal law. See Int. Rev. Code, § 23 (o)(2) (income tax), § 812 (d) (estate tax), and § 1004 (a)(2)(B) (gift tax), providing tax exemption for contributions to charitable and educational organizations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." For illustrative cases applying this criterion, see *Sharpe's Estate v. Commissioner, 148 F.2d 179* (C. A. 3d Cir.); *Marshall v. Commissioner, 147 F.2d 75* (C. A. 2d Cir.); *Faulkner v. Commissioner, 112 F.2d 987* (C. A. 1st Cir.); *Huntington National Bank v. Commissioner, 13 T. C. 760, 769.* Cf. *Girard Trust Co.* v. *Commissioner, 122 F.2d 108* (C. A. 3d Cir.); *Leubuscher v. Commissioner, 54 F.2d 998* (C. A. 2d Cir.); *Weyl v. Commissioner, 48 F.2d 811* (C. A. 2d Cir.); *Slee v. Commissioner, 42 F.2d 184* (C. A. 2d Cir.). See also Annotation, 138 A. L. R. 456.

[***LEdHR8] [8] [***LEdHR9] [9] To summarize, therefore, there are three prerequisites to coverage under § 307: (1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. And since § 307 modifies the substantive provisions of the Act, our construction of § 307 will of necessity also narrow the scope of § 305 and § 308, the substantive provisions underlying the information in this case. Thus § 305 is limited to those persons who are covered by § 307; and when so covered, they must report all contributions and expenditures having the purpose of attempting to influence legislation through direct communication with Congress. Similarly, § 308 is limited to those persons (with the stated exceptions [14]) who are covered by § 307 and who, in addition, engage themselves [*624] for pay or for any other valuable consideration for the purpose of attempting to influence legislation [***1000] through direct communication with Congress. Construed in this way, the Lobbying Act meets the constitutional requirement of definiteness. [15]

14 For the three exceptions, see note 2, *supra*.

15 Under this construction, the Act is at least as definite as many other criminal statutes which this Court has upheld against a charge of vagueness. *E. g., Boyce Motor Lines v. United States, 342 U.S. 337* (regulation providing that drivers of motor vehicles carrying explosives "shall avoid,

so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings"); *Dennis v. United States, 341 U.S. 494* (Smith Act making it unlawful for any person to conspire "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . . ."); *United States v. Petrillo, 332 U.S. 1* (statute forbidding coercion of radio stations to employ persons "in excess of the number of employees needed . . . to perform actual services"); *Screws v. United States, 325 U.S. 91*, and *Williams v. United States, 341 U.S. 97* (statute forbidding acts which would deprive a person of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); *United States v. Wurzbach, 280 U.S. 396* (statute forbidding any candidate for Congress or any officer or employee of the United States to solicit or receive a "contribution for any political purpose whatever" from any other such officer or employee); *Omaechevarria v. Idaho, 246 U.S. 343* (statute forbidding pasturing of sheep "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower"); *Fox v. Washington, 236 U.S. 273* (state statute imposing criminal sanctions on "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice . . . ."); *Nash v. United States, 229 U.S. 373* (Sherman Act forbidding "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"). Cf. *Jordan v. De George, 341 U.S. 223* (statute providing for deportation of persons who have committed crimes involving "moral turpitude").

[*625] II.

[***LEdHR10] [10]Thus construed, §§ 305 and 308 also do not violate the freedoms guaranteed [**816] by the *First Amendment* -- freedom to speak, publish, and petition the Government.

[***LEdHR11] [11]Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent. [16]

16 Similar legislation has been enacted in over twenty states. See Notes, 56 Yale L. J. 304, 313-316, and 47 Col. L. Rev. 98, 99-103.

Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act -- [***1001] to maintain the integrity of a basic governmental process. See *Burroughs and Cannon v. United States, 290 U.S. 534, 545.*

Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection. [*626] And here Congress has used that power in a manner restricted to its appropriate end. We conclude that §§ 305 and 308, as applied to persons defined in § 307, do not offend the *First Amendment.*

[***LEdHR12] [12]It is suggested, however, that the Lobbying Act, with respect to persons other than those defined in § 307, may as a practical matter act as a deterrent to their exercise of *First Amendment* rights. Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act. Our narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint. But, even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws. [17] The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

17 Similarly, the Hatch Act probably deters some federal employees from political activity permitted by that statute, but yet was sustained because of the national interest in a nonpolitical civil service. *United Public Workers v. Mitchell, 330 U.S. 75.*

[**817] III.

The appellees further attack the statute on the ground that the penalty provided in § 310 (b) is unconstitutional. That section provides:

> "(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from [*627] appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $ 10,000, or imprisonment for not more than five years, or by both such fine and imprisonment."

This section, the appellees argue, is a patent violation of the *First Amendment* guarantees of freedom of speech and the right to petition the Government.

[***LEdHR13] [13]We find it unnecessary to pass on this contention. Unlike §§ 305, 307, and 308 which we have judged on their face, § 310 (b) has not yet been applied to the appellees, and it will never be so applied if the appellees are found innocent of the charges against them. See *United States v. Wurzbach, 280 U.S. 396, 399;United States v. Petrillo, 332 U.S. 1, 9-12.*

[***LEdHR14] [14]Moreover, the Act provides for the separability of any provision found invalid. [18] If § 310 (b) should ultimately be declared unconstitutional, its elimination would still leave a statute defining specific [***1002] duties and providing a specific penalty for violation of any such duty. The prohibition of § 310 (b) is expressly stated to be "In addition to the penalties provided for in subsection (a) . . ."; subsection (a) makes a violation of § 305 or § 308 a misdemeanor, punishable by fine or imprisonment or both. Consequently, there would seem to be no obstacle to giving effect to the separability clause as to § 310 (b), if this should ever prove necessary. Compare *Electric Bond & Share Co.* v. *Securities & Exchange Commission, 303 U.S. 419, 433-437.*

18 60 Stat. 812, 814:

> "If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

[*628] The judgment below is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

DISSENT BY: DOUGLAS; JACKSON

DISSENT

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I am in sympathy with the effort of the Court to save this statute from the charge that it is so vague and indefinite as to be unconstitutional. My inclinations were that way at the end of the oral argument. But further study changed my mind. I am now convinced that the formula adopted to save this Act is too dangerous for use. It can easily ensnare people who have done no more than exercise their constitutional rights of speech, assembly, and press.

[***LEdHR15] [15]We deal here with the validity of a criminal statute. To use the test of *Connally v. General Construction Co., 269 U.S. 385, 391*, the question is whether this statute "either forbids or requires the doing of an act in terms so vague that [**818] men of common intelligence must necessarily guess at its meaning and differ as to its application." If it is so vague, as I think this one is, then it fails to meet the standards required by due process of law. See *United States v. Petrillo, 332 U.S. 1.*In determining that question we consider the statute on its face. As stated in *Lanzetta v. New Jersey, 306 U.S. 451, 453*:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the

> accusation [*629] under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

And see *Winters v. New York, 333 U.S. 507, 515.*

The question therefore is not what the information charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning.

It is contended that the Act plainly applies

> -- to persons who pay others to present views to Congress either in committee hearings or by letters or other communications to Congress or Congressmen and
>
> -- to persons who spend money to induce others to communicate with Congress.

The Court adopts that view, with one minor limitation which the Court places on the Act -- that only persons who solicit, collect, or receive money are included.

The difficulty is that the Act has to be rewritten and words actually added and subtracted to produce that result.

[***1003] Section 307 makes the Act applicable to anyone who "directly or indirectly" solicits, collects, or receives contributions "to be used principally to aid, or the principal purpose of which person is to aid" in either

> -- the "passage or defeat of any legislation" by Congress, or
>
> -- "To influence, directly or indirectly, the passage or defeat of any legislation" by Congress.

We start with an all-inclusive definition of "legislation" contained in § 302 (e). It means "bills, resolutions, amendments, nominations, and other matters [*630] pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House." What is the scope of "any other matter which may be the subject of action" by Congress? It would seem to include not only pending or proposed legislation but any matter within the legitimate domain of Congress.

What contributions might be used "principally to aid" in influencing "directly or indirectly, the passage or defeat" of any such measure by Congress? When is one retained for the purpose of influencing the "passage or defeat of any legislation"?

(1) One who addresses a trade union for repeal of a labor law certainly hopes to influence legislation.

(2) So does a manufacturers' association which runs ads in newspapers for a sales tax.

(3) So does a farm group which undertakes to raise money for an educational program to be conducted in newspapers, magazines, and on radio and television, showing the need for revision of our attitude on world trade.

(4) So does a group of oil companies which puts agents in the Nation's capital [**819] to sound the alarm at hostile legislation, to exert influence on Congressmen to defeat it, to work on the Hill for the passage of laws favorable to the oil interests.

(5) So does a business, labor, farm, religious, social, racial, or other group which raises money to contact people with the request that they write their Congressman to get a law repealed or modified, to get a proposed law passed, or themselves to propose a law.

Are all of these activities covered by the Act? If one is included why are not the others? The Court apparently excludes the kind of activities listed in categories (1), (2), and (3) and includes part of the activities in (4) and (5) -- those which entail contacts with the Congress.

[*631] There is, however, difficulty in that course, a difficulty which seems to me to be insuperable. I find no warrant in the Act for drawing the line, as the Court does, between "direct communication with Congress" and other pressures on Congress. The Act is as much concerned with one as with the other.

The words "direct communication with Congress" are not in the Act. Congress was concerned with the raising of money to aid in the passage or defeat of legislation, whatever tactics were used. But the Court not only strikes out one whole group of activities -- to influence "indirectly" -- but substitutes a new concept for the remaining group -- to influence "directly." To influence "directly" the passage or defeat of legislation includes any number of methods -- for example, nationwide radio, television or advertising programs promoting a particular measure, as well as the "buttonholing" of Congressmen. To include the latter while excluding the former is to rewrite the Act.

This is not a case where one or more distinct types of "lobbying" are specifically proscribed and another and different group defined in such loose, broad terms as to make its definition vague and uncertain. Here if we give the words of the Act their ordinary meaning, we do not know what the terminal points are. Judging from the words Congress used, one type of activity which I have enumerated is as much proscribed as another.

[***1004] The importance of the problem is emphasized by reason of the fact that this legislation is in the domain of the *First Amendment*. That Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

Can Congress require one to register before he writes an article, makes a speech, files an advertisement, appears [*632] on radio or television, or writes a letter seeking to influence existing, pending, or proposed legislation? That would pose a considerable question under the *First Amendment*, as *Thomas v. Collins, 323 U.S. 516*, indicates. I do not mean to intimate that Congress is without power to require disclosure of the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups. I mention the *First Amendment* to emphasize why statutes touching this field should be "narrowly drawn to prevent the supposed evil" (see *Cantwell v. Connecticut, 310 U.S. 296, 307)* and not be cast in such vague and indefinite terms as to cast a cloud on the exercise of constitutional rights. Cf. *Stromberg v. California, 283 U.S. 359, 369*; *Thornhill v. Alabama, 310 U.S. 88, 97-98*; *Winters v. New York, 333 U.S. 507, 509*; *Joseph Burstyn, Inc.* v. *Wilson, 343 U.S. 495, 504-505.*

[**820] If that rule were relaxed, if Congress could impose registration requirements on the exercise of *First Amendment* rights, saving to the courts the salvage of the good from the bad, and meanwhile causing all who might possibly be covered to act at their peril, the law would in practical effect be a deterrent to the exercise of *First Amendment* rights. The Court seeks to avoid that consequence by construing the law narrowly as applying only to those who are paid to "buttonhole" Congressmen or who collect and expend moneys to get others to do so. It may be appropriate in some cases to read a statute with the gloss a court has placed on it in order to save it from the charge of vagueness. See *Fox v. Washington, 236 U.S. 273, 277.* But I do not think that course is appropriate here.

The language of the Act is so broad that one who writes a letter or makes a speech or publishes an article [*633] or distributes literature or does many of the other things with which appellees are charged has no fair notice when he is close to the prohibited line. No construction we give it today will make clear retroactively the vague standards that confronted appellees when they did the acts now charged against them as criminal. Cf. *Pierce v. United States, 314 U.S. 306, 311.* Since the Act touches on the exercise of *First Amendment* rights, and is not narrowly drawn to meet precise evils, its vagueness has some of the evils of a continuous and effective restraint.

MR. JUSTICE JACKSON, dissenting.

Several reasons lead me to withhold my assent from this decision.

The clearest feature of this case is that it begins with an Act so mischievously vague that the Government charged with its enforcement does not understand it, for some of its important assumptions are rejected by the Court's interpretation. The clearest feature of the Court's decision is that it leaves the country under an Act which is not much like any Act passed by Congress. Of course, when such a question is before us, it is easy to differ as to whether it is more appropriate to strike out or to strike down. But [***1005] I recall few cases in which the Court has gone so far in rewriting an Act.

The Act passed by Congress would appear to apply to all persons who (1) solicit or receive funds for the purpose of lobbying, (2) receive and expend funds for the purpose of lobbying, or (3) merely expend funds for the purpose of lobbying. The Court at least eliminates this last category from coverage of the Act, though I should suppose that more serious evils affecting the public interest are to be found in the way lobbyists spend their money than in the ways they obtain it. In the present indictments, six counts relate exclusively to failures to [*634] report expenditures while only one appears to rest exclusively on failure to report receipts.

Also, Congress enacted a statute to reach the raising and spending of funds for the purpose of influencing congressional action *directly or indirectly*. The Court entirely deletes "indirectly" and narrows "directly" to mean "direct communication with members of Congress." These two constructions leave the Act touching only a part of the practices Congress deemed sinister.

Finally, as if to compensate for its deletions from the Act, the Court expands the phrase "the principal purpose" so that it now refers to any contribution which "in substantial part" is used to influence legislation.

I agree, of course, that we should make liberal interpretations to save legislative Acts, including penal statutes which punish conduct traditionally recognized as morally "wrong." Whoever kidnaps, steals, kills, or

commits similar [**821] acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague. But we are dealing with a novel offense that has no established bounds and no such moral basis. The criminality of the conduct dealt with here depends entirely upon a purpose to influence legislation. Though there may be many abuses in pursuit of this purpose, this Act does not deal with corruption. These defendants, for example, are indicted for failing to report their activities in raising and spending money to influence legislation in support of farm prices, with no charge of corruption, bribery, deception, or other improper action. This may be a selfish business and against the best interests of the nation as a whole, but it is in an area where legal penalties should be applied only by formulae as precise and clear as our language will permit.

[*635] The *First Amendment* forbids Congress to abridge the right of the people "to petition the Government for a redress of grievances." If this right is to have an interpretation consistent with that given to other *First Amendment* rights, it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt, deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.

In matters of this nature, it does not seem wise to leave the scope of a criminal Act, close to impinging on the right of petition, dependent upon judicial construction for its limitations. Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction. One may rely on today's narrow interpretation only at his peril, for some later Court may expand the Act to include, in accordance with its terms, what today the Court excludes. This recently happened with the antitrust laws, which the Court cites as being [***1006] similarly vague. This Court, in a criminal case, sustained an indictment by admittedly changing repeated and long-established constitutional and statutory interpretations. *United States v. South-Eastern Underwriters Assn., 322 U.S. 533.* The *ex post facto* provision of our Constitution has not been held to protect the citizen against a retroactive change in decisional law, but it does against such a prejudicial change in legislation. As long as this statute stands on the books, its vagueness will be a contingent threat to activities which the Court today rules out, the contingency being a change of views by the Court as hereafter constituted.

[*636] The Court's opinion presupposes, and I do not disagree, that Congress has power to regulate lobbying for hire as a business or profession and to require such agents to disclose their principals, their activities, and their receipts. However, to reach the real evils of lobbying without cutting into the constitutional right of petition is a difficult and delicate task for which the Court's action today gives little guidance. I am in doubt whether the Act as construed does not permit applications which would abridge the right of petition, for which clear, safe and workable channels must be maintained. I think we should point out the defects and limitations which condemn this Act so clearly that the Court cannot sustain it as written, and leave its rewriting to Congress. After all, it is Congress that should know from experience both the good in the right of petition and the evils of professional lobbying.

EXHIBIT "13"

LEXSEE 481 U.S. 739

UNITED STATES v. SALERNO ET AL.

No. 86-87

SUPREME COURT OF THE UNITED STATES

481 U.S. 739; 107 S. Ct. 2095; 95 L. Ed. 2d 697; 1987 U.S. LEXIS 2259; 55 U.S.L.W. 4663

January 21, 1987, Argued
May 26, 1987, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

DISPOSITION: *794 F.2d 64*, reversed.

DECISION:

Provisions of Bail Reform Act of 1984 (*18 USCS 3141 et seq.*) allowing pretrial detention without bail on ground of dangerousness held not to violate either (1) bail clause of *Eighth Amendment*, or (2) due process.

SUMMARY:

Under particular conditions, the Bail Reform Act of 1984 (*18 USCS 3141 et seq.*) permits a federal court to detain an arrestee without bail, pending trial, on the ground of such an arrestee's dangerousness to any other person and to the community. Two defendants were arrested after being indicted on numerous counts of racketeering activity--including fraud, extortion, gambling, and conspiracy to commit murder--as well as other federal crimes. At a hearing pursuant to the Bail Reform Act in the United States District Court for the Southern District of New York, the Federal Government presented evidence--contested by the defendants--that (1) the defendants were a "boss" and a "captain," respectively, in an organized crime "family"; (2) both defendants had participated in conspiracies to aid their illegitimate enterprises through violent means; and (3) one defendant had personally participated in two murder conspiracies. The District Court (1) granted the government's motion for pretrial detention under the Act on the grounds of dangerousness, and (2) expressed the view that the evidence of the two defendants' present danger to the community was overwhelming (*631 F Supp 1364*). On appeal, the United States Court of Appeals for the Second Circuit ruled that the District Court's pretrial detention order ought to be vacated, expressing the view that (1) pretrial detention of the two defendants on the ground of dangerousness met the Act's statutory conditions; but (2) the Bail Reform Act's authorization of pretrial detention on the ground of dangerousness to the community was repugnant to the Federal Constitution's concept of substantive due process, which concept, the Court of Appeals reasoned, prohibited a total deprivation of liberty simply as a means of preventing future crimes (*794 F2d 64*).

On certiorari, the United States Supreme Court reversed. In an opinion by Rehnquist, Ch. J., joined by White, Blackmun, Powell, O'Connor, and Scalia, JJ., it was held that the contested provisions of the Bail Reform Act--which allowed a federal court to detain an arrestee pending trial if the Federal Government demonstrated by clear and convincing evidence after an adversary hearing that no release conditions would reasonably assure the safety of any other person and the community--did not, on their face, violate (1) substantive due process under the *Fifth Amendment*, (2) procedural due process under the *Fifth Amendment*, or (3) the *Eighth Amendment* guaranty against excessive bail.

Marshall, J., joined by Brennan, J., dissented, expressing the view that (1) due to developments after the District Court issued its pretrial detention order, there was a substantial question whether, within the meaning of Article III of the Constitution, a live case or controversy remained; and (2) under the *due process clause of the Fifth Amendment* and the bail clause of the *Eighth Amendment*, the contested Bail Reform Act provi-

sions--which permitted indefinite detention of an indicted defendant, pending the trial of allegations which were legally presumed to be untrue, if the Federal Government showed to the satisfaction of a judge that the defendant was likely to commit crimes, unrelated to the pending charges, at any time in the future--were invalid as infringing upon the constitutionally established presumption of innocence.

Stevens, J., dissented, expressing the view that (1) there might be times when the government's interest in protecting the safety of the community would justify the brief detention of a person who had not committed any crime; but (2) the provisions of the Bail Reform Act which allowed pretrial detention on the basis of future dangerousness to the community were unconstitutional; and (3) there was a possibility that, in the case at hand, the Federal Government was more interested in litigating a "test case" than in resolving an actual controversy concerning the two defendants' threat to the safety of the community.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

RECOGNIZANCE §7

LAW §853.4

Bail Reform Act -- pretrial detention without bail -- substantive due process --

Headnote:[1A][1B][1C][1D][1E][1F][1G]

The pretrial detention provisions of the Bail Reform Act of 1984 (*18 USCS 3141 et seq.*)--which allow a federal court to detain arrestees without bail, pending trial, if the Federal Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions will reasonably assure the safety of any other person and the community--do not, on their face, violate substantive due process under the *Fifth Amendment to the United States Constitution*, because (1) the pretrial detention provisions are regulatory, not penal; and (2) under the limits imposed by the Act, the Federal Government's legitimate and compelling interest in preventing crime by such arrestees outweighs the arrestees' fundamental interest in liberty. (Marshall, Brennan, and Stevens, JJ., dissented from this holding.)

[***LEdHN2]

RECOGNIZANCE §7

LAW §831.5

Bail Reform Act -- pretrial detention without bail -- procedural due process --

Headnote:[2A][2B][2C][2D][2E][2F]

The pretrial detention provisions of the Bail Reform Act of 1984 (*18 USCS 3141 et seq.*)--which permit the detention of certain arrestees without bail on the grounds of dangerousness to any other person and to the community--do not, on their face, violate procedural due process under the *Fifth Amendment to the United States Constitution*, because the procedures under the Act by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination, where (1) there is nothing inherently unattainable about a prediction of future criminal conduct; (2) detainees have a right to counsel at a detention hearing; (3) detainees may testify on their own behalf; (4) detainees may present information by proffer or otherwise; (5) detainees may cross-examine witnesses who appear at such a hearing; (6) the judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include (a) the nature and circumstances of the charges, (b) the weight of the evidence, (c) the history and characteristics of the putative offender, and (d) the danger to the community; (7) the government must prove its case by clear and convincing evidence; (8) the judicial officer must include written findings of fact and a written statement of reasons for the decision to detain; and (9) the Act provides for immediate appellate review of the detention decision. (Marshall, Brennan, and Stevens, JJ., dissented in part from this holding).

[***LEdHN3]

RECOGNIZANCE §7

Bail Reform Act -- pretrial detention without bail -- Eighth Amendment --

Headnote:[3A][3B][3C][3D][3E][3F][3G]

The pretrial detention provisions of the Bail Reform Act of 1984 (*18 USCS 3141 et seq.*)--which permit the pretrial detention, without bail, of certain arrestees on the ground of dangerousness to any other person and to the community--do not, on their face, violate the clause of the *Eighth Amendment of the United States Constitution* which provides that excessive bail shall not be required, because, (1) even if the bail clause--which says nothing about whether bail shall be available at all--imposes substantive limitations on Congress' power to define the classes of criminal arrestees to be admitted to bail, the clause does not categorically prohibit the government from pursuing compelling interests other than the risk of flight through the regulation of pretrial release; (2) in the Bail Reform Act, Congress has mandated pretrial detention on the basis of a legitimate and compelling interest in the prevention of crime by arrestees who have been

shown to be dangerous to any other person and to the community; and (3) the government's Bail Reform Act response of pretrial detention is not excessive in light of the interest asserted. (Marshall, Brennan, and Stevens, JJ., dissented from this holding.)

[***LEdHN4]

APPEAL §1659

mootness -- pretrial detention -- sentence in unrelated proceeding --

Headnote:[4A][4B]

A pretrial detainee's challenge to the constitutionality of the pretrial detention provisions of the Bail Reform Act of 1984 (*18 USCS 3141 et seq.*) remains alive and properly presented on certiorari for resolution by the United States Supreme Court--even though the detainee has subsequently been sentenced in unrelated proceedings before a different judge--where (1) the detainee has not been confined pursuant to the unrelated sentence, and (2) a Federal District Court's pretrial detention order in the case at hand is the authority for the detainee's present incarceration. (Marshall, Brennan, and Stevens, JJ., dissented in part from this holding.)

[***LEdHN5]

RECOGNIZANCE §6

LAW §930

STATUTES §13

Bail Reform Act -- facial challenge -- overbreadth --

Headnote:[5]

In a facial challenge to a legislative act, a challenger must establish that no set of circumstances exists under which the act would be valid; the fact that, as to criminal trials, the Bail Reform Act of 1984 (*18 USCS 3141 et seq.*) might operate unconstitutionally under some conceivable set of circumstances is insufficient to render the Act wholly invalid, since the United States Supreme Court has not recognized an "overbreadth" doctrine outside the limited context of the *First Amendment to the United States Constitution.*

[***LEdHN6]

LAW §514

substantive and procedural due process --

Headnote:[6]

The *due process clause of the Fifth Amendment to the United States Constitution* protects individuals against two types of government action: (1) "substantive" due process prevents the government from engaging in conduct that (a) shocks the conscience, (b) or interferes with the rights implicit in the concept of ordered liberty; and (2) even if government action depriving a person of life, liberty, or property survives substantive due process scrutiny, "procedural" due process requires that such government action be implemented in a fair manner.

[***LEdHN7]

RECOGNIZANCE §7

LAW §853.4

STATUTES §145.4

Bail Reform Act -- pretrial detention without bail -- due process -- regulation -- legislative history --

Headnote:[7A][7B][7C][7D]

For the purpose of substantive due process analysis under the *Fifth Amendment to the United States Constitution*, the restrictions on liberty imposed by the pretrial detention provisions of the Bail Reform Act of 1984 (*18 USCS 3141 et seq.*) constitute permissible regulation rather than impermissible punishment, where (1) the legislative history of the Act indicates that Congress did not formulate the pretrial detention provisions (a) as punishment for dangerous individuals, but (b) as a potential means of achieving the legitimate regulatory goal of preventing danger to the community; and (2) the incidents of pretrial detention are not excessive in relation to the danger-prevention goal, since (a) the Act limits detention to the most serious of crimes, (b) the arrestee is entitled to a prompt detention hearing, (c) the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act (*18 USCS 3161 et seq.*), and (d) the conditions of confinement envisioned by the Act--to the extent practicable, in facilities separate from persons awaiting or serving sentences, or being held in custody pending appeal--appear to reflect the regulatory goal relied upon by the government. (Marshall, Brennan, and Stevens, JJ., dissented in part from this holding.)

[***LEdHN8]

LAW §848

STATUTES §91

substantive due process -- punishment -- legislative intent --

Headnote:[8]

For the purpose of substantive due process analysis under the *Fifth Amendment to the United States Constitution*, the mere fact that a person is detained does not

inexorably lead to the conclusion that the government has imposed punishment; in order to determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, the United States Supreme Court will first look to legislative intent; unless Congress expressly intends to impose punitive restrictions, the punitive/regulatory distinction turns on whether (1) an alternative purpose, to which the restriction may rationally be connected, is assignable for the restriction, and (2) the restriction appears excessive in relation to the alternative purpose assigned to the restriction. (Marshall, Brennan, and Stevens, JJ., dissented in part from this holding.)

[***LEdHN9]

LAW §528.3

due process -- detention without conviction -- war -- aliens -- mental incompetents -- juveniles -- arrestees --

Headnote:[9A][9B]

Despite the general rule of substantive due process, under the *Fifth Amendment of the United States Constitution*, that the government may not detain a person prior to a judgment of guilt in a criminal trial, a number of exceptions exist whereby the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest, where, for example, a government may detain (1) individuals whom the government believes to be dangerous, during times of war or insurrection; (2) potentially dangerous resident aliens, pending deportation proceedings; (3) mentally unstable individuals who present a danger to the public; (4) dangerous criminal defendants who become incompetent to stand trial; (5) juvenile arrestees, prior to trial, when they present a continuing danger to the community; (6) arrestees who are suspected of a crime, until a neutral magistrate determines whether probable cause exists; and (7) arrestees, prior to trial, when they present either a risk of flight or a danger to witnesses.

[***LEdHN10]

RECOGNIZANCE §7

LAW §853.4

Bail Reform Act -- pretrial detention without bail -- substantive due process --

Headnote:[10A][10B]

For the purpose of determining whether the pretrial detention provisions of the Bail Reform Act of 1984 (*18 USCS 3141 et seq.*) violate substantive due process under the *Fifth Amendment of the United States Constitution*, the Federal Government's legitimate and compelling interest in preventing crimes by arrestees outweighs such arrestees' fundamental interest in liberty, where (1) the Act operates to detain without bail only those individuals who have been arrested for a specific category of extremely serious offenses; (2) Congress has specifically found that such individuals are far more likely to be responsible for dangerous acts in the community after arrest; (3) the government must demonstrate probable cause to believe that the charged crime has been committed by such an arrestee; and (4) in a full-blown adversary hearing, the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. (Marshall, Brennan, and Stevens, JJ., dissented from this holding.)

[***LEdHN11]

RECOGNIZANCE §7

criminal case -- exceptions --

Headnote:[11]

A court may refuse bail in (1) a capital case, or (2) a criminal case in which the defendant presents a threat to the judicial process by intimidating witnesses. (Marshall and Brennan, JJ., dissented in part from this holding.)

[***LEdHN12]

RECOGNIZANCE §6

criminal case -- function --

Headnote:[12]

A primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of criminal defendants.

[***LEdHN13]

RECOGNIZANCE §7.5

excessive amount --

Headnote:[13]

Pursuant to the clause of the *Eighth Amendment to the United States Constitution* which provides that excessive bail shall not be required, when the government has admitted that its only interest is in preventing flight, bail must be set by a court at the sum designed to insure that goal, and no more.

[***LEdHN14]

RECOGNIZANCE §7

pretrial detention -- criminal case --

Headnote:[14]

In the United States, liberty is the norm, and detention prior to a criminal trial, or without trial, is the carefully limited exception.

SYLLABUS

The Bail Reform Act of 1984 (Act) requires courts to detain prior to trial arrestees charged with certain serious felonies if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." *18 U. S. C. § 3142(e) (1982 ed., Supp. III)*. The Act provides arrestees with a number of procedural rights at the detention hearing, including the right to request counsel, to testify, to present witnesses, to proffer evidence, and to cross-examine other witnesses. The Act also specifies the factors to be considered in making the detention decision, including the nature and seriousness of the charges, the substantiality of the Government's evidence, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by his release. Under the Act, a decision to detain must be supported by written findings of fact and a statement of reasons, and is immediately reviewable. After a hearing under the Act, the District Court ordered the detention of respondents, who had been charged with 35 acts of racketeering activity. The Court of Appeals reversed, holding that *§ 3142(e)*'s authorization of pretrial detention on the ground of future dangerousness is facially unconstitutional as violative of the *Fifth Amendment's* substantive due process guarantee.

Held:

1. Given the Act's legitimate and compelling regulatory purpose and the procedural protections it offers, *§ 3142(e)* is not facially invalid under the Due Process Clause. Pp. 746-752.

(a) The argument that the Act violates substantive due process because the detention it authorizes constitutes impermissible punishment before trial is unpersuasive. The Act's legislative history clearly indicates that Congress formulated the detention provisions not as punishment for dangerous individuals, but as a potential solution to the pressing societal problem of crimes committed by persons on release. Preventing danger to the community is a legitimate regulatory goal. Moreover, the incidents of detention under the Act are not excessive in relation to that goal, since the Act carefully limits the circumstances under which detention may be sought to the most serious of crimes, the arrestee is entitled to a prompt hearing, the maximum length of detention is limited by the Speedy Trial Act, and detainees must be housed apart from convicts. Thus, the Act constitutes permissible regulation rather than impermissible punishment. Pp. 746-748.

(b) The Court of Appeals erred in ruling that the Due Process Clause categorically prohibits pretrial detention that is imposed as a regulatory measure on the ground of community danger. The Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. Such circumstances exist here. The Act narrowly focuses on a particularly acute problem -- crime by arrestees -- in which the Government's interests are overwhelming. Moreover, the Act operates only on individuals who have been arrested for particular extremely serious offenses, and carefully delineates the circumstances under which detention will be permitted. Pp. 748-751.

(c) The Act's extensive procedural safeguards are specifically designed to further the accuracy of the likelihood-of-future-dangerousness determination, and are sufficient to withstand respondents' facial challenge, since they are more than "adequate to authorize the pretrial detention of at least some [persons] charged with crimes." *Schall v. Martin, 467 U.S. 253, 264*. Pp. 751-752.

2. *Section 3142(e)* is not facially unconstitutional as violative of the *Excessive Bail Clause of the Eighth Amendment*. The contention that the Act violates the Clause because it allows courts essentially to set bail at an infinite amount for reasons not related to the risk of flight is not persuasive. Nothing in the Clause's text limits the Government's interest in the setting of bail solely to the prevention of flight. Where Congress has mandated detention on the basis of some other compelling interest -- here, the public safety -- the *Eighth Amendment* does not require release on bail. Pp. 752-755.

COUNSEL: Solicitor General Fried argued the cause for the United States. With him on the briefs were Assistant Attorney General Weld, Deputy Solicitor General Bryson, Jeffrey P. Minear, Samuel Rosenthal, and Maury S. Epner.

Anthony M. Cardinale argued the cause for respondents. With him on the brief was Kimberly Homan. *

* Briefs of amici curiae urging affirmance were filed for the National Association of Criminal Defense Lawyers by Jon May and Mark King Leban; and for the Public Defender Service by Cheryl M. Long, James Klein, and David A. Reiser.

Briefs of amici curiae were filed for the American Bar Association by Eugene C. Thomas,

Charles G. Cole, and David A. Schlueter; for the American Civil Liberties Union et al. by William J. Genego, Dennis E. Curtis, Mark Rosenbaum, Paul Hoffman, Richard Emery, Martin Guggenheim, Alvin Bronstein, and David Goldstein; and for Howard Perry by Allen N. Brunwasser.

JUDGES: Rehnquist, C. J., delivered the opinion of the Court, in which White, Blackmun, Powell, O'Connor, and Scalia, JJ., joined. Marshall, J., filed a dissenting opinion, in which Brennan, J., joined, post, p. 755. Stevens, J., filed a dissenting opinion, post, p. 767.

OPINION BY: REHNQUIST

OPINION

[*741] [***705] [**2098] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A] [***LEdHR3A] [3A]The Bail Reform Act of 1984 (Act) allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." The United States Court of Appeals for the Second Circuit struck down this provision of the Act as facially unconstitutional, because, in that court's words, this type of pretrial detention violates "substantive due process." We granted certiorari because of a conflict among the Courts of Appeals regarding the validity of the Act. [1] *479 U.S. 929 (1986).* We hold that, as against the facial attack mounted by these respondents, the Act fully comports with constitutional requirements. We therefore reverse.

1 Every other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional challenge. *United States v. Walker, 805 F.2d 1042 (CA11 1986)*; *United States v. Rodriguez, 803 F.2d 1102 (CA11 1986)*; *United States v. Simpkins, 255 U. S. App. D. C. 306, 801 F.2d 520 (1986)*; *United States v. Zannino, 798 F.2d 544 (CA1 1986)*; *United States v. Perry, 788 F.2d 100* (CA3), cert. denied, *479 U.S. 864 (1986)*; *United States v. Portes, 786 F.2d 758 (CA7 1985).*

[*742] I

Responding to "the alarming problem of crimes committed by persons on release," S. Rep. No. 98-225, p. 3 (1983), Congress formulated the Bail Reform Act of 1984, *18 U. S. C. § 3141 et seq. (1982 ed., Supp. III)*, as the solution to a bail crisis in the federal courts. The Act represents the National Legislature's considered response to numerous perceived deficiencies in the [**2099] federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. No. 98-225, at 3.

To this end, *§ 3141(a)* of the Act requires a judicial officer to determine whether an arrestee shall be detained. *Section 3142(e)* provides that "if, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." *Section 3142(f)* provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may [***706] cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, *§ 3142(i)*, and support his conclusion with "clear and convincing evidence," *§ 3142(f).*

The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the [*743] arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. *§ 3142(g).* Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order. *§§ 3145(b), (c).*

Respondents Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, after being charged in a 29-count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations. The RICO counts alleged 35 acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder. At respondents' arraignment, the Government moved to have Salerno and Cafaro detained pursuant to *§ 3142(e)*, on the ground that no condition of release would assure the safety of the community or any person. The District Court held a hearing at which the Government made a detailed proffer of evidence. The Government's case showed that Salerno was the "boss" of the Genovese crime family of La Cosa Nostra and that Cafaro was a

"captain" in the Genovese family. According to the Government's proffer, based in large part on conversations intercepted by a court-ordered wiretap, the two respondents had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. The Government also offered the testimony of two of its trial witnesses, who would assert that Salerno personally participated in two murder conspiracies. Salerno opposed the motion for detention, challenging the credibility of the Government's witnesses. He offered the testimony of several character witnesses as well as a letter from his doctor stating that he was suffering from a serious medical condition. Cafaro presented no evidence at the hearing, but instead characterized the wiretap conversations as merely "tough talk."

[***LEdHR4A] [4A]The District Court granted the Government's detention motion, concluding that the Government had established by [*744] clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person:

"The activities of a criminal organization such as the Genovese Family do not [**2100] cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When [***707] business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident." *631 F.Supp. 1364, 1375 (SDNY 1986).* [2]

2 [***LEdHR4B] [4B]

Salerno was subsequently sentenced in unrelated proceedings before a different judge. To this date, however, Salerno has not been confined pursuant to that sentence. The authority for Salerno's present incarceration remains the District Court's pretrial detention order. The case is therefore very much alive and is properly presented for our resolution.

Respondents appealed, contending that to the extent that the Bail Reform Act permits pretrial detention on the ground that the arrestee is likely to commit future crimes, it is unconstitutional on its face. Over a dissent, the United States Court of Appeals for the Second Circuit agreed. *794 F.2d 64 (1986).* Although the court agreed that pretrial detention could be imposed if the defendants were likely to intimidate witnesses or otherwise jeopardize the trial process, it found "*§ 3142(e)*'s authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *Id., at 71-72.* The court concluded that the Government could not, consistent with due process, detain persons who had not been accused of any crime merely because they were thought to present a danger to the community. *Id., at 72,* quoting *United States v. Melendez-Carrion, 790 F.2d 984, 100-1001* [*745] *(CA2 1986)* (opinion of Newman, J.). It reasoned that our criminal law system holds persons accountable for past actions, not anticipated future actions. Although a court could detain an arrestee who threatened to flee before trial, such detention would be permissible because it would serve the basic objective of a criminal system -- bringing the accused to trial. The court distinguished our decision in *Gerstein v. Pugh, 420 U.S. 103 (1975),* in which we upheld police detention pursuant to arrest. The court construed *Gerstein* as limiting such detention to the "'administrative steps incident to arrest.'" *794 F.2d, at 74,* quoting *Gerstein, supra, at 114.* The Court of Appeals also found our decision in *Schall v. Martin, 467 U.S. 253 (1984),* upholding postarrest, pretrial detention of juveniles, inapposite because juveniles have a lesser interest in liberty than do adults. The dissenting judge concluded that on its face, the Bail Reform Act adequately balanced the Federal Government's compelling interests in public safety against the detainee's liberty interests.

II

[***LEdHR1B] [1B] [***LEdHR2B] [2B] [***LEdHR3B] [3B] [***LEdHR5] [5]A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the *First Amendment. Schall v. Martin, supra, at 269, n. 18.* We think respondents have failed to shoulder their heavy burden to demonstrate [***708] that the Act is "facially" unconstitutional. [3]

3 We intimate no view on the validity of any aspects of the Act that are not relevant to respondents' case. Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case.

[*746] [**2101] Respondents present two grounds for invalidating the Bail Reform Act's provisions permitting pretrial detention on the basis of future dangerousness. First, they rely upon the Court of Appeals' conclusion that the Act exceeds the limitations placed

upon the Federal Government by the *Due Process Clause of the Fifth Amendment*. Second, they contend that the Act contravenes the *Eighth Amendment's* proscription against excessive bail. We treat these contentions in turn.

A

[***LEdHR6] [6]The *Due Process Clause of the Fifth Amendment* provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California, 342 U.S. 165, 172 (1952)*, or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut, 302 U.S. 319, 325-326 (1937)*. When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v. Eldridge, 424 U.S. 319, 335 (1976)*. This requirement has traditionally been referred to as "procedural" due process.

[***LEdHR1C] [1C] [***LEdHR7A] [7A] Respondents first argue that the Act violates substantive due process because the pretrial detention it authorizes constitutes impermissible punishment before trial. See *Bell v. Wolfish, 441 U.S. 520, 535, and n. 16 (1979)*. The Government, however, has never argued that pretrial detention could be upheld if it were "punishment." The Court of Appeals assumed that pretrial detention under the Bail Reform Act is regulatory, not penal, and we agree that it is.

[***LEdHR7B] [7B] [***LEdHR8] [8]As an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. *Bell v. Wolfish, supra, at* [*747] *537*. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. *Schall v. Martin, 467 U.S., at 269*. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Ibid.*, quoting *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963)*.

[***LEdHR7C] [7C]We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail [***709] Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. See S. Rep. No. 98-225, at 8. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. *Id.*, at 4-7. There is no doubt that preventing danger to the community is a legitimate regulatory goal. *Schall v. Martin, supra.*

[***LEdHR7D] [7D]Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. See *18 U. S. C. § 3142(f)* (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). The arrestee is entitled to a prompt detention hearing, *ibid.*, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial [**2102] Act. [4] See *18 U. S. C. § 3161 et seq. (1982 ed. and Supp. III)*. Moreover, as in *Schall* v. *Martin*, the conditions of confinement envisioned by the Act "appear to reflect the regulatory purposes relied upon by the" Government. [*748] 467 U.S., at 270. As in *Schall*, the statute at issue here requires that detainees be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." *18 U. S. C. § 3142(i)(2)*. We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.

4 We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal.

The Court of Appeals nevertheless concluded that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." *794 F.2d, at 71*. Respondents characterize the Due Process Clause as erecting an impenetrable "wall" in this area that "no governmental interest -- rational, important, compelling or otherwise -- may surmount." Brief for Respondents 16.

[***LEdHR9A] [9A]We do not think the Clause lays down any such categorical imperative. We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous. See *Ludecke v. Watkins, 335 U.S. 160 (1948)* (approving unreviewable executive power to detain enemy aliens in

time of war); *Moyer v. Peabody, 212 U.S. 78, 84-85 (1909)* (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection). Even outside the exigencies of war, we have found that sufficiently compelling [***710] governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. *Carlson v. Landon, 342 U.S. 524, 537-542 (1952)*; *Wong Wing v. United States, 163 U.S. 228 (1896)*. We have also held that the government may detain mentally unstable individuals who present a danger [*749] to the public, *Addington v. Texas, 441 U.S. 418 (1979)*, and dangerous defendants who become incompetent to stand trial, *Jackson v. Indiana, 406 U.S. 715, 731-739 (1972)*; *Greenwood v. United States, 350 U.S. 366 (1956)*. We have approved of postarrest regulatory detention of juveniles when they present a continuing danger to the community. *Schall v. Martin, supra.* Even competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. *Gerstein v. Pugh, 420 U.S. 103 (1975)*. Finally, respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, see *Bell v. Wolfish, 441 U.S., at 534*, or a danger to witnesses.

[***LEdHR9B] [9B]Respondents characterize all of these cases as exceptions to the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. Such a "general rule" may freely be conceded, but we think that these cases show a sufficient number of exceptions to the rule that the congressional action challenged here [**2103] can hardly be characterized as totally novel. Given the well-established authority of the government, in special circumstances, to restrain individuals' liberty prior to or even without criminal trial and conviction, we think that the present statute providing for pretrial detention on the basis of dangerousness must be evaluated in precisely the same manner that we evaluated the laws in the cases discussed above.

[***LEdHR1D] [1D] [***LEdHR3C] [3C] [***LEdHR10A] [10A]The government's interest in preventing crime by arrestees is both legitimate and compelling. *De Veau v. Braisted, 363 U.S. 144, 155 (1960)*. In *Schall, supra*, we recognized the strength of the State's interest in preventing juvenile crime. This general concern with crime prevention is no less compelling when the suspects are adults. Indeed, "the [*750] harm suffered by the victim of a crime is not dependent upon the age of the perpetrator." *Schall v. Martin, supra, at 264-265*. The Bail Reform Act of 1984 responds to an even more particularized governmental interest than the interest we sustained in *Schall*. The statute we upheld in *Schall* permitted pretrial detention of any juvenile arrested on any charge after a showing that the individual might commit some undefined further crimes. The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals [***711] who have been arrested for a specific category of extremely serious offenses. *18 U. S. C. § 3142(f)*. Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. See S. Rep. No. 98-225, at 6-7. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. *18 U. S. C. § 3142(f)*. While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

[***LEdHR1E] [1E] [***LEdHR10B] [10B]On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated [*751] to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)*.

[***LEdHR2C] [2C]Finally, we may dispose briefly of respondents' facial challenge to the procedures of the Bail Reform Act. To sustain them against such a challenge, we need only find them "adequate to authorize

the pretrial detention of at least some [persons] charged with crimes," *Schall, supra, at 264*, whether or not they might be insufficient in some particular circumstances. We think they pass that test. As we stated in *Schall*, "there is [**2104] nothing inherently unattainable about a prediction of future criminal conduct." *467 U.S., at 278*; see *Jurek v. Texas, 428 U.S. 262, 274 (1976)* (joint opinion of Stewart, POWELL, and STEVENS, JJ.); *id., at 279* (WHITE, J., concurring in judgment).

[***LEdHR2D] [2D]Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. *18 U. S. C. § 3142(f)*. They may testify in their [***712] own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. *Ibid.* The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, [*752] and the danger to the community. *§ 3142(g)*. The Government must prove its case by clear and convincing evidence. *§ 3142(f)*. Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. *§ 3142(i)*. The Act's review provisions, *§ 3145(c)*, provide for immediate appellate review of the detention decision.

[***LEdHR1F] [1F] [***LEdHR2E] [2E]We think these extensive safeguards suffice to repel a facial challenge. The protections are more exacting than those we found sufficient in the juvenile context, see *Schall, supra, at 275-281*, and they far exceed what we found necessary to effect limited postarrest detention in *Gerstein v. Pugh, 420 U.S. 103 (1975)*. Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the *Due Process Clause of the Fifth Amendment*.

B

[***LEdHR3D] [3D]Respondents also contend that the Bail Reform Act violates the *Excessive Bail Clause of the Eighth Amendment*. The Court of Appeals did not address this issue because it found that the Act violates the Due Process Clause. We think that the Act survives a challenge founded upon the *Eighth Amendment*.

[***LEdHR11] [11]The *Eighth Amendment* addresses pretrial release by providing merely that "excessive bail shall not be required." This Clause, of course, says nothing about whether bail shall be available at all. Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on *Stack v. Boyle, 342 U.S. 1, 5 (1951)*, in which the Court stated that "bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the *Eighth Amendment*." In respondents' view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it [*753] violates the *Excessive Bail Clause*. Respondents concede that the right to bail they have discovered in the *Eighth Amendment* is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses. Brief for Respondents 21-22. Respondents characterize these exceptions as consistent with what they claim to be the sole purpose of bail -- to ensure the integrity of the judicial process.

[***LEdHR3E] [3E] [***LEdHR12] [12]While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the *Eighth Amendment* categorically prohibits the government from pursuing [***713] other admittedly compelling interests through regulation of pretrial release. The above-quoted [**2105] dictum in *Stack* v. *Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the *Excessive Bail Clause* requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial.

The holding of *Stack* is illuminated by the Court's holding just four months later in *Carlson v. Landon, 342 U.S. 524 (1952)*. In that case, remarkably similar to the present action, the detainees had been arrested and held without bail pending a determination of deportability. The Attorney General refused to release the individuals, "on the ground that there was reasonable cause to believe that [their] release would be prejudicial to the public interest and *would endanger the welfare and safety of the United States." Id., at 529* (emphasis added). The detainees brought the same challenge that respondents bring to us today: the *Eighth Amendment* [*754] required them to be admitted to bail. The Court squarely rejected this proposition:

"The bail clause was lifted with slight changes from the English *Bill of Rights* Act. In England that clause has never been thought to accord a right to bail in all

cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our *Bill of Rights*, nothing was said that indicated any different concept. The *Eighth Amendment* has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." *Id., at 545-546* (footnotes omitted).

[***LEdHR3F] [3F] [***LEdHR13] [13] *Carlson v. Landon* was a civil case, and we need not decide today whether the *Excessive Bail Clause* speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail. For even if we were to conclude that the *Eighth Amendment* imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid. Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack v. Boyle, supra.* We believe that when Congress has mandated detention on the basis of a [***714] compelling interest other than prevention [*755] of flight, as it has here, the *Eighth Amendment* does not require release on bail.

III

[***LEdHR1G] [1G] [***LEdHR2F] [2F] [***LEdHR3G] [3G] [***LEdHR14] [14]In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government -- a concern [**2106] for the safety and indeed the lives of its citizens -- on its face violates either the *Due Process Clause of the Fifth Amendment* or the *Excessive Bail Clause of the Eighth Amendment.*

The judgment of the Court of Appeals is therefore

Reversed.

DISSENT BY: MARSHALL; STEVENS

DISSENT

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice [*756] established centuries ago and enshrined beyond the reach of governmental interference in the *Bill of Rights.*

I

A few preliminary words are necessary with respect to the majority's treatment of the facts in this case. The two paragraphs which the majority devotes to the procedural posture are essentially correct, but they omit certain matters which are of substantial legal relevance.

The Solicitor General's petition for certiorari was filed on July 21, 1986. On October 9, 1986, respondent Salerno filed a response to the petition. No response or appearance of counsel was filed on behalf of respondent Cafaro. The petition for certiorari was granted on November 3, 1986.

On November 19, 1986, respondent Salerno was convicted after a jury trial on charges unrelated to those alleged in the indictment in this case. On January 13, 1987, Salerno was sentenced on those charges to 100 years' imprisonment. As of that date, the Government no longer required a pretrial detention order for the purpose of keeping Salerno incarcerated; it could simply take him [***715] into custody on the judgment and commitment order. The present case thus became moot as to respondent Salerno. [1]

1 Had this judgment and commitment order been executed immediately, as is the ordinary course, the present case would certainly have

been moot with respect to Salerno. On January 16, 1987, however, the District Judge who had sentenced Salerno in the unrelated proceedings issued the following order, apparently with the Government's consent:

"Inasmuch as defendant Anthony Salerno was not ordered detained in this case, but is presently being detained pretrial in the case of *United States* v. *Anthony Salerno et al.*, SS 86 Cr. 245 (MJL),

"IT IS HEREBY ORDERED that the bail status of defendant Anthony Salerno in the above-captioned case shall remain the same as it was prior to the January 13, 1987 sentencing, pending further order of the Court." Order in SS 85 Cr. 139 (RO) (SDNY) (Owen, J.).

This order is curious. To release on bail pending appeal "a person who has been found guilty of an offense and sentenced to a term of imprisonment," the District Judge was required to find "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ." *18 U. S. C. § 3143(b)(1) (1982 ed., Supp. III)*. In short, the District Court which had sentenced Salerno to 100 years' imprisonment then found, with the Government's consent, that he was not dangerous, in a vain attempt to keep alive the controversy as to Salerno's dangerousness before this Court.

[*757] The situation with respect to respondent Cafaro is still more disturbing. In early October 1986, before the Solicitor General's petition for certiorari was granted, respondent Cafaro became a cooperating witness, assisting the Government's investigation "by working in a covert capacity." [2] The information that Cafaro was [**2107] cooperating with the Government was not revealed to his codefendants, including respondent Salerno. On October 9, 1986, respondent Cafaro was released, ostensibly "temporarily for medical care and treatment," with the Government's consent. Docket, SS 86 Cr. 245-2, p. 6 (MJL) (SDNY) (Lowe, J.). [3] This release was conditioned upon execution of a personal recognizance bond in the sum of $ 1 million, under the general pretrial [*758] release provisions of *18 U. S. C. § 3141 (1982 ed., Supp. III)*. In short, respondent Cafaro became an informant and the Government agreed to his release on bail in order that he might better serve the Government's purposes. As to Cafaro, this case was no longer justiciable even before certiorari was granted, but the information bearing upon the essential issue of the Court's jurisdiction was not made available to us.

2 This characterization of Cafaro's activities, along with an account of the process by which Cafaro became a Government agent, appears in an affidavit executed by a former Assistant United States Attorney and filed in the District Court during proceedings in the instant case which occurred after the case was submitted to this Court. Affidavit of Warren Neil Eggleston, dated March 18, 1987, SS 86 Cr. 245, p. 4 (MJL) (SDNY).

3 Further particulars of the Government's agreement with Cafaro, including the precise terms of the agreement to release him on bail, are not included in the record, and the Court has declined to order that the relevant documents be placed before us.

In his reply brief in this Court, the Solicitor General stated: "On October 8, 1986, Cafaro was temporarily released for medical treatment. Because he is still subject to the pretrial detention order, Cafaro's case also continues to present a live controversy." Reply Brief for United States 1-2, n. 1. The Solicitor General did not inform the Court that this release involved the execution of a personal recognizance bond, nor did he reveal that Cafaro had become a cooperating witness. I do not understand how the Solicitor General's representation that Cafaro was "still subject to the pretrial detention order" can be reconciled with the fact of his release on a $ 1 million personal recognizance bond.

The [***716] Government thus invites the Court to address the facial constitutionality of the pretrial detention statute in a case involving two respondents, one of whom has been sentenced to a century of jail time in another case and released pending appeal with the Government's consent, while the other was released on bail *in this case*, with the Government's consent, because he had become an informant. These facts raise, at the very least, a substantial question as to the Court's jurisdiction, for it is far from clear that there is now an actual controversy between these parties. As we have recently said, "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Burke v. Barnes, 479 U.S. 361, 363 (1987)*; see *Sosna v. Iowa, 419 U.S. 393, 402 (1975)*; *Golden v. Zwickler, 394 U.S. 103, 108 (1969)*. Only by flatly ignoring these matters is the majority able to maintain the pretense that it has jurisdiction to decide the question which it is in such a hurry to reach.

II

The majority approaches respondents' challenge to the Act by dividing the discussion into two sections, one concerned with the substantive guarantees implicit in the Due Process Clause, and the other concerned with the protection afforded by the *Excessive Bail Clause of the Eighth Amendment*. This is a sterile formalism, which divides a unitary argument [*759] into two independent parts and then professes to demonstrate that the parts are individually inadequate.

On the due process side of this false dichotomy appears an argument concerning the distinction between regulatory and punitive legislation. The majority concludes that the Act is a regulatory rather than a punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement. The major premise is that "unless Congress expressly [**2108] intended to impose punitive restrictions, the punitive/regulatory distinction turns on '"whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."'" *Ante*, at 747 (citations omitted). The majority finds that "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals," but instead was pursuing the "legitimate regulatory goal" of "preventing danger to the community." *Ibid.* [4] Concluding [***717] that pretrial detention is not an excessive solution to the problem of preventing danger to the community, the majority thus finds that no substantive element of the guarantee of due process invalidates the statute.

> 4 Preventing danger to the community through the enactment and enforcement of criminal laws is indeed a legitimate goal, but in our system the achievement of that goal is left primarily to the States. The Constitution does not contain an explicit delegation to the Federal Government of the power to define and administer the general criminal law. The Bail Reform Act does not limit its definition of dangerousness to the likelihood that the defendant poses a danger to others through the commission of *federal* crimes. Federal preventive detention may thus be ordered under the Act when the danger asserted by the Government is the danger that the defendant will violate state law. The majority nowhere identifies the constitutional source of congressional power to authorize the federal detention of persons whose predicted future conduct would not violate any federal statute and could not be punished by a federal court. I can only conclude that the Court's frequently expressed concern with the principles of federalism vanishes when it threatens to interfere with the Court's attainment of the desired result.

[*760] This argument does not demonstrate the conclusion it purports to justify. Let us apply the majority's reasoning to a similar, hypothetical case. After investigation, Congress determines (not unrealistically) that a large proportion of violent crime is perpetrated by persons who are unemployed. It also determines, equally reasonably, that much violent crime is committed at night. From amongst the panoply of "potential solutions," Congress chooses a statute which permits, after judicial proceedings, the imposition of a dusk-to-dawn curfew on anyone who is unemployed. Since this is not a measure enacted for the purpose of punishing the unemployed, and since the majority finds that preventing danger to the community is a legitimate regulatory goal, the curfew statute would, according to the majority's analysis, be a mere "regulatory" detention statute, entirely compatible with the substantive components of the Due Process Clause.

The absurdity of this conclusion arises, of course, from the majority's cramped concept of substantive due process. The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as "regulation," and, magically, the Constitution no longer prohibits its imposition. Because, as I discuss in Part III, *infra*, the Due Process Clause protects other substantive rights which are infringed by this legislation, the majority's argument is merely an exercise in obfuscation.

The logic of the majority's *Eighth Amendment* analysis is equally unsatisfactory. The *Eighth Amendment*, as the majority notes, states that "excessive bail shall not be required." The majority then declares, as if it were undeniable, that: "this Clause, of course, says nothing about whether bail shall be available at all." *Ante*, at 752. If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether. Whether the [*761] magistrate sets bail at $ 1 billion or refuses to set bail at all, the consequences are indistinguishable. It would be mere sophistry to suggest that the *Eighth Amendment* protects against the former decision, and not the latter. Indeed, such a result would lead to the conclusion that there was no need for [**2109] Congress to pass a preventive detention measure of any kind; every federal magistrate and district judge could simply refuse, despite the absence of any evidence of risk of flight or danger to the community, to set bail. This would be entirely constitutional, [***718] since, according to the majority, the *Eighth Amendment* "says nothing about whether bail shall be available at all."

But perhaps, the majority says, this manifest absurdity can be avoided. Perhaps the Bail Clause is addressed only to the Judiciary. "We need not decide today," the majority says, "whether the *Excessive Bail Clause* speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." *Ante*, at 754. The majority is correct that this question need not be decided today; it was decided long ago. Federal and state statutes which purport to accomplish what the *Eighth Amendment* forbids, such as imposing cruel and unusual punishments, may not stand. See, *e. g., Trop v. Dulles, 356 U.S. 86 (1958)*; *Furman v. Georgia, 408 U.S. 238 (1972)*. The text of the Amendment, which provides simply that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," provides absolutely no support for the majority's speculation that both courts and Congress are forbidden to inflict cruel and unusual punishments, while only the courts are forbidden to require excessive bail. [5]

5 The majority refers to the statement in *Carlson v. Landon, 342 U.S. 524, 545 (1952)*, that the Bail Clause was adopted by Congress from the English *Bill of Rights* Act of 1689, 1 Wm. & Mary, Sess. 2, ch. II, § I(10), and that "in England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." A sufficient answer to this meager argument was made at the time by Justice Black: "The *Eighth Amendment* is in the American *Bill of Rights* of 1789, not the English *Bill of Rights* of 1689." *Carlson v. Landon, supra, at 557* (dissenting opinion). Our *Bill of Rights* is contained in a written Constitution, one of whose purposes is to protect the rights of the people against infringement by the Legislature, and its provisions, whatever their origins, are interpreted in relation to those purposes.

[*762] The majority's attempts to deny the relevance of the Bail Clause to this case are unavailing, but the majority is nonetheless correct that the prohibition of excessive bail means that in order "to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response." *Ante*, at 754. The majority concedes, as it must, that "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." *Ibid.* But, the majority says, "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the *Eighth Amendment* does not require release on bail." *Ante*, at 754-755. This conclusion follows only if the "compelling" interest upon which Congress acted is an interest which the Constitution permits Congress to further through the denial of bail. The majority does not ask, as a result of its disingenuous division of the analysis, if there are any substantive limits contained in both the *Eighth Amendment* and the Due Process Clause which render this system of preventive detention unconstitutional. The majority does not ask because the answer is apparent and, to the majority, inconvenient.

[***719] III

The essence of this case may be found, ironically enough, in a provision of the Act to which the majority does not refer. Title *18 U. S. C. § 3142(j) (1982 ed., Supp. III)* provides that "nothing in this section shall be construed as modifying or limiting the presumption of innocence." But the very pith [*763] and purpose of this statute is an abhorrent limitation of the presumption [**2110] of innocence. The majority's untenable conclusion that the present Act is constitutional arises from a specious denial of the role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States, 156 U.S. 432, 453 (1895)*. Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty," *Palko v. Connecticut, 302 U.S. 319, 325 (1937)*, and is established beyond legislative contravention in the Due Process Clause. See *Estelle v. Williams, 425 U.S. 501, 503 (1976)*; *In re Winship, 397 U.S. 358, 364 (1970)*. See also *Taylor v. Kentucky, 436 U.S. 478, 483 (1978)*; *Kentucky v. Whorton, 441 U.S. 786, 790 (1979)* (Stewart, J., dissenting).

The statute now before us declares that persons who have been indicted may be detained if a judicial officer finds clear and convincing evidence that they pose a danger to individuals or to the community. The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary. But let us suppose that a defendant is indicted and the Government shows by clear and convincing evidence that he is dangerous and should be detained pending a trial, at which trial the defendant is acquitted. May the Government continue to hold the defendant in detention based upon its showing that he is dangerous? The answer cannot be yes, for that would allow the Government to imprison someone for uncommitted crimes based upon

"proof" not beyond a reasonable doubt. The result must therefore be that once the indictment has failed, detention [*764] cannot continue. But our fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal. Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. "'If it suffices to accuse, what will become of the innocent?'" *Coffin v. United States, supra, at 455* (quoting Ammianus Marcellinus, [***720] Rerum Gestarum Libri Qui Supersunt, L. XVIII, c. 1, A. D. 359).

To be sure, an indictment is not without legal consequences. It establishes that there is probable cause to believe that an offense was committed, and that the defendant committed it. Upon probable cause a warrant for the defendant's arrest may issue; a period of administrative detention may occur before the evidence of probable cause is presented to a neutral magistrate. See *Gerstein v. Pugh, 420 U.S. 103 (1975)*. Once a defendant has been committed for trial he may be detained in custody if the magistrate finds that no conditions of release will prevent him from becoming a fugitive. But in this connection the charging instrument is evidence of nothing more than the fact that there will be a trial, and

"release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a [**2111] sum of money subject to forfeiture serves as additional assurance of the [*765] presence of an accused." *Stack v. Boyle, 342 U.S. 1, 4-5 (1951)* (citation omitted). [6]

> 6 The majority states that denial of bail in capital cases has traditionally been the rule rather than the exception. And this of course is so, for it has been the considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee. If in any particular case the presumed likelihood of flight should be made irrebuttable, it would in all probability violate the Due Process Clause. Thus what the majority perceives as an exception is nothing more than an example of the traditional operation of our system of bail.

The finding of probable cause conveys power to try, and the power to try imports of necessity the power to assure that the processes of justice will not be evaded or obstructed. [7] "Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested." *794 F.2d 64, 73 (CA2 1986)* (quoting *United States v. Melendez-Carrion, 790 F.2d 984, 1002 (CA2 1986)* (opinion of Newman, J.)). The detention purportedly authorized by this statute bears no relation to the Government's power to try charges supported by a finding of probable cause, and thus the interests it serves are outside the scope of interests which may be considered in weighing the excessiveness of bail under the *Eighth Amendment*.

> 7 It is also true, as the majority observes, that the Government is entitled to assurance, by incarceration if necessary, that a defendant will not obstruct justice through destruction of evidence, procuring the absence or intimidation of witnesses, or subornation of perjury. But in such cases the Government benefits from no presumption that any particular defendant is likely to engage in activities inimical to the administration of justice, and the majority offers no authority for the proposition that bail has traditionally been denied *prospectively*, upon speculation that witnesses would be tampered with. Cf. *Carbo v. United States, 82 S. Ct. 662, 7 L. Ed. 2d 769 (1962)* (Douglas, J., in chambers) (bail pending appeal denied when more than 200 intimidating phone calls made to witness, who was also severely beaten).

[*766] It is not a novel proposition that the Bail Clause plays a vital role in protecting the presumption of innocence. Reviewing the application for bail pending appeal by members of [***721] the American Communist Party convicted under the Smith Act, *18 U. S. C. § 2385*, Justice Jackson wrote:

"Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice . . . ." *Williamson v. United*

States, 95 L. Ed. 1379, 1382 (1950) (opinion in chambers) (footnote omitted).

As Chief Justice Vinson wrote for the Court in *Stack v. Boyle, supra*: "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *342 U.S., at 4.*

IV

There is a connection between the peculiar facts of this case and the evident constitutional defects in the statute which the Court upholds today. Respondent Cafaro was originally incarcerated for an indeterminate period at the request of the Government, which believed (or professed to believe) that his release imminently threatened the safety of the community. That threat apparently vanished, from the Government's point of view, when Cafaro agreed to act as a covert agent of the Government. There could be no more eloquent demonstration of the coercive power of authority to imprison upon prediction, or [**2112] of the dangers which the almost [*767] inevitable abuses pose to the cherished liberties of a free society.

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz, 339 U.S. 56, 69 (1950)* (Frankfurter, J., dissenting). Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth [***722] without authority, and come back without respect.

I dissent.

JUSTICE STEVENS, dissenting.

There may be times when the Government's interest in protecting the safety of the community will justify the brief detention of a person who has not committed any crime, see *ante*, at 748-749, see also *United States v. Greene, 497 F.2d 1068, 1088-1089 (CA7 1974)* (Stevens, J., dissenting). [1] To [*768] use Judge Feinberg's example, it is indeed difficult to accept the proposition that the Government is without power to detain a person when it is a virtual certainty that he or she would otherwise kill a group of innocent people in the immediate future. *United States v. Salerno, 794 F.2d 64, 77 (CA2 1986)* (dissenting opinion). Similarly, I am unwilling to decide today that the police may never impose a limited curfew during a time of crisis. These questions are obviously not presented in this case, but they lurk in the background and preclude me from answering the question that is presented in as broad a manner as JUSTICE MARSHALL has. Nonetheless, I firmly agree with JUSTICE MARSHALL that the provision of the Bail Reform Act allowing pretrial detention on the basis of future dangerousness is unconstitutional. Whatever the answers are to the questions I have mentioned, it is clear to me that a pending indictment may not be given any weight in evaluating an individual's risk to the community or the need for immediate detention.

1 "If the evidence overwhelmingly establishes that a skyjacker, for example, was insane at the time of his act, and that he is virtually certain to resume his violent behavior as soon as he is set free, must we then conclude that the only way to protect society from such predictable harm is to find an innocent man guilty of a crime he did not have the capacity to commit?" *United States v. Greene, 497 F.2d, at 1088.*

If the evidence of imminent danger is strong enough to warrant emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense. In this case, for example, it is unrealistic to assume that the danger to the community that was present when respondents were at large did not justify their detention before they were indicted, but did require that measure the moment that the grand jury found probable cause to believe they had committed crimes in the past. [2] It is equally unrealistic to [**2113] assume that the danger will vanish if a jury happens to acquit them. [*769] JUSTICE MARSHALL has demonstrated that the fact of indictment cannot, consistent with the presumption of innocence and the *Eighth Amendment's Excessive Bail Clause*, be used to create a special class, the members of which are, alone, eligible for detention because of future dangerousness.

2 The Government's proof of future dangerousness was not dependent on any prediction that, as a result of the indictment, respondents

posed a threat to potential witnesses or to the judicial system.

Several factors combine to give me an uneasy feeling about the case the Court decides today. The facts set forth in Part I of JUSTICE MARSHALL's opinion strongly support the possibility that the Government is much more interested in litigating a "test case" than in resolving an actual controversy concerning respondents' threat to the safety of the community. [***723] Since Salerno has been convicted and sentenced on other crimes, there is no need to employ novel pretrial detention procedures against him. Cafaro's case is even more curious because he is apparently at large and was content to have his case argued by Salerno's lawyer even though his interests would appear to conflict with Salerno's. But if the merits must be reached, there is no answer to the arguments made in Parts II and III of JUSTICE MARSHALL's dissent. His conclusion, and not the Court's, is faithful to the "fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v. New York, 198 U.S. 45, 76 (1905)* (Holmes, J., dissenting). Accordingly, I respectfully dissent.

REFERENCES

Supreme Court's construction and application of provision of *Federal Constitution's Eighth Amendment* that excessive bail shall not be required

8 Am Jur 2d, Bail and Recognizance 4, 7.5, 9, 10, 18, 24, 28, 42, 43, 47

9 Federal Procedure, L Ed, Criminal Procedure 22:999-22:1002, 22:1006-22:1014

18 Am Jur Proof of Facts 2d 149, Excessive Bail

USCS, *Constitution, Amendments 5, 8; 18 USCS 3141 et seq.*

US L Ed Digest, Bail and Recognizance 7; Constitutional Law 831.5, 853.4

Index to Annotations, Bail and Recognizance; Due Process; Federal Bail Reform Act; Liberty

Annotation References:

Supreme Court's views as to concept of "liberty" under *due process clauses of Fifth* and *Fourteenth Amendments. 47 L Ed 2d 975.*

Considerations affecting grant, continuance ,reduction ,or revocation of bail by individual Justice of Supreme Court. *30 L Ed 2d 952.*

Propriety of denial of pretrial bail under Bail Reform Act (*18 USCS 3141 et seq.*). *75 ALR Fed 806.*

EXHIBIT “14”

LEXSEE 128 S.CT. 2783

DISTRICT OF COLUMBIA, et al., Petitioners v. DICK ANTHONY HELLER

No. 07-290

SUPREME COURT OF THE UNITED STATES

554 U.S. 570; 128 S. Ct. 2783; 171 L. Ed. 2d 637; 2008 U.S. LEXIS 5268; 76 U.S.L.W. 4631; 21 Fla. L. Weekly Fed. S 497

March 18, 2008, Argued
June 26, 2008, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: Related proceeding at *Heller v. District of Columbia, 698 F. Supp. 2d 179, 2010 U.S. Dist. LEXIS 29063 (D.D.C., Mar. 26, 2010)*

PRIOR HISTORY: [***1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Parker v. District of Columbia, 478 F.3d 370, 375 U.S. App. D.C. 140, 2007 U.S. App. LEXIS 5519 (2007)

DISPOSITION: Affirmed.

DECISION:

[**637] *Federal Constitution's Second Amendment* held violated by District of Columbia's general (1) ban on handgun possession in home, and (2) prohibition against rendering any lawful firearm in home operable for purpose of immediate self-defense.

SUMMARY:

Procedural posture: Petitioner District of Columbia sought certiorari review of a judgment from the United States Court of Appeals for the District of Columbia Circuit which held that the *Second Amendment* protected an individual's right to possess firearms and that the total ban on handguns under *D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4)*, as well as the requirement under *D.C. Code § 7-2507.02* that firearms be kept nonfunctional, violated that right.

Overview: Respondent, a special policeman, filed the instant action after the District refused his application to register a handgun. The Court held that the District's ban on handgun possession in the home and its prohibition against rendering any lawful firearm in the home operable for the purposes of immediate self-defense violated the *Second Amendment*. The Court held that the *Second Amendment* protected an individual right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home. The Court determined that the *Second Amendment's* prefatory clause announced a purpose but did not limit or expand the scope of the operative clause. The operative clause's text and history demonstrated that it connoted an individual right to keep and bear arms, and the Court's reading of the operative clause was consistent with the announced purpose of the prefatory clause. None of the Court's precedents foreclosed its conclusions. The Court held that the *Second Amendment* right [**638] was not unlimited, and it noted that its opinion should not be taken to cast doubt on certain long-standing prohibitions related to firearms.

Outcome: The Court affirmed the judgment of the Court of Appeals. Assuming respondent was not disqualified from exercising *Second Amendment* rights, the Court held that the District must permit respondent to register his handgun and must issue him a license to carry it in his home. 5-4 Decision; 2 Dissents.

LAWYERS' EDITION HEADNOTES:

[**LEdHN1]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- INTERPRETATION

Headnote:[1]

The *Second Amendment* provides: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. In interpreting this text, the United States Supreme Court is guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN2]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- INTERPRETATION

Headnote:[2]

The *Second Amendment* is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The *Second Amendment* could be rephrased: Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed. Although this structure of the *Second Amendment* is unique in the United States Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose. Logic demands that there be a link between the stated purpose and the command. That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause. But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. It is nothing unusual in acts for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN3]

STATUTES §119

PREAMBLE -- LIMITS

Headnote:[3]

In America the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN4]

CONSTITUTIONAL LAW §27 WEAPONS AND FIREARMS §1

[**639] SECOND AMENDMENT -- PEOPLE -- REPEATED TERM

Headnote:[4]

"The people" seems to have been a term of art employed in select parts of the Constitution. Its uses suggest that "the people" protected by the *Fourth Amendment*, and by the *First* and *Second Amendments*, and to whom rights and powers are reserved in the *Ninth* and *Tenth Amendments*, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with the United States to be considered part of that community. This contrasts markedly with the phrase "the militia" in the prefatory clause of the *Second Amendment*. The "militia" in colonial America consisted of a subset of "the people"--those who were male, able bodied, and within a certain age range. Reading the *Second Amendment* as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people." The United States Supreme Court starts therefore with a strong presumption that the *Second Amendment* right is exercised individually and belongs to all Americans. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN5]

WEAPONS AND FIREARMS §1

ARMS -- MEANING

Headnote:[5]

The 18th-century meaning of "Arms" is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as weapons of offence, or armour of defence. Timothy Cunningham's important 1771 legal dictionary defined "arms" as any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another. The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN6]

CONSTITUTIONAL LAW §925 SEARCH AND SEIZURE §5 WEAPONS AND FIREARMS §1

MODERN FORMS

Headnote:[6]

In regard to the argument that only those arms in existence in the 18th century are protected by the *Second Amendment*, the United States Supreme Court does not interpret constitutional rights that way. Just as the *First Amendment* protects modern forms of communications and the *Fourth Amendment* applies to modern forms of search, the *Second Amendment* extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN7]

WEAPONS AND FIREARMS §1

KEEP ARMS -- MEANING

Headnote:[7]

The most natural reading of "keep Arms" in the *Second Amendment* is to "have weapons." (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN8]

WEAPONS AND FIREARMS §1

BEAR ARMS -- MEANING

Headnote:[8]

At the time of the founding, as now, to "bear" meant to "carry." When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose--confrontation. In Muscarello v. United States, in the course of analyzing the meaning of "carries a firearm" in a [**640] federal criminal statute, Justice Ginsburg wrote that surely a most familiar meaning is, as the *Constitution's Second Amendment* indicates: wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person. The United States Supreme Court thinks that Justice Ginsburg accurately captured the natural meaning of "bear arms." Although the phrase implies that the carrying of the weapon is for the purpose of offensive or defensive action, it in no way connotes participation in a structured military organization. From a review of founding-era sources, the United States Supreme Court concludes that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN9]

WEAPONS AND FIREARMS §1

BEAR ARMS -- MEANING

Headnote:[9]

The phrase "bear Arms" had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: to serve as a soldier, do military service, fight, or to wage war. But it unequivocally bore that idiomatic meaning only when followed by the preposition "against," which was in turn followed by the target of the hostilities. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN10]

CONSTITUTIONAL LAW §925 SEARCH AND SEIZURE §5 WEAPONS AND FIREARMS §1

INDIVIDUAL RIGHT -- PRE-EXISTENCE

Headnote:[10]

Putting all of the textual elements of the operative clause of the *Second Amendment* together, the United States Supreme Court finds that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the *Second Amendment*. The Supreme Court looks to this because it has always been widely understood that the *Second Amendment*, like the *First* and *Fourth Amendments*, codified a pre-existing right. The very text of the *Second Amendment* implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As the Supreme Court said in United States v. Cruikshank, this is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The *Second Amendment* declares that it shall not be infringed. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN11]

CONSTITUTIONAL LAW §927 WEAPONS AND FIREARMS §1

INDIVIDUAL RIGHT -- LIMIT

Headnote:[11]

There seems to the United States Supreme Court no doubt, on the basis of both text and history, that the *Second Amendment* conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the *First Amendment's* right of free speech was not. Thus, the Supreme Court does not read the *Second Amendment* to protect the right of citizens to carry arms for "any sort" of confrontation, just as it does not read the *First Amendment* to protect the right of citizens to speak for "any purpose." (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN12]

MILITIA §1

[**641] DEFINITION

Headnote:[12]

In United States v. Miller, the United States Supreme Court explained that the Militia comprised all males physically capable of acting in concert for the common defense. That definition comports with founding-era sources. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN13]

MILITIA §1 MILITIA §2 MILITIA §3

DEFINITION -- ORGANIZATION -- CALLING FORTH

Headnote:[13]

Unlike armies and navies, which Congress is given the power to create under *U.S. Const. art. I, § 8, cls. 12-13*, the militia is assumed by U.S. Const. art. I already to be in existence. Congress is given the power to provide for calling forth the militia, *U.S. Const. art. I, § 8, cl. 15*, and the power not to create, but to organize it--and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence, *U.S. Const. art. I, § 8, cl. 16*. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in U.S. Const. art. I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN14]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- IMPLICATION

Headnote:[14]

The adjective "well-regulated" in the *Second Amendment* implies nothing more than the imposition of proper discipline and training. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN15]

CONSTITUTIONAL LAW §27 MILITIA §1

SECOND AMENDMENT -- MEANING -- REPEATED TERM

Headnote:[15]

The phrase "security of a free state" in the *Second Amendment* means "security of a free polity," not security of each of the several States. The word "state" is used in various senses in the United States Constitution and in its most enlarged sense it means the people composing a particular nation or community. In reference to the *Second Amendment's* prefatory clause, the militia is the natural defence of a free country. It is true that the term "State" elsewhere in the Constitution refers to individual States, but the phrase "security of a free state" and close variations seem to have been terms of art in 18th-century political discourse, meaning a "free country" or "free polity." Moreover, the other instances of "state" in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States--"each state," "several states," "any state," "that state," "particular states," "one state," "no state." And the presence of the term "foreign state" in U.S. Const. arts. I and III shows that the word "state" did not have a single meaning in the Constitution. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN16]

WEAPONS AND FIREARMS §1

[**642] SECOND AMENDMENT -- INTERPRETATION

Headnote:[16]

The preface fits perfectly with an operative clause that creates an individual right to keep and bear arms under the *Second Amendment*. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN17]

CONSTITUTIONAL LAW §15 STATUTES §143 STATUTES §151.5

LEGISLATIVE HISTORY -- PUBLIC UNDERSTANDING

Headnote:[17]

"Legislative history" refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. "Postenactment legislative history," a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN18]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- INTERPRETATION

Headnote:[18]

In United States v. Cruikshank, the United States Supreme Court held that the *Second Amendment* does not by its own force apply to anyone other than the Federal Government. The opinion explained that the right is not a right granted by the Constitution or in any manner dependent upon that instrument for its existence. The *Second Amendment* means no more than that it shall not be infringed by Congress. States, the Supreme Court said, were free to restrict or protect the right under their police powers. The limited discussion of the *Second Amendment* in Cruikshank supports, if anything, the individual-rights interpretation. Cruikshank described the right protected by the *Second Amendment* as bearing arms for a lawful purpose and said that the people must look for their protection against any violation by their fellow-citizens of the rights it recognizes to the States' police power. That discussion makes little sense if it is only a right to bear arms in a state militia. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN19]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- TYPES OF WEAPONS

Headnote:[19]

In considering what types of weapons the United States Supreme Court's decision in United States v. Miller permits, Miller's "ordinary military equipment" language must be read in tandem with what comes after: Ordinarily when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time. The traditional militia was formed from a pool of men bringing arms in common use at the time for lawful purposes like self-defense. In the colonial and revolutionary war era, small-arms weapons used by militiamen and weapons used in defense of person and home were one and the same. Indeed, that [**643] is precisely the way in which the *Second Amendment's* operative clause furthers the purpose announced in its preface. The United States Supreme Court therefore reads Miller to say only that the *Second Amendment* does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN20]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- LIMITS ON RIGHT

Headnote:[20]

Like most rights, the right secured by the *Second Amendment* is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the *Second Amendment* or state analogues. Although the United States Supreme Court does not undertake an exhaustive historical analysis of the full scope of the *Second Amendment*, nothing in its Heller opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. The Supreme Court identifies these presumptively lawful regulatory measures only as examples; the list does not purport to be exhaustive. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[** LEdHN21]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- TYPES OF WEAPONS

Headnote:[21]

The United States Supreme Court recognizes an important limitation on the right to keep and carry arms under the *Second Amendment.* Miller said that the sorts of weapons protected were those "in common use at the time." The Supreme Court thinks that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons. It may be objected that if weapons that are most useful in military service--M-16 rifles and the like--may be banned, then the *Second Amendment* right is completely detached from the prefatory clause. But the conception of the militia at the time of the *Second Amendment's* ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right under the *Second Amendment* cannot change the Supreme Court's interpretation of the right. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN22]

WEAPONS AND FIREARMS §1

[**644] SECOND AMENDMENT -- SELF-DEFENSE -- HANDGUN BAN

Headnote:[22]

The inherent right of self-defense has been central to the *Second Amendment* right. The handgun ban under *D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02 (a)(4)* (2001) amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that the United States Supreme Court has applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to "keep" and use for protection of one's home and family would fail constitutional muster. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN23]

CONSTITUTIONAL LAW §316.2 CONSTITUTIONAL LAW §927 CRIMINAL LAW §22 CRIMINAL LAW §46.3 WEAPONS AND FIREARMS §1

RATIONAL-BASIS SCRUTINY -- WHEN USED

Headnote:[23]

Rational-basis scrutiny is a mode of analysis the United States Supreme Court has used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test can not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the *Second Amendment* would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN24]

WEAPONS AND FIREARMS §1

HANDGUNS -- PROHIBITION

Headnote:[24]

Handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN25]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- INOPERABLE FIREARMS

Headnote:[25]

The District of Columbia's requirement under *D.C. Code § 7-2507.02* (2001) that firearms in the home be rendered and kept inoperable at all times makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional under the *Second Amendment.* (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[**LEdHN26]

WEAPONS AND FIREARMS §1

HANDGUNS -- REGULATION

Headnote:[26]

The Constitution leaves a variety of tools for combating the problem of handgun violence, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. (Scalia, J., joined by Roberts, [**645] Ch. J., and Kennedy, Thomas, and Alito, JJ.)

SYLLABUS

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed this suit seeking, on *Second Amendment* [**646] grounds, to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the *Second Amendment* protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms [***2] in the home be kept nonfunctional even when necessary for self-defense, violated that right.

Held:

1. The *Second Amendment* protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. Pp. 2-53.

(a) The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms. Pp. 2-22.

(b) The prefatory clause comports with the Court's interpretation of the operative clause. The "militia" comprised all males physically capable of acting in concert for the common defense. The Antifederalists feared that the Federal Government would disarm the people in order to disable this citizens' militia, enabling a politicized standing army or a select militia to rule. The response was to deny Congress power to abridge the ancient right of individuals to keep and bear arms, so that the ideal of a citizens' militia would be preserved. Pp. 22-28.

(c) The Court's interpretation is confirmed by analogous arms-bearing rights [***3] in state constitutions that preceded and immediately followed the *Second Amendment*. Pp. 28-30.

(d) The *Second Amendment's* drafting history, while of dubious interpretive worth, reveals three state *Second Amendment* proposals that unequivocally referred to an individual right to bear arms. Pp. 30-32.

(e) Interpretation of the *Second Amendment* by scholars, courts, and legislators, from immediately after its ratification through the late 19th century, also supports the Court's conclusion. Pp. 32-47.

(f) None of the Court's precedents forecloses the Court's interpretation. Neither *United States v. Cruikshank, 92 U.S. 542, 553, 23 L. Ed. 588*, nor *Presser v. Illinois, 116 U.S. 252, 264-265, 6 S. Ct. 580, 29 L. Ed. 615*, refutes the individual-rights interpretation. *United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373*, does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, *i.e.*, those in common use for lawful purposes. Pp. 47-54.

2. Like most rights, the *Second Amendment* right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have [***4] been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *Miller's* holding that the sorts [**647] of weapons protected are those "in common use at the time" finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons. Pp. 54-56.

3. The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the *Second Amendment*. The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition--in the place where

the importance of the lawful defense of self, family, and property is most acute--would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home [***5] be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. Because Heller conceded at oral argument that the D. C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and does not address the licensing requirement. Assuming he is not disqualified from exercising *Second Amendment* rights, the District must permit Heller to register his handgun and must issue him a license to carry it in the home. Pp. 56-64.

375 U.S. App. D.C. 140, 478 F.3d 370, affirmed.

COUNSEL: Walter Dellinger argued the cause for petitioners.

Paul D. Clement argued the cause for the United States, as amicus curiae, by special leave of the court.

Alan Gura argued the cause for respondent

JUDGES: Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Souter, Ginsburg, and Breyer, JJ., joined, *post*, p.___. Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined, *post*, p.___.

OPINION BY: SCALIA

OPINION

[*2787] Justice **Scalia** delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of [*2788] usable handguns in the home violates the *Second Amendment to the Constitution.*

I

The District of Columbia generally prohibits the possession [***6] of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. See *D. C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4)* (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. See *§§ 22-4504(a), 22-4506.* District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and dissembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities. See *§ 7-2507.02.*[1]

1 There are minor exceptions to all of these prohibitions, none of which is relevant here.

Respondent Dick Heller is a D. C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of [**648] Columbia seeking, on *Second Amendment* grounds, to enjoin the city from enforcing the bar on the registration of handguns, [***7] the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of "functional firearms within the home." App. 59a. The District Court dismissed respondent's complaint, see *Parker v. District of Columbia, 311 F. Supp. 2d 103, 109 (2004).* The Court of Appeals for the District of Columbia Circuit, construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense,[2] reversed, see *Parker v. District of Columbia, 375 U.S. App. D.C. 140, 478 F.3d 370, 401 (2007).* It held that the *Second Amendment* protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. See *id., at 395, 399-401.* The Court of Appeals directed the District Court to enter summary judgment for respondent.

2 That construction has not been challenged here.

We granted certiorari. *552 U.S. , 552 U.S. 1035, 128 S. Ct. 645, 169 L. Ed. 2d 417 (2007).*

II

We turn first to the meaning of the *Second Amendment.*

A

[**LEdHR1] [1] The *Second Amendment* provides: "A well [***8] regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague, 282 U.S. 716, 731, 51 S. Ct.*

220, 75 L. Ed. 640 (1931); see also *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 188, 6 L. Ed. 23 (1824)*. Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

[*2789] The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. See Brief for Petitioners 11-12; *post, at ____, 171 L. Ed. 2d, at 684* (Stevens, J., dissenting). Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. See Brief for Respondent [***9] 2-4.

[**LEdHR2] [2] The *Second Amendment* is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." See J. Tiffany, A Treatise on Government and Constitutional Law § 585, p 394 (1867); Brief for Professors of Linguistics and English as *Amici Curiae* 3 (hereinafter Linguists' [**649] Brief). Although this structure of the *Second Amendment* is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose. See generally Volokh, The Commonplace *Second Amendment*, *73 N. Y. U. L. Rev. 793, 814-821 (1998)*.

Logic demands that there be a link between the stated purpose and the command. The *Second Amendment* would be nonsensical if it read, "A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed." That requirement [***10] of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause ("The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence." The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Dwarris, A General Treatise on Statutes 268-269 (P. Potter ed. 1871); T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 42-45 (2d ed. 1874).[3] "'It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'" J. Bishop, Commentaries on Written Laws and Their Interpretation § 51, p 49 (1882) (quoting *Rex v. Marks*, 3 East 157, 165, 102 Eng. Rep. 557, 560 (K. B. 1802)). Therefore, while we will begin [*2790] our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced [***11] purpose.[4]

3 As Sutherland explains, the key 18th-century English case on the effect of preambles, *Copeman v. Gallant*, 1 P. Wms. 314, 24 Eng. Rep. 404 (1716), stated that "the preamble could not be used to restrict the effect of the words of the purview." 2A N. Singer, Sutherland on Statutory Construction §47.04, pp. 145-146 rev. (5th ed. 1992). This rule was modified in England in an 1826 case to give more importance to the preamble, but [**LEdHR3] [3] in America "the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms." *Id.*, at 146.

Justice Stevens says that we violate the general rule that every clause in a statute must have effect. *Post, at ____, 171 L. Ed. 2d, at 688*. But where the text of a clause itself indicates that it does not have operative effect, such as "whereas" clauses in federal legislation or the Constitution's preamble, a court has no license to make it do what it was not designed to do. Or to put the point differently, operative provisions should be given effect as operative provisions, and prologues as prologues.

4 Justice Stevens criticizes us for discussing the prologue last. *Ibid.* But if a prologue [***12] can be used only to clarify an ambiguous operative provision, surely the first step must be to determine whether the operative provision is ambiguous. It might be argued, we suppose, that the prologue itself should be one of the factors that go into the determination of whether the operative provision is ambiguous--but that would cause the prologue to be used to produce ambiguity rather than just to resolve it. In any event, even if we considered the prologue *along with* the operative provision we would reach the same result we do today, since (as we explain) our interpretation of "the right of the people to keep and bear arms" furthers the purpose of an effective militia no less than (indeed, more than) the dissent's interpretation. See *infra, at ____ - ____, 171 L. Ed. 2d, at 662*.

1. Operative Clause.

a. "Right of the People." The first salient feature of the operative clause is that it codifies a "right of the [**650] people." The unamended Constitution and the *Bill of Rights* use the phrase "right of the people" two other times, in the *First Amendment's* Assembly-and-Petition Clause and in the *Fourth Amendment's* Search-and-Seizure Clause. The *Ninth Amendment* uses very similar terminology ("The enumeration in the Constitution, [***13] of certain rights, shall not be construed to deny or disparage others retained by the people"). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.[5]

> 5 Justice Stevens is of course correct, *post, at ____, 171 L. Ed. 2d, at 689*, that the right to assemble cannot be exercised alone, but it is still an individual right, and not one conditioned upon membership in some defined "assembly," as he contends the right to bear arms is conditioned upon membership in a defined militia. And Justice Stevens is dead wrong to think that the right to petition is "primarily collective in nature." *Ante, at ___, 171 L. Ed. 2d, at 689*. See *McDonald v. Smith, 472 U.S. 479, 482-484, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985)* (describing historical origins of right to petition).

Three provisions of the Constitution refer to "the people" in a context other than "rights"--the famous preamble ("We the people"), § 2 of Article I (providing that "the people" will choose members of the House), and the *Tenth Amendment* (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively--but [***14] they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.[6]

> 6 If we look to other founding-era documents, we find that some state constitutions used the term "the people" to refer to the people collectively, in contrast to "citizen," which was used to invoke individual rights. See Heyman, Natural Rights and the *Second Amendment*, in The *Second Amendment* in Law and History 179, 193-195 (C. Bogus ed. 2000) (hereinafter Bogus). But that usage was not remotely uniform. See, *e.g.*, N. C. Declaration of Rights § XIV (1776), in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 2787, 2788 (F. Thorpe ed. 1909) (hereinafter Thorpe) (jury trial); Md. Declaration of Rights § XVIII (1776), in 3 *id.*, at 1686, 1688 (vicinage requirement); *Vt. Declaration of Rights, ch. 1, § XI (1777)*, in 6 *id.*, at 3737, 3741 (searches and seizures); Pa. Declaration of Rights § XII (1776), in 5 *id.*, at 3082, 3083 (free speech). And, most importantly, it was clearly not the terminology used in the Federal Constitution, given the *First*, *Fourth*, and *Ninth Amendments*.

What [***15] is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not [*2791] an unspecified subset. As we said in *United States v. Verdugo-Urquidez, 494 U.S. 259, 265, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)*:

> [**LEdHR4] [4] "'[T]he people' seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that 'the people' protected by the *Fourth Amendment*, and by the *First* and *Second Amendments*, and to whom rights and powers are reserved in the *Ninth* and *Tenth Amendments*, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

This contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people"--those who were male, able bodied, and within a [**651] certain age range. Reading the *Second Amendment* as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."

We start therefore [***16] with a strong presumption that the *Second Amendment* right is exercised individually and belongs to all Americans.

b. "Keep and Bear Arms." We move now from the holder of the right--"the people"--to the substance of the right: "to keep and bear Arms."

Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." [**LEdHR5] [5] The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "[w]eapons of offence, or armour of defence." 1 Dictionary of the English Language 106

(4th ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. For instance, Cunningham's legal dictionary gave as an example of usage: "Servants and labourers shall use bows and arrows [***17] on *Sundays*, &c. and not bear other arms." See also, *e.g.*, An Act for the trial of Negroes, 1797 Del. Laws ch. XLIII, § 6, in 1 First Laws of the State of Delaware 102, 104 (J. Cushing ed. 1981 (pt. 1)); see generally *State v. Duke, 42 Tex. 455, 458 (1874)* (citing decisions of state courts construing "arms"). Although one founding-era thesaurus limited "arms" (as opposed to "weapons") to "instruments of offence *generally* made use of in war," even that source stated that all firearms constituted "arms." 1 J. Trusler, The Distinction Between Words Esteemed Synonymous in the English Language 37 (3d ed. 1794) (emphasis added).

Some have made the argument, bordering on the frivolous, [**LEdHR6] [6] that only those arms in existence in the 18th century are protected by the *Second Amendment*. We do not interpret constitutional rights that way. Just as the *First Amendment* protects modern forms of communications, *e.g.*, *Reno v. ACLU, 521 U.S. 844, 849, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)*, and the *Fourth Amendment* applies to modern forms of search, *e.g.*, *Kyllo v. United States, 533 U.S. 27, 35-36, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)*, the *Second Amendment* extends, [*2792] prima facie, to all instruments that constitute bearable arms, even those that were [***18] not in existence at the time of the founding.

We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Johnson 1095. Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of an idiomatic meaning of "keep Arms." Thus, [**LEdHR7] [7] the most natural reading of "keep Arms" in the *Second Amendment* is to "have weapons."

The phrase "keep arms" was not prevalent in the written documents of [**652] the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to "keep arms in their houses." 4 Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone); see also 1 W. & M., ch. 15, § 4, in 3 Eng. Stat. at Large 422 (1689) ("[N]o Papist . . . shall or may have or keep in his House . . . any Arms . . ."); 1 W. Hawkins, Treatise on the Pleas of the Crown 26 (1771) (similar). [***19] Petitioners point to militia laws of the founding period that required militia members to "keep" arms in connection with militia service, and they conclude from this that the phrase "keep Arms" has a militia-related connotation. See Brief for Petitioners 16-17 (citing laws of Delaware, New Jersey, and Virginia). This is rather like saying that, since there are many statutes that authorize aggrieved employees to "file complaints" with federal agencies, the phrase "file complaints" has an employment-related connotation. "Keep arms" was simply a common way of referring to possessing arms, for militiamen *and everyone else.*[7]

7 See, *e.g.*, 3 A Compleat Collection of State-Tryals 185 (1719) ("Hath not every Subject power to keep Arms, as well as Servants in his House for defence of his Person?"); T. Wood, A New Institute of the Imperial or Civil Law 282 (4th ed. corrected 1730) ("Those are guilty of *publick* Force, who keep Arms in their Houses, and make use of them otherwise than upon Journeys or Hunting, or for Sale . . ."); A Collection of All the Acts of Assembly, Now in Force, in the Colony of Virginia 596 (1733) ("Free Negros, Mulattos, or Indians, and Owners of Slaves, seated at Frontier Plantations, [***20] may obtain Licence from a Justice of Peace, for keeping Arms, &c."); J. Ayliffe, A New Pandect of *Roman* Civil Law 195 (1734) ("Yet a Person might keep Arms in his House, or on his Estate, on the Account of Hunting, Navigation, Travelling, and on the Score of Selling them in the way of Trade or Commerce, or such Arms as accrued to him by way of Inheritance"); J. Trusler, A Concise View of the Common Law and Statute Law of England 270 (1781) ("[I]f [papists] keep arms in their houses, such arms may be seized by a justice of the peace"); Some Considerations on the Game Laws 54 (1796) ("Who has been deprived by [the law] of keeping arms for his own defence? What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . .?"); 3 B. Wilson, The Works of the Honourable James Wilson 84 (1804) (with reference to state constitutional right: "This is one of our many renewals of the Saxon regulations. 'They were bound,' says Mr. Selden, 'to keep arms for the preserva-

tion of the kingdom, and of their own persons'"); W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31-32 (1833) (with reference to [***21] colonists' English rights: "The right of every individual to keep arms for his defence, suitable to his condition and degree; which was the public allowance, under due restrictions of the natural right of resistance and self-preservation"); 3 R. Burn, Justice of the Peace and Parish Officer 88 (29th ed. 1845) ("It is, however, laid down by Serjeant *Hawkins*, . . . that if a lessee, after the end of the term, keep arms in his house to oppose the entry of the lessor, . . ."); *State v. Dempsey, 31 N. C. 384, 385 (1849)* (citing 1840 state law making it a misdemeanor for a member of certain racial groups "to carry about his person or keep in his house any shot gun or other arms").

[**LEdHR8] [8] [*2793] At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose--confrontation. In *Muscarello v. United States, 524 U.S. 125, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998)*, in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice Ginsburg [**653] wrote that "[s]urely [***22] a most familiar meaning is, as the *Constitution's Second Amendment* . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Id., at 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111* (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1990)). We think that Justice Ginsburg accurately captured the natural meaning of "bear arms." Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the *Second Amendment*: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear [***23] arms in defense of himself and the state."[8] It is clear from those formulations that "bear arms" did not refer only to carrying a weapon in an organized military unit. Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right, for example, as a recognition of the natural right of defense "of one's person or house"--what he called the law of "self preservation." 2 Collected Works of James Wilson 1142, and n x (K. Hall & M. Hall eds. 2007) (citing Pa. Const., Art. IX, § 21 (1790)); see also T. Walker, Introduction to American Law 198 (1837) [*2794] ("Thus the right of self-defence [is] guaranteed by the [Ohio] constitution"); see also *id.*, at 157 (equating *Second Amendment* with that provision of the Ohio Constitution). That was also the interpretation of those state constitutional provisions adopted by pre-Civil War state courts.[9] These provisions demonstrate--again, in the most analogous linguistic context--that "bear arms" [**654] was not limited to the carrying of arms in a militia.

8 See Pa. Declaration of Rights § XIII, in 5 Thorpe 3083 ("That the people have a right to bear arms for the defence of themselves and the state . . ."); Vt. Declaration of Rights, Ch. 1, § XV, in [***24] 6 *id.*, at 3741 ("That the people have a right to bear arms for the defence of themselves and the State . . ."); Ky. Const., Art. XII, § 23 (1792), in 3 *id.*, at 1264, 1275 ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned"); Ohio Const., Art. VIII, § 20 (1802), in 5 *id.*, at 2901, 2911 ("That the people have a right to bear arms for the defence of themselves and the State . . ."); *Ind. Const., Art. I, § 20 (1816)*, in 2 *id.*, at 1057, 1059 ("That the people have a right to bear arms for the defense of themselves and the State . . ."); Miss. Const., Art. I, § 23 (1817), in 4 *id.*, at 2032, 2034 ("Every citizen has a right to bear arms, in defence of himself and the State"); *Conn. Const., Art. First, § 17 (1818)*, in 1 *id.*, at 536, 538 ("Every citizen has a right to bear arms in defense of himself and the state"); *Ala. Const., Art. I, § 23 (1819)*, in *id.*, at 96, 98 ("Every citizen has a right to bear arms in defence of himself and the State"); *Mo. Const., Art. XIII, § 3* (1820), in 4 *id.*, at 2150, 2163 ("[T]hat their right to bear arms in defence of themselves and of the State cannot be questioned"). See generally Volokh, State Constitutional [***25] Rights to Keep and Bear Arms, *11 Tex. Rev. L. & Politics 191 (2006)*.

9 See *Bliss v. Commonwealth, 12 Ky. 90, 2 Litt. 90, 91-92 (Ky. 1822)*; *State v. Reid, 1 Ala. 612, 616-617 (1840)*; *State v. Schoultz, 25 Mo. 128, 155 (1857)*; see also *Simpson v. State, 13 Tenn. 356, 5 Yer. 356, 360 (Tenn. 1833)* (interpreting similar provision with "'common de-

fence'" purpose); *State v. Huntly, 25 N. C. 418, 422-423 (1843)* (same); cf. *Nunn v. State, 1 Ga. 243, 250-251 (1846)* (construing *Second Amendment*); *State v. Chandler, 5 La. Ann. 489, 489-490 (1850)* (same).

[**LEdHR9] [9] The phrase "bear Arms" also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: "to serve as a soldier, do military service, fight" or "to wage war." See Linguists' Brief 18; *post, at ____, 171 L. Ed. 2d, at 690* (Stevens, J., dissenting). But it *unequivocally* bore that idiomatic meaning only when followed by the preposition "against," which was in turn followed by the target of the hostilities. See 2 Oxford 21. (That is how, for example, our Declaration of Independence P 28 used the phrase: "He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country . . . .") Every example given by petitioners' [***26] *amici* for the idiomatic meaning of "bear arms" from the founding period either includes the preposition "against" or is not clearly idiomatic. See Linguists' Brief 18-23. Without the preposition, "bear arms" normally meant (as it continues to mean today) what Justice Ginsburg's opinion in *Muscarello* said.

In any event, the meaning of "bear arms" that petitioners and Justice Stevens propose is *not even* the (sometimes) idiomatic meaning. Rather, they manufacture a hybrid definition, whereby "bear arms" connotes the actual carrying of arms (and therefore is not really an idiom) but only in the service of an organized militia. No dictionary has ever adopted that definition, and we have been apprised of no source that indicates that it carried that meaning at the time of the founding. But it is easy to see why petitioners and the dissent are driven to the hybrid definition. Giving "bear Arms" its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war--an absurdity that no commentator has ever endorsed. See L. Levy, Origins of the *Bill of Rights* 135 (1999). Worse still, the phrase "keep and bear Arms" would be incoherent. The word "Arms" would [***27] have two different meanings at once: "weapons" (as the object of "keep") and (as the object of "bear") one-half of an idiom. It would be rather like saying "He filled and kicked the bucket" to mean "He filled the bucket and died." Grotesque.

Petitioners justify their limitation of "bear arms" to the military context by pointing out the unremarkable fact that it was often used in that context--the same mistake they made with respect to "keep arms." It is especially unremarkable that the phrase was often used in a military context in the federal legal sources (such as records of congressional debate) that have been the focus of petitioners' inquiry. Those sources would have had little occasion to use it *except* in discussions about the standing army and the militia. And the phrases used primarily in those military discussions include not only "bear arms" but also "carry arms," "possess arms," and "have arms"--though no one [*2795] thinks that those *other* phrases also had special military meanings. See Barnett, Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia? *83 Texas L. Rev. 237, 261 (2004)*. The common references to those "fit to bear arms" in congressional discussions [***28] about the militia are matched by use of the same phrase in the few nonmilitary federal contexts where the concept would be relevant. See, *e.g.*, 30 Journals of Continental Congress 349-351 (J. Fitzpatrick [**655] ed. 1934). Other legal sources frequently used "bear arms" in nonmilitary contexts.[10] Cunningham's legal dictionary, cited above, gave as an example of its usage a sentence unrelated to military affairs ("Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms"). And if one looks beyond legal sources, "bear arms" was frequently used in nonmilitary contexts. See Cramer & Olson, What Did "Bear Arms" Mean in the *Second Amendment*? 6 Georgetown J. L. & Pub. Pol'y 511 (2008) (identifying numerous nonmilitary uses of "bear arms" from the founding period).

10 See J. Brydall, Privilegia Magnatud apud Anglos 14 (1704) (Privilege XXXIII) ("In the 21st Year of King Edward the Third, a Proclamation Issued, that no Person should bear any Arms within London, and the Suburbs"); J. Bond, A Compleat Guide to Justices of the Peace 43 [***29] (3d ed. 1707) ("Sheriffs, and all other Officers in executing their Offices, and all other persons pursuing Hu[e] and Cry may lawfully bear Arms"); 1 An Abridgment of the Public Statutes in Force and Use Relative to Scotland (1755) (entry for "Arms": "And if any person above described shall have in his custody, use, or bear arms, being thereof convicted before one justice of peace, or other judge competent, summarily, he shall for the first offense forfeit all such arms" (citing 1 Geo., ch. 54, § 1, in 5 Eng. Stat. at Large 90 (1668))); Statute Law of Scotland Abridged 132-133 (2d ed. 1769) ("Acts for disarming the highlands" but "exempting those who have particular licenses to bear arms"); E. de Vattel, The Law of Nations, or, Principles of the Law of Nature 144 (1792) ("Since custom has allowed persons of rank and gentlemen of the army to bear arms in time of peace, strict care should be taken that none but these should be allowed to wear swords"); E. Roche, Proceedings of a Court-Martial, Held at the Council-Chamber, in the City of Cork 3 (1798) (charge VI: "With having held traitorous conferences, and with

having conspired, with the like intent, for the purpose of attacking and despoiling of the arms of several of the [***30] King's subjects, qualified by law to bear arms"); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822) ("[I]n this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify people unnecessarily").

Justice Stevens points to a study by *amici* supposedly showing that the phrase "bear arms" was most frequently used in the military context. See *post, at* ____ - ____, *n 9, 171 L. Ed. 2d, at 691*; Linguists' Brief 24. Of course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts. Moreover, the study's collection appears to include (who knows how many times) the idiomatic phrase "bear arms against," which is irrelevant. The *amici* also dismiss examples such as "'bear arms . . . for the purpose of killing game'" because those uses are "expressly qualified." Linguists' Brief 24. (Justice Stevens uses the same excuse for dismissing the state constitutional provisions analogous to the *Second Amendment* that identify private-use purposes [***31] for which the individual right can be asserted. See *post, at* ____, *171 L. Ed. 2d, at 690-691*.) That analysis is faulty. A purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass [*2796] (except, apparently, in some courses on linguistics). If "bear arms" means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage ("for the purpose of self-defense" or "to make war against the King"). But if "bear arms" means, as the petitioners and the dissent think, the carrying of arms only for military purposes, one simply cannot add "for [**656] the purpose of killing game." The right "to carry arms in the militia for the purpose of killing game" is worthy of the Mad Hatter. Thus, these purposive qualifying phrases positively establish that "to bear arms" is not limited to military use.[11]

11 Justice Stevens contends, *post, at* ____, *171 L. Ed. 2d, at 692*, that since we assert that adding "against" to "bear arms" gives it a military meaning we must concede that adding a purposive qualifying phrase to "bear arms" can alter its meaning. But the difference is that we do not maintain that "against" *alters* the meaning of "bear arms" but merely that it *clarifies* which of various [***32] meanings (one of which is military) is intended. Justice Stevens, however, argues that "[t]he term 'bear arms' is a familiar idiom; when used unadorned by any additional words, its meaning is 'to serve as a soldier, do military service, fight.'" *Post, at* ____, *171 L. Ed. 2d, at 690*. He therefore must establish that adding a contradictory purposive phrase can *alter* a word's meaning.

Justice Stevens places great weight on James Madison's inclusion of a conscientious-objector clause in his original draft of the *Second Amendment*: "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Creating the *Bill of Rights* 12 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit). He argues that this clause establishes that the drafters of the *Second Amendment* intended "bear Arms" to refer only to military service. See *post, at* ____, *171 L. Ed. 2d, at 698*. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.[12] In any case, what Justice Stevens would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about [***33] personal gunfights. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever--so much so that Quaker frontiersmen were forbidden to use arms to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes have been almost overwhelming." P. Brock, Pacifism in the United States 359 (1968); see M. Hirst, The Quakers in Peace and War 336-339 (1923); 3 T. Clarkson, Portraiture of Quakerism 103-104 (3d ed. 1807). The Pennsylvania Militia Act of 1757 exempted from service those *"scrupling the use of arms"*--a phrase that no one contends had an idiomatic meaning. See 5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders Comm'r. 1898) (emphasis in original). Thus, the most natural interpretation of Madison's deleted text is that those opposed to carrying weapons for potential violent confrontation would not be "compelled to render military service," in which such carrying would be required. [13]

12 Justice Stevens finds support for his legislative history inference from the recorded views of one Antifederalist member of the House. *Post, at* ____, *n 25, 171 L. Ed. 2d, at 698*. "The claim that the best or [***34] most representative reading of the [language of the] amendments would conform to the understanding and concerns of [the Antifederalists] is . . . highly problematic." Rakove, The *Second Amendment*: The Highest Stage of Originalism, in Bogus 74, 81.

13 The same applies to the conscientious-objector amendments proposed by Virginia

and North Carolina, which said: "That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead." See Veit 19; 4 J. Eliot, The Debates in the Several State Constitutions on the Adoption of the Federal Constitution 243, 244 (2d ed. 1836) (reprinted 1941). Certainly their second use of the phrase ("bear arms in his stead") refers, by reason of context, to compulsory bearing of arms for military duty. But their first use of the phrase ("any person religiously scrupulous of bearing arms") assuredly did not refer to people whose God allowed them to bear arms for defense of themselves but not for defense of their country.

[**657] [*2797] Finally, Justice Stevens suggests that "keep and bear Arms" was some sort of term of art, presumably akin to "hue and cry" or "cease and desist." (This suggestion usefully [***35] evades the problem that there is no evidence whatsoever to support a military reading of "keep arms.") Justice Stevens believes that the unitary meaning of "keep and bear Arms" is established by the *Second Amendment's* calling it a "right" (singular) rather than "rights" (plural). See *post, at ___, 171 L. Ed. 2d, at 692-693*. There is nothing to this. State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular "right," and the *First Amendment* protects the "right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances." See, *e.g.*, Pa. Declaration of Rights §§ IX, XII, XVI, in 5 Thorpe 3083-3084; *Ohio Const., Art. VIII, §§ 11*, 19 (1802), in *id.*, at 2910-2911.[14] And even if "keep and bear Arms" were a unitary phrase, we find no evidence that it bore a military meaning. Although the phrase was not at all common (which would be unusual for a term of art), we have found instances of its use with a clearly nonmilitary connotation. In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm private citizens (not militia members) as "a violation of the constitutional right of Protestant [***36] subjects to keep and bear arms for their own defence." 49 The London Magazine or Gentleman's Monthly Intelligencer 467 (1780). In response, another member of Parliament referred to "the right of bearing arms for personal defence," making clear that no special military meaning for "keep and bear arms" was intended in the discussion. *Id.*, at 467-468. [15]

14 Faced with this clear historical usage, Justice Stevens resorts to the bizarre argument that because the word "to" is not included before "bear" (whereas it is included before "petition" in the *First Amendment*), the unitary meaning of "'to keep and bear'" is established. *Post, at ___, n 13, 171 L. Ed. 2d, at 693*. We have never heard of the proposition that omitting repetition of the "to" causes two verbs with different meanings to become one. A promise "to support and to defend the Constitution of the United States" is not a whit different from a promise "to support and defend the Constitution of the United States."

15 Cf. 21 Geo. II, ch. 34, § 3, in 7 Eng. Stat. at Large 126 (1748) ("That the Prohibition contained . . . in this Act, of having, keeping, bearing, or wearing any Arms or Warlike Weapons . . . shall not extend . . . to any Officers or their Assistants, employed [***37] in the Execution of Justice . . .").

c. Meaning of the Operative Clause. Putting all of these textual elements together, [**LEdHR10] [10] we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the *Second Amendment*. We look to this because it has always been widely understood that the *Second Amendment*, like the *First* and *Fourth Amendments*, codified a *pre-existing* right. The very text of the *Second Amendment* implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States v. Cruikshank, 92 U.S. 542, 553, 23 L. Ed. 588 (1876)*, "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The [*2798] *second amendment* declares [**658] that it shall not be infringed . . . ."[16]

16 Contrary to Justice Stevens' wholly unsupported assertion, *post, at ___, 171 L. Ed. 2d, at 684, 693*, there was no pre-existing right in English law "to use weapons for certain military purposes" or to use arms in an organized militia.

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in [***38] using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. See J. Malcolm, To Keep and Bear Arms 31-53 (1994) (hereinafter Malcolm); L. Schwoerer, The Declaration of Rights, 1689, p 76 (1981). Under the auspices of the 1671 Game Act, for example, the Catholic Charles II had ordered general disarmaments of regions home to his Protestant enemies. See Malcolm 103-106. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English *Bill of Rights*), that Protestants would never be disarmed: "That the subjects which are Protestants may

have arms for their defence suitable to their Conditions, and as allowed by Law." 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. This right has long been understood to be the predecessor to our *Second Amendment*. See E. Dumbauld, The *Bill of Rights* and What It Means Today 51 (1957); W. Rawle, A View of the Constitution of the United States of America 122 (1825) (hereinafter Rawle). It was clearly an individual [***39] right, having nothing whatever to do with service in a militia. To be sure, it was an individual right not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament. See Schwoerer, To Hold and Bear Arms: The English Perspective, in Bogus 207, 218; but see 3 J. Story, Commentaries on the Constitution of the United States § 1858 (1833) (hereinafter Story) (contending that the "right to bear arms" is a "limitatio[n] upon the power of parliament" as well). But it was secured to them as individuals, according to "libertarian political principles," not as members of a fighting force. Schwoerer, Declaration of Rights, at 283; see also *id.*, at 78; G. Jellinek, The Declaration of the Rights of Man and of Citizens 49, and n 7 (1901) (reprinted 1979).

By the time of the founding, the right to have arms had become fundamental for English subjects. See Malcolm 122-134. Blackstone, whose works, we have said, "constituted the preeminent authority on English law for the founding generation," *Alden v. Maine, 527 U.S. 706, 715, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)*, cited the arms provision of the *Bill of Rights* as one of the [***40] fundamental rights of Englishmen. See 1 Blackstone 136, 139-140 (1765). His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation," *id.*, at 139, and "the right of having and using arms for self-preservation and defence," *id.*, at 140; see also 3 *id.*, at 2-4 (1768). Other contemporary authorities concurred. See G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17-18, 27 (3d ed. 1782); 2 J. de Lolme, The Rise and Progress of the English Constitution 886-887 (1784) (A. [**659] Stephens ed. 1838); W. Blizard, Desultory Reflections on Police 59-60 (1785). Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual [*2799] right protecting against both public and private violence.

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their [***41] rights as Englishmen to keep arms. A New York article of April 1769 said that "[i]t is a natural right which the people have reserved to themselves, confirmed by the *Bill of Rights*, to keep arms for their own defence." A Journal of the Times: Mar. 17, New York Journal, Supp. 1, Apr. 13, 1769, in Boston Under Military Rule 79 (O. Dickerson ed. 1936) (reprinted 1970); see also, *e.g.*, Shippen, Boston Gazette, Jan. 30, 1769, in 1 The Writings of Samuel Adams 299 (H. Cushing ed. 1904) (reprinted 1968). They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury." 1 Blackstone's Commentaries 145-146, n 42 (1803) (hereinafter Tucker's Blackstone). See also W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31-32 (1833).

[**LEdHR11] [11] There seems to us no doubt, on the basis of both text and history, that the *Second Amendment* [***42] conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the *First Amendment's* right of free speech was not, see, *e.g.*, *United States v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)*. Thus, we do not read the *Second Amendment* to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the *First Amendment* to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the *Second Amendment* comports with our interpretation of the operative clause.

2. Prefatory Clause.

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

a. "Well-Regulated Militia." [**LEdHR12] [12] In *United States v. Miller, 307 U.S. 174, 179, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)*, we explained that "the Militia comprised all males physically capable of acting in concert for the common defense." That definition comports with founding-era sources. See, *e.g.*, Webster ("The militia of a country are the able bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises on certain days [***43] only, but at other times left to pursue their usual occupations"); The Federalist No. 46, pp 329, 334 (B. Wright ed. 1961) (J. Madison) ("near half a million of citizens with arms in their hands"); Letter to Des-

tutt de Tracy (Jan. 26, 1811), in The Portable Thomas Jefferson 520, 524 (M. Peterson ed. 1975) ("the militia of the [**660] State, that is to say, of every man in it able to bear arms").

Petitioners take a seemingly narrower view of the militia, stating that "[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, § 8, cls. 15-16)." Brief for Petitioners 12. Although we agree with petitioners' interpretive assumption that "militia" means the same thing in Article I [*2800] and the *Second Amendment*, we believe that petitioners identify the wrong thing, namely, the organized militia. [**LEdHR13] [13] Unlike armies and navies, which Congress is given the power to create ("to raise . . . Armies"; "to provide . . . a Navy," Art. I, § 8, cls. 12-13), the militia is assumed by Article I already to be *in existence.* Congress is given the power to "provide for calling forth the Militia," § 8, cl. 15; and the power not to create, but to "organiz[e]" it--and [***44] not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence, *ibid.*, cl. 16. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. That is what Congress did in the first militia Act, which specified that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." Act of May 8, 1792, 1 Stat. 271. To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.

Finally, [**LEdHR14] [14] the adjective "well-regulated" implies nothing more than [***45] the imposition of proper discipline and training. See Johnson 1619 ("Regulate": "To adjust by rule or method"); Rawle 121-122; cf. Va. Declaration of Rights § 13 (1776), in 7 Thorpe 3812, 3814 (referring to "a well-regulated militia, composed of the body of the people, trained to arms").

b. "Security of a Free State." [**LEdHR15] [15] The phrase "security of a free State" meant "security of a free polity," not security of each of the several States as the dissent below argued, see *478 F.3d at 405, and n 10.* Joseph Story wrote in his treatise on the Constitution that "the word 'state' is used in various senses [and in] its most enlarged sense it means the people composing a particular nation or community." 1 Story § 208; see also 3 *id.*, § 1890 (in reference to the *Second Amendment's* prefatory clause: "The militia is the natural defence of a free country"). It is true that the term "State" elsewhere in the Constitution refers to individual States, but the phrase "security of a free State" and close variations seem to have been terms of art in 18th-century political discourse, meaning a "'free country'" or free polity. See Volokh, "Necessary to the Security of a Free State," *83 Notre Dame L. Rev. 1, 5 (2007)*; [***46] see, *e.g.*, 4 Blackstone 151 (1769); Brutus Essay III (Nov. 15, 1787), in The Essential Antifederalist 251, 253 (W. Allen & G. Lloyd eds., 2d ed. 2002). Moreover, the other instances of [**661] "state" in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States--"each state," "several states," "any state," "that state," "particular states," "one state," "no state." And the presence of the term "foreign state" in Article I and Article III shows that the word "state" did not have a single meaning in the Constitution.

There are many reasons why the militia was thought to be "necessary to the security of a free State." See 3 Story § 1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary--an argument that Alexander Hamilton made in favor of federal control [*2801] over the militia. The Federalist No. 29, pp 226, 227 (B. Wright ed. 1961) (A. Hamilton). Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

3. Relationship Between Prefatory Clause and Operative Clause.

We reach the question, then: [**LEdHR16] [16] Does [***47] the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English *Bill of Rights.*

The debate with respect to the right to keep and bear arms, as with other guarantees in the *Bill of Rights*, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. See, *e.g.*, Letters from The Federal Farmer III (Oct. 10, 1787), in 2

The Complete Anti-Federalist 234, 242 (H. Storing ed. 1981). John Smilie, for example, worried not only [***48] that Congress's "command of the militia" could be used to create a "select militia," or to have "no militia at all," but also, as a separate concern, that "[w]hen a select militia is formed; the people in general may be disarmed." 2 Documentary History of the Ratification of the Constitution 508-509 (M. Jensen ed. 1976) (hereinafter Documentary Hist.). Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people. See, *e.g.*, A Pennsylvanian III (Feb. 20, 1788), in The Origin of the *Second Amendment* 275, 276 (D. Young ed., 2d ed. 2001) (hereinafter Young); White, To the Citizens of Virginia (Feb. 22, 1788), in *id.*, at 280, 281; A Citizen of America (Oct. 10, 1787), in *id.*, at 38, 40; Foreign Spectator Remarks on the Amendments to the federal Constitution, Nov. 7, 1788, in *id.*, at 556. It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

It is therefore entirely sensible that [**662] the *Second Amendment's* prefatory clause announces the purpose [***49] for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right--unlike some other English rights--was codified in a written Constitution. Justice Breyer's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms, see *post, at ____, 171 L. Ed. 2d, at 731*(dissenting opinion), is profoundly mistaken. He bases that assertion solely upon the prologue--but that can only show that self-defense had little to do with the right's *codification;* it was the *central component* of the right itself.

Besides ignoring the historical reality that the *Second Amendment* was not intended to lay down a "novel principl[e]" [*2802] but rather codified a right "inherited from our English ancestors," *Robertson v. Baldwin, 165 U.S. 275, 281, 17 S. Ct. 326, 41 L. Ed. 715 (1897)*, petitioners' interpretation does not even achieve the narrower purpose that prompted codification of the right. If, as they believe, [***50] the *Second Amendment* right is no more than the right to keep and use weapons as a member of an organized militia, see Brief for Petitioners 8--if, that is, the *organized* militia is the sole institutional beneficiary of the *Second Amendment's* guarantee--it does not assure the existence of a "citizens' militia" as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force.[17] That is why the first Militia Act's requirement that only whites enroll caused States to amend their militia laws to exclude free blacks. See Siegel, The Federal Government's Power to Enact Color-Conscious Laws, *92 Nw. U. L. Rev. 477, 521-525 (1998).* Thus, if petitioners are correct, the *Second Amendment* protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them. It guarantees a select militia of the sort the Stuart kings found useful, but not the people's militia that was the concern of the founding generation.

17 *Article I, § 8, cl. 16, of the Constitution* gives Congress the power "[t]o provide for organizing, arming, and disciplining, the Militia, [***51] and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

It could not be clearer that Congress's "organizing" power, unlike its "governing" power, can be invoked even for that part of the militia not "employed in the Service of the United States." Justice Stevens provides no support whatever for his contrary view, see *post, at ____, n 20, 171 L. Ed. 2d, at 695.* Both the Federalists and Anti-federalists read the provision as it was written, to permit the creation of a "select" militia. See The Federalist No. 29, pp 226, 227 (B. Wright ed. 1961); Centinel, Revived, No. XXIX, Philadelphia Independent Gazetteer, Sept. 9, 1789, in Young 711, 712.

B

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the *Second Amendment.* Four States adopted analogues to the Federal *Second Amendment* in the period between [**663] independence and the ratification of the *Bill of Rights.* Two of them--Pennsylvania and Vermont--clearly adopted individual rights [***52] unconnected to militia service. Pennsylvania's Declaration of Rights of 1776 said: "That the people have a right to bear arms *for the defence of themselves* and the state . . . ." § XIII, in 5 Thorpe 3082, 3083 (emphasis added). In 1777, Vermont adopted the identical provision, except for inconsequential differences in punctuation and capitalization. See *Vt. Const., ch. 1, § XV*, in 6 *id.*, at 3741.

North Carolina also codified a right to bear arms in 1776: "That the people have a right to bear arms, for the defence of the State . . . ." Declaration of Rights § XVII, in 5 *id.*, at 2787, 2788. This could plausibly be read to support only a right to bear arms in a militia--but that is a peculiar way to make the point in a constitution that elsewhere repeatedly mentions the militia explicitly. See N. C. Const., §§ XIV, XVIII, XXXV, in *id.*, at 2789, 2791, 2793. Many colonial statutes required individual arms bearing for public-safety reasons--such as the 1770 Georgia law that "for the security and *defence of this province* from internal dangers and insurrections" required those men who qualified for militia duty individually "to carry fire arms" "to places of [*2803] public worship." 19 Colonial Records of the State of [***53] Georgia 137-139 (A. Candler ed. 1911 (pt. 1)) (emphasis added). That broad public-safety understanding was the connotation given to the North Carolina right by that State's Supreme Court in 1843. See *State v. Huntly, 25 N.C. 418, 422-423.*

The 1780 Massachusetts Constitution presented another variation on the theme: "The people have a right to keep and to bear arms for the common defence. . . ." *Pt. First, Art. XVII*, in 3 Thorpe 1888, 1892. Once again, if one gives narrow meaning to the phrase "common defence" this can be thought to limit the right to the bearing of arms in a state-organized military force. But once again the State's highest court thought otherwise. Writing for the court in an 1825 libel case, Chief Justice Parker wrote: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction." *Commonwealth v. Blanding, 20 Mass. 304, 313-314, 3 Pick. 304*The analogy makes no sense if firearms could not be used for any individual purpose at all. See also Kates, Handgun Prohibition and the Original Meaning of the *Second Amendment, 82 Mich. L. Rev. 204, 244 (1983)* [***54] (19th-century courts never read "common defence" to limit the use of weapons to militia service).

We therefore believe that the most likely reading of all four of these pre-*Second Amendment* state constitutional provisions is that they secured an individual right to bear arms for defensive purposes. Other States did not include rights to bear arms in their pre-1789 constitutions-- although in Virginia a *Second Amendment* analogue was proposed (unsuccessfully) by Thomas Jefferson. (It read: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]."[18] 1 The Papers of Thomas Jefferson 344 (J. Boyd ed. 1950).)

18 Justice Stevens says that the drafters of the Virginia Declaration of Rights rejected this proposal and adopted "instead" a provision written by George Mason stressing the importance of the militia. See *post, at ____, 171 L. Ed. 2d, at 697, and n 24.* There is no evidence that the drafters regarded the Mason proposal as a substitute for the Jefferson proposal.

[**664] Between 1789 and 1820, nine States adopted *Second Amendment* analogues. Four of them--Kentucky, Ohio, Indiana, and Missouri-- referred to the right of the people to "bear arms in defence of themselves and the State." See n. 8, *supra* [***55] Another three States--Mississippi, Connecticut, and Alabama--used the even more individualistic phrasing that each citizen has the "right to bear arms in defence of himself and the State." See *ibid.* Finally, two States--Tennessee and Maine--used the "common defence" language of Massachusetts. See Tenn. Const., Art. XI, § 26 (1796), in 6 Thorpe 3414, 3424; *Me. Const., Art. I, § 16* (1819), in 3 *id.*, at 1646, 1648. That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right. And with one possible exception that we discuss in Part II-D-2, 19th-century courts and commentators interpreted these state constitutional provisions to protect an individual right to use arms for self-defense. See n. 9, *supra; Simpson v. State, 13 Tenn. 356, 5 Yer. 356, 360 (Tenn. 1833).*

The historical narrative that petitioners must endorse would thus treat the Federal *Second Amendment* as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on [*2804] little more than [***56] an overreading of the prefatory clause.

C

Justice Stevens relies on the drafting history of the *Second Amendment*--the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one. But even assuming that this legislative history is relevant, Justice Stevens flatly misreads the historical record.

It is true, as Justice Stevens says, that there was concern that the Federal Government would abolish the institution of the state militia. See *post, at ____, 171 L. Ed. 2d, at 695.* That concern found expression, however, *not* in the various *Second Amendment* precursors proposed in the state conventions, but in separate structural provisions that would have given the States concurrent and seemingly non-pre-emptible authority to or-

ganize, discipline, and arm the militia when the Federal Government failed to do so. See Veit 17, 20 (Virginia proposal); 4 J. Eliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 244, 245 (2d ed. 1836) (reprinted 1941) (North Carolina proposal); see also 2 Documentary Hist. 624 (Pennsylvania minority's [***57] proposal). The *Second Amendment* precursors, by contrast, referred to the individual English right already codified in two (and probably four) state constitutions. The Federalist-dominated first Congress chose to reject virtually all major structural revisions favored by the Antifederalists, including the proposed militia amendments. Rather, it adopted primarily the popular and uncontroversial (though, in the Federalists' view, unnecessary) individual-rights amendments. The *Second Amendment* right, [**665] protecting only individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia. See, *e.g.*, Centinel, Revived, No. XXIX, Philadelphia Independent Gazetteer, Sept. 9, 1789, in Young 711, 712.

Justice Stevens thinks it significant that the Virginia, New York, and North Carolina *Second Amendment* proposals were "embedded . . . within a group of principles that are distinctly military in meaning," such as statements about the danger of standing armies. *Post, at ____, 171 L. Ed. 2d, at 696.* But so was the highly influential minority proposal in Pennsylvania, yet that proposal, with its reference to hunting, plainly referred to an individual right. See 2 Documentary [***58] Hist. 624. Other than that erroneous point, Justice Stevens has brought forward absolutely no evidence that those proposals conferred only a right to carry arms in a militia. By contrast, New Hampshire's proposal, the Pennsylvania minority's proposal, and Samuel Adams' proposal in Massachusetts unequivocally referred to individual rights, as did two state constitutional provisions at the time. See Veit 16, 17 (New Hampshire proposal); 6 Documentary Hist. 1452, 1453 (J. Kaminski & G. Saladino eds. 2000) (Samuel Adams' proposal). Justice Stevens' view thus relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the *Bill of Rights* codified venerable, widely understood liberties.

D

We now address how the *Second Amendment* was interpreted from immediately after its ratification through the end of the 19th century. Before proceeding, [*2805] however, we take issue with Justice Stevens' equating of these sources with postenactment legislative history, a comparison that betrays a fundamental misunderstanding of a court's interpretive [***59] task. See *post, at ____, n 28, 171 L. Ed. 2d, at 699.* [**LEdHR17] [17] "'[L]egislative history,'" of course, refers to the preenactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. *Ibid.* "[P]ostenactment legislative history," *ibid.*, a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. As we will show, virtually all interpreters of the *Second Amendment* in the century after its enactment interpreted the Amendment as we do.

1. Postratification Commentary.

Three important founding-era legal scholars interpreted the *Second Amendment* in published writings. All three understood it to protect an individual right [***60] unconnected with militia service.

St. George Tucker's version of [**666] Blackstone's Commentaries, as we explained above, conceived of the Blackstonian arms right as necessary for self-defense. He equated that right, absent the religious and class-based restrictions, with the *Second Amendment.* See 2 Tucker's Blackstone 143. In Note D, entitled, "View of the Constitution of the United States," Tucker elaborated on the *Second Amendment*: "This may be considered as the true palladium of liberty . . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." 1 *id.*, at App. 300 (ellipsis in original). He believed that the English game laws had abridged the right by prohibiting "keeping a gun or other engine for the destruction of game." *Ibid.*; see also 2 *id.*, at 143, and nn 40 and 41. He later grouped the right with some of the individual rights included in the *First Amendment* and [***61] said that if "a law be passed by congress, prohibiting" any of those rights, it would "be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused . . . ." 1 *id.*, at App. 357. It is unlikely that Tucker was referring to a person's being "accused" of violating a law making it a crime to bear arms in a state militia.[19]

19 Justice Stevens quotes some of Tucker's unpublished notes, which he claims show that Tucker had ambiguous views about the *Second Amendment*. See *post, at ____, 171 L. Ed. 2d, at 701, and n 32*. But it is clear from the notes that Tucker located the power of States to arm their militias in the *Tenth Amendment*, and that he cited the *Second Amendment* for the proposition that such armament could not run afoul of any power of the Federal Government (since the Amendment prohibits Congress from ordering disarmament). Nothing in the passage implies that the *Second Amendment* pertains only to the carrying of arms in the organized militia.

In 1825, William Rawle, a prominent lawyer who had been a member of the Pennsylvania Assembly that ratified the [*2806] *Bill of Rights*, published an influential treatise, which analyzed the *Second Amendment* [***62] as follows:

> "The first [principle] is a declaration that a well regulated militia is necessary to the security of a free state; a proposition from which few will dissent. . . .
>
> "The corollary, from the first position is, that the right of the people to keep and bear arms shall not be infringed.
>
> "The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." Rawle 121-122.[20]

Like Tucker, Rawle regarded the English game laws as violating the right codified in the *Second Amendment*. See *id.*, 122-123. Rawle clearly differentiated [**667] between the people's right to bear arms and their service in a militia: "In a people permitted and accustomed to bear arms, we have the rudiments of a militia, which properly consists of armed citizens, divided into military bands, and instructed at least in part, in the use of arms for the purposes of war." *Id.*, at 140. Rawle further said that [***63] the *Second Amendment* right ought not "be abused to the disturbance of the public peace," such as by assembling with other armed individuals "for an unlawful purpose"--statements that make no sense if the right does not extend to *any* individual purpose. *Id.*, at 123.

20 Rawle, writing before our decision in *Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 7 Pet. 243, 8 L. Ed. 672 (1833)*, believed that the *Second Amendment* could be applied against the States. Such a belief would of course be nonsensical on petitioners' view that it protected only a right to possess and carry arms when conscripted by the State itself into militia service.

Joseph Story published his famous Commentaries on the Constitution of the United States in 1833. Justice Stevens suggests that "[t]here is not so much as a whisper" in Story's explanation of the *Second Amendment* that favors the individual-rights view. *Post, at ____, 171 L. Ed. 2d, at 703*. That is wrong. Story explained that the English *Bill of Rights* had also included a "right to bear arms," a right that, as we have discussed, had nothing to do with militia service. 3 Story § 1858. He then equated the English right with the *Second Amendment*:

> "§ 1891. A similar provision [to the *Second Amendment*] in favour of [***64] protestants (for to them it is confined) is to be found in the *bill of rights* of 1688, it being declared, 'that the subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law.' But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege." (Footnotes omitted.)

This comparison to the Declaration of Right would not make sense if the *Second Amendment* right was the right to use a gun in a militia, which was plainly not what the English right protected. As the Tennessee Supreme Court recognized 38 years after Story wrote his Commentaries, "[t]he passage from Story, shows clearly that this right was intended . . . and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights." *Andrews v. State, 50 Tenn. 165, 183-184 (1871)*. Story's Commentaries also cite as support Tucker and Rawle, both of whom clearly viewed the right as unconnected [*2807] to militia service. See 3 Story § 1890, n 2, § 1891, n 3. In addition, in a shorter 1840 work Story wrote: "One [***65] of the ordinary modes, by which tyrants accomplish their purposes

without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia." A Familiar Exposition of the Constitution of the United States § 450 (reprinted 1986).

Antislavery advocates routinely invoked the right to bear arms for self-defense. Joel Tiffany, for example, citing Blackstone's description of the right, wrote that "the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed." A Treatise on the Unconstitutionality of American Slavery 117-118 (1849); see also L. Spooner, The Unconstitutionality of Slavery 116 (1845) (right enables "personal defence"). In his famous Senate speech about the 1856 [**668] "Bleeding Kansas" conflict, Charles Sumner proclaimed:

> "The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defense, than now in Kansas, and at least one article [***66] in our National Constitution must be blotted out, before the complete right to it can in any way be impeached. And yet such is the madness of the hour, that, in defiance of the solemn guarantee, embodied in the Amendments to the Constitution, that 'the right of the people to keep and bear arms shall not be infringed,' the people of Kansas have been arraigned for keeping and bearing them, and the Senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed--of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment." The Crime Against Kansas, May 19-20, 1856, in American Speeches: Political Oratory from the Revolution to the Civil War 553, 606-607 (T. Widmer ed. 2006).

We have found only one early-19th century commentator who clearly conditioned the right to keep and bear arms upon service in the militia--and he recognized that the prevailing view was to the contrary. "The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such [militia-related] purposes only, and not to prevent congress or the legislatures [***67] of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it." B. Oliver, The Rights of an American Citizen 177 (1832).

2. Pre-Civil War Case Law.

The 19th-century cases that interpreted the *Second Amendment* universally support an individual right unconnected to militia service. In *Houston v. Moore, 18 U.S. 1, 5 Wheat. 1, 24, 5 L. Ed. 19 (1820)*, this Court held that States have concurrent power over the militia, at least where not pre-empted by Congress. Agreeing in dissent that States could "organize, arm, and discipline" the militia in the absence of conflicting federal regulation, Justice Story said that the *Second Amendment* "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id., at 51-53, 5 Wheat. 1, 24, 5 L. Ed. 19.* Of course, if the Amendment simply "protect[ed] the right of the people of each of the several States to maintain a well-regulated militia," *post, at ____, 171 L. Ed. 2d, at 684* (Stevens, J., dissenting), it would have enormous [*2808] and obvious bearing on the point. But the Court and Story derived the States' power over the militia from the nonexclusive [***68] nature of federal power, not from the *Second Amendment*, whose preamble merely "confirms and illustrates" the importance of the militia. Even clearer was Justice Baldwin. In the famous fugitive-slave case of *Johnson v. Tompkins, 13 F. Cas. 840, 850, 852, F. Cas. No. 7416 (CC Pa. 1833)*, Baldwin, sitting as a Circuit Judge, cited both the *Second Amendment* and the Pennsylvania analogue for his conclusion that a citizen has "a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence [**669] as made it necessary for the protection or safety of either."

Many early-19th century state cases indicated that the *Second Amendment* right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions. A Virginia case in 1824 holding that the Constitution did not extend to free blacks explained: "[n]umerous restrictions imposed on [blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both [***69] classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms." *Aldridge v. Commonwealth, 4 Va. 447, 2 Va. Cas. 447, 449 (Gen. Ct.).* The claim was obviously not that blacks were prevented from carrying guns in the militia.[21] See also *Waters v. State, 1 Gill 302, 309 (Md. 1843)* (because free

blacks were treated as a "dangerous population," "laws have been passed to prevent their migration into this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness"). An 1829 decision by the Supreme Court of Michigan said: "The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose." *United States* v. *Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940) (hereinafter Blume). It is not possible to read this as discussing anything other than an individual right [***70] unconnected to militia service. If it did have to do with militia service, the limitation upon it would not be any "unlawful or unjustifiable purpose," but any non-military purpose whatsoever.

> 21 Justice Stevens suggests that this is not obvious because free blacks in Virginia had been required to muster without arms. See *post, at ____, n 29,171 L. Ed. 2d, at 700* (citing Siegel, The Federal Government's Power to Enact Color-Conscious Laws, *92 Nw. U. L. Rev. 477, 497 (1998)*). But that could not have been the type of law referred to in *Aldridge*, because that practice had stopped 30 years earlier when blacks were excluded entirely from the militia by the First Militia Act. See *Siegel, supra, at 498, n. 120*. Justice Stevens further suggests that laws barring blacks from militia service could have been said to violate the "right to bear arms." But under Justice Stevens' reading of the *Second Amendment* (we think), the protected right is the right to carry arms to the extent one is enrolled in the militia, not the right *to be in the militia.* Perhaps Justice Stevens really does adopt the full-blown idiomatic meaning of "bear arms," in which case every man and woman in this country has a right "to be a soldier" or even [***71] "to wage war." In any case, it is clear to us that *Aldridge*'s allusion to the existing Virginia "restriction" upon the right of free blacks "to bear arms" could only have referred to "laws prohibiting free blacks from keeping weapons," *Siegel, supra, at 497-498.*

[*2809] In *Nunn v. State, 1 Ga. 243, 251 (1846)*, the Georgia Supreme Court construed the *Second Amendment* as protecting the "*natural* right of self-defence" and therefore struck down a ban on carrying pistols openly. Its opinion perfectly captured the way in which the operative clause of the *Second Amendment* furthers the purpose announced in the prefatory clause, in continuity with the English right:

> "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and [**670] bear *arms* of every description, and not *such* merely as are used by the *militia,* shall not be *infringed,* curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right,* originally [***72] belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*!" *Ibid.*

Likewise, in *State v. Chandler, 5 La. Ann. 489, 490 (1850)*, the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."

Those who believe that the *Second Amendment* preserves only a militia-centered right place great reliance on the Tennessee Supreme Court's 1840 decision in *Aymette v. State, 21 Tenn. 154*. The case does not stand for that broad proposition; in fact, the case does not mention the word "militia" at all, except in its quoting of the *Second Amendment*. *Aymette* held that the state constitutional guarantee of the right to "bear" arms did not prohibit the banning of concealed weapons. The opinion first recognized that both the state right and [***73] the federal right were descendents of the 1689 English right, but (erroneously, and contrary to virtually all other authorities) read that right to refer only to "protect[ion of] the public liberty" and "keep[ing] in awe those who are in power," *id., at 158*. The court then adopted a sort of middle position, whereby citizens were permitted to carry arms openly, unconnected with any service in a formal militia, but were given the right to use them only for the military purpose of banding together to oppose tyranny. This odd reading of the right is, to be

sure, not the one we adopt--but it is not petitioners' reading either. More importantly, seven years earlier the Tennessee Supreme Court had treated the state constitutional provision as conferring a right "to all the free citizens of the State to keep and bear arms for their defence," *Simpson, 5 Yer., at 360*; and 21 years later the court held that the "keep" portion of the state constitutional right included the right to personal self-defense: "[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by [***74] the duties of a good citizen in times of peace." *Andrews, 50 Tenn., at 178-179*; see also *ibid.* (equating state provision with *Second Amendment*).

3. Post-Civil War Legislation.

In the aftermath of the Civil War, there was an outpouring of discussion of the *Second Amendment* in Congress and in public discourse, as people debated whether [*2810] and how to secure constitutional rights for newly free slaves. See generally S. Halbrook, Freedmen, the *Fourteenth Amendment*, and the Right to Bear Arms, 1866-1876 (1998) (hereinafter Halbrook); Brief for Institute for Justice [**671] as *Amicus Curiae.* Since those discussions took place 75 years after the ratification of the *Second Amendment*, they do not provide as much insight into its original meaning as earlier sources. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive.

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim [***75] was not that blacks were being prohibited from carrying arms in an organized state militia. A Report of the Commission of the Freedmen's Bureau in 1866 stated plainly: "[T]he civil law [of Kentucky] prohibits the colored man from bearing arms. . . . Their arms are taken from them by the civil authorities. . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed.*" H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236. A joint congressional Report decried:

> "[I]n some parts of [South Carolina,] armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen. Such conduct is in plain and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.' The freedmen of South Carolina have shown by their peaceful and orderly conduct that they can safely be trusted with fire-arms, and they need them to kill game for subsistence, and to protect their crops from destruction by birds and animals." Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, [***76] p 229 (1866) (Proposed Circular of Brigadier General R. Saxton).

The view expressed in these statements was widely reported and was apparently widely held. For example, an editorial in The Loyal Georgian (Augusta) on February 3, 1866, assured blacks that "[a]ll men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." Halbrook 19.

Congress enacted the Freedmen's Bureau Act on July 16, 1866. Section 14 stated:

> "[T]he right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery. . . ." 14 Stat. 176-177.

The understanding that the *Second Amendment* gave freed blacks the right to keep and bear arms was reflected in congressional discussion of the bill, with even an opponent of it saying that the founding generation "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense." [***77] Cong. Globe, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis).

Similar discussion attended the passage of the Civil Rights Act of 1871 and the *Fourteenth Amendment.* For [**672] example, Representative Butler said of the Act: "Section eight is intended to enforce the well-known constitutional provision guaranteeing [*2811] the right of the citizen to 'keep and bear arms,' and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed

guilty of larceny of the same." H. R. Rep. No. 37, 41st Cong., 3d Sess., 7-8 (1871). With respect to the proposed Amendment, Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess., 1182 (1866). Representative Nye thought the *Fourteenth Amendment* unnecessary because "[a]s citizens of the United States [blacks] have equal right to protection, and to keep and bear arms for self-defense." *Id.*, at 1073.

It was plainly the understanding in the post-Civil War Congress that the [***78] *Second Amendment* protected an individual right to use arms for self-defense.

4. Post-Civil War Commentators.

Every late-19th century legal scholar that we have read interpreted the *Second Amendment* to secure an individual right unconnected with militia service. The most famous was the judge and professor Thomas Cooley, who wrote a massively popular 1868 Treatise on Constitutional Limitations. Concerning the *Second Amendment* it said:

> "Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms. . . . The alternative to a standing army is 'a well-regulated militia,' but this cannot exist unless the people are trained to bearing arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been very little occasion to discuss that subject by the courts." *Id.*, at 350.

That Cooley understood the right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms, is made even clearer in his 1880 work, General Principles of Constitutional Law. The *Second Amendment*, he said, "was adopted with some modification and enlargement from the [***79] English *Bill of Rights* of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people." *Id.*, at 270. In a section entitled "The Right in General," he continued:

> "It might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly [**673] is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables government [***80] to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their [*2812] efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order." *Id.*, at 271.

All other post-Civil War 19th-century sources we have found concurred with Cooley. One example from each decade will convey the general flavor:

> "[The purpose of the *Second Amendment* is] to secure a well-armed militia. . . . But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms. . . . The clause is analogous to the one securing the freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libellous abuse, is protected." J. Pomeroy, An Introduction to [***81] the Constitutional Law of the United States §239, pp. 152-153 (1868) (hereinafter Pomeroy).

"As the Constitution of the United States, and the constitutions of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons, when not on a journey, or as travellers, from *wearing or carrying concealed weapons*, be constitutional. There has been a great difference of opinion on the question." 2 J. Kent, Commentaries on American Law *340, n 2 (O. Holmes ed., 12th ed. 1873) (hereinafter Kent).

"Some general knowledge of firearms is important to the public welfare; because it would be impossible, in case of war, to organize promptly an efficient force of volunteers unless the people had some familiarity with weapons of war. The Constitution secures the right of the people to keep and bear arms. No doubt, a citizen who keeps a gun or pistol under judicious precautions, practises in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right. No doubt, a person whose residence or duties involve peculiar [***82] peril may keep a pistol for prudent self-defence." B. Abbott, Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land 333 (1880) (hereinafter Abbott).

"The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection to the person, it represents among all nations power coupled with the exercise of a certain jurisdiction. . . . [I]t was not necessary that the right to bear [**674] arms should be granted in the Constitution, for it had always existed." J. Ordronaux, Constitutional Legislation in the United States 241-242 (1891).

E

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

[**LEdHR18] [18]*United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588*, in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the *Second Amendment* does not by its own force apply to anyone other than the Federal Government. The opinion explained that the right "is not a right granted by the Constitution [or] in any manner dependent upon that instrument for its existence. [*2813] The *second amendment* . . . means no more [***83] than that it shall not be infringed by Congress." *Id. at 553, 23 L. Ed. 588*. States, we said, were free to restrict or protect the right under their police powers. The limited discussion of the *Second Amendment* in *Cruikshank* supports, if anything, the individual-rights interpretation. There was no claim in *Cruikshank* that the victims had been deprived of their right to carry arms in a militia; indeed, the Governor had disbanded the local militia unit the year before the mob's attack, see C. Lane, The Day Freedom Died 62 (2008). We described the right protected by the *Second Amendment* as "'bearing arms for a lawful purpose'" [22] and said that "the people [must] look for their protection against any violation by their fellow-citizens of the rights it recognizes" to the States' police power. *92 U.S., at 553, 23 L. Ed. 588*. That discussion makes little sense if it is only a right to bear arms in a state militia.[23]

22 Justice Stevens' accusation that this is "not accurate," *post, at ____, 171 L. Ed. 2d, at 706*, is wrong. It is true it was the indictment that described the right as "bearing arms for a lawful purpose." But, in explicit reference to the right described in the indictment, the Court stated that "[t]he *second amendment* declares [***84] that it [*i.e.*, the right of bearing arms for a lawful purpose] shall not be infringed." *92 U.S., at 553, 23 L. Ed. 588*.

23 With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the *First Amendment* did not apply against the States and did not engage in the sort of *Fourteenth Amendment* inquiry required by our later cases. Our later decisions in *Presser v. Illinois, 116 U.S. 252, 265, 6 S. Ct. 580, 29 L. Ed. 615 (1886)*, and *Miller v. Texas, 153 U.S. 535, 538, 14 S. Ct. 874, 38 L. Ed. 812 (1894)*, reaffirmed that the *Second Amendment* applies only to the Federal Government.

Presser v. Illinois, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615 (1886), held that the right to keep and bear arms was not violated by a law that forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law." *Id., at 264-265, 6 S. Ct. 580, 29 L. Ed. 615*. This does not refute the individual-rights interpretation

of the Amendment; no one supporting that interpretation has contended that States may not ban such groups. Justice Stevens presses *Presser* into service to support his view that the right to bear arms is limited to service in the militia by joining *Presser*'s brief discussion [***85] of the *Second Amendment* with a later portion of the opinion making the seemingly relevant (to the *Second Amendment*) point that the plaintiff was not a member of the state militia. Unfortunately for Justice Stevens' argument, that later portion deals with the *Fourteenth Amendment;* it was [**675] the *Fourteenth Amendment*to which the plaintiff's nonmembership in the militia was relevant. Thus, Justice Stevens' statement that *Presser* "suggested that. . . nothing in the Constitution protected the use of arms outside the context of a militia," *post, at ____, 171 L. Ed. 2d, at 707*, is simply wrong. *Presser* said nothing about the *Second Amendment's* meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.

Justice Stevens places overwhelming reliance upon this Court's decision in *Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373.* "[H]undreds of judges," we are told, "have relied on the view of the Amendment we endorsed there," *post, at ____, 171 L. Ed. 2d, at 685*, and "[e]ven if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself . . . would prevent most [*2814] jurists [***86] from endorsing such a dramatic upheaval in the law," *post, at ____, 171 L. Ed. 2d, at 686.* And what is, according to Justice Stevens, the holding of *Miller* that demands such obeisance? That the *Second Amendment* "protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons." *Post, at ____, 171 L. Ed. 2d, at 685.*

Nothing so clearly demonstrates the weakness of Justice Stevens' case. *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a *Second Amendment* challenge two men's federal indictment for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the *Second Amendment* did not apply was *not* that the defendants were "bear[ing] arms" not "for . . . military purposes" but for "nonmilitary use," *post, at ____, 171 L. Ed. 2d, at 685.* Rather, it was that the *type of weapon at issue* was not eligible for *Second Amendment* protection: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some [***87] reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the *Second Amendment* guarantees the right to keep and bear *such an instrument.*" *307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206* (emphasis added). "Certainly," the Court continued, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Ibid.* Beyond that, the opinion provided no explanation of the content of the right.

This holding is not only consistent with, but positively suggests, that the *Second Amendment* confers an individual right to keep and bear arms (though only arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"). Had the Court believed that the *Second Amendment* protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. Justice Stevens can say again and again that *Miller* did not "turn on the difference between muskets and sawed-off shotguns; it [**676] turned, rather, on the basic difference between the military and nonmilitary use and possession [***88] of guns," *post, at ____ - ____, 171 L. Ed. 2d, at 708*, but the words of the opinion prove otherwise. The most Justice Stevens can plausibly claim for *Miller* is that it declined to decide the nature of the *Second Amendment* right, despite the Solicitor General's argument (made in the alternative) that the right was collective, see Brief for United States, O. T. 1938, No. 696, pp 4-5. *Miller* stands only for the proposition that the *Second Amendment* right, whatever its nature, extends only to certain types of weapons.

It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the *Second Amendment.* Justice Stevens claims, *post, at ____, 171 L. Ed. 2d, at 708*, that the opinion reached its conclusion "[a]fter reviewing many of the same sources that are discussed at greater length by the Court today." Not many, which was not entirely the Court's fault. The defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of the *Second Amendment*). See Frye, The Peculiar Story [***89] of *United States v. Miller, 3 N. Y. U. J. L. & Liberty 48, 65-68 (2008).* The Government's [*2815] brief spent two pages discussing English legal sources, concluding "that at least the carrying of weapons without lawful occasion or excuse was always a crime" and that (because of the class-based restrictions and the prohibition on terrorizing people with dangerous or unusual weapons) "the early English law did not guarantee an unrestricted right to

bear arms." Brief for United States, O. T. 1938, No. 696, at 9-11. It then went on to rely primarily on the discussion of the English right to bear arms in *Aymette v. State, 21 Tenn. 154*, for the proposition that the only uses of arms protected by the *Second Amendment* are those that relate to the militia, not self-defense. See Brief for United States, O. T. 1938, No. 696, at 12-18. The final section of the brief recognized that "some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property," and launched an alternative argument that "weapons which are commonly used by criminals," such as sawed-off shotguns, are not protected. See *id.*, at 18-21. The Government's *Miller* [***90] brief thus provided scant discussion of the history of the *Second Amendment*--and the Court was presented with no counterdiscussion. As for the text of the Court's opinion itself, that discusses *none* of the history of the *Second Amendment*. It assumes from the prologue that the Amendment was designed to preserve the militia, *307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206* (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their members were expected to possess, *id., at 178-182, 59 S. Ct. 816, 83 L. Ed. 1206*. Not a word *(not a word)* about the history of the *Second Amendment*. This is the [**677] mighty rock upon which the dissent rests its case. [24]

> 24 As for the "hundreds of judges," *post, at ____, 171 L. Ed. 2d, at 685*, who have relied on the view of the *Second Amendment* Justice Stevens claims we endorsed in *Miller:* If so, they overread *Miller*. And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms. In any event, it should not be thought that the cases decided by these judges would necessarily have come out [***91] differently under a proper interpretation of the right.

We may as well consider at this point (for we will have to consider eventually) *what* types of weapons *Miller* permits. Read in isolation, *Miller's* phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. [**LEdHR19] [19] We think that *Miller's* "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *307 U.S., at 179, 59 S. Ct. 816, 83 L. Ed. 1206*. The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. "In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." *State v. Kessler, 289 Ore. 359, 368, 614 P.2d 94, 98 (1980)* (citing G. [***92] Neumann, Swords and Blades of the American Revolution 6-15, 252-254 (1973)). Indeed, that is precisely the way in which the *Second Amendment's* operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the *Second Amendment* [*2816] does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right, see Part III, *infra*[25]

> 25 *Miller* was briefly mentioned in our decision in *Lewis v. United States, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980)*, an appeal from a conviction for being a felon in possession of a firearm. The challenge was based on the contention that the prior felony conviction had been unconstitutional. No *Second Amendment* claim was raised or briefed by any party. In the course of rejecting the asserted challenge, the Court commented gratuitously, in a footnote, that "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States* v. *Miller* . . . (the *Second Amendment* guarantees no right to keep [***93] and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia')." *Id., at 65-66, n 8, 100 S. Ct. 915, 63 L. Ed. 2d 198*. The footnote then cites several Court of Appeals cases to the same effect. It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the *Bill of Rights* upon such a footnoted dictum in a case where the point was not at issue and was not argued.

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the *Second Amendment*. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the *Bill of Rights* was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the *Bill of Rights* have similarly [**678] remained un-

illuminated for lengthy periods. This Court first held a law to violate the *First Amendment's* guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, see *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)*, and it was not until after World War [***94] II that we held a law invalid under the *Establishment Clause*, see *Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948)*. Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. See *New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)*. It is demonstrably not true that, as Justice Stevens claims, *post, at ____ - ____, 171 L. Ed. 2d, at 707*, "for most of our history, the invalidity of *Second-Amendment*-based objections to firearms regulations has been well settled and uncontroversial." For most of our history the question did not present itself.

III

[**LEdHR20] [20] Like most rights, the right secured by the *Second Amendment* is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, *e.g., Sheldon*, in 5 Blume 346; Rawle 123; Pomeroy 152-153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the *Second Amendment* or state [***95] analogues. See, *e.g., State v. Chandler, 5 La. Ann., at 489-490*; *Nunn v. State, 1 Ga., at 251*; see generally 2 Kent *340, n 2; The American Students' Blackstone 84, n 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the *Second Amendment*, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession [*2817] of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[26]

> 26 We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

[**LEdHR21] [21] We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." *307 U.S., at 179, 59 S. Ct. 816, 83 L. Ed. 1206*. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148-149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804); [***96] J. Dunlap, The New-York Justice 8 (1815); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 271-272 (1831); H. Stephen, Summary of the Criminal Law 48 (1840); E. Lewis, An Abridgment of the Criminal Law of the United States 64 (1847); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). See also *State v. Langford,* [**679] *10 N. C. 381, 383-384 (1824)*; *O'Neill v. State, 16 Ala. 65, 67 (1849)*; *English v. State, 35 Tex. 473, 476 (1871)*; *State v. Lanier, 71 N. C. 288, 289 (1874)*.

It may be objected that if weapons that are most useful in military service--M-16 rifles and the like--may be banned, then the *Second Amendment* right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the *Second Amendment's* ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at [***97] large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, [**LEdHR22] [22] the inherent right of self-defense has been central to the *Second Amendment* right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, [27] banning from the home [*2818] "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *478 F.3d at 400*, would fail constitutional [***98] muster.

27 Justice Breyer correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. *Post, at ____, 171 L. Ed. 2d, at 714.* [**LEdHR23] [23] But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. See, *e.g., Engquist v. Or. Dep't of Agric., 553 U.S. 591, 602, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).* In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See *United States v. Carolene Products Co., 304 U.S. 144, 152, n 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938)* ("There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . ."). If all that was required to overcome the right to keep and [***99] bear arms was a rational basis, the *Second Amendment* would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down. In *Nunn* v. *State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). See *1 Ga., at 251.* In *Andrews* v. *State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly [**680] or privately, without regard to time or place, or circumstances," *50 Tenn., at 187*, violated the state constitutional provision (which the court equated with the *Second Amendment*). That was so even though the statute did not restrict the carrying of long guns. *Ibid.* See also *State v. Reid, 1 Ala. 612, 616-617 (1840)* ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

It is no answer to say, as [***100] petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, [**LEdHR24] [24] handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

We must also address [**LEdHR25] [25] the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. The District argues that we should interpret this element of the statute to [***101] contain an exception for self-defense. See Brief for Petitioners 56-57. But we think that is precluded by the unequivocal text, and by the presence of certain other enumerated exceptions: "Except for law enforcement personnel . . ., each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." *D. C. Code § 7-2507.02.* The nonexistence of a self-defense exception is also suggested by the D. C. Court of Appeals' statement that the statute forbids residents to use firearms to [*2819] stop intruders, see *McIntosh v. Washington, 395 A.2d 744, 755-756 (1978).* [28]

28 *McIntosh* upheld the law against a claim that it violated the *Equal Protection Clause* by arbitrarily distinguishing between residences and businesses. See *395 A. 2d, at 755.* One of the rational bases listed for that distinction was the legislative finding "that for each intruder stopped by a firearm there are four gun-related accidents within the home." *Ibid.* That tradeoff would not bear mention if the statute did not prevent stopping [***102] intruders by firearms.

Apart from his challenge to the handgun ban and the trigger-lock requirement respondent asked the District Court to enjoin petitioners from enforcing the separate licensing requirement "in such a manner as to forbid the carrying of a firearm within one's home or possessed land without a license." App. 59a. The Court of Appeals did not invalidate the licensing requirement, but held only that the District "may not prevent [a handgun] from being moved throughout one's house." *478 F.3d at*