Second Amendment did not apply to felons. *See Williams*, 616 F.3d at 692 (noting that "[t]he academic writing on the subject of whether felons were excluded from firearm possession at the time of the founding is inconclusive at best" (internal quotation marks omitted)); *Skoien*, 614 F.3d at 650-51 (Sykes, J., dissenting) ("[S]cholars disagree about the extent to which *felons*-let alone misdemeanants-were considered excluded from the right to bear arms during the founding era. . . . We simply cannot say with any certainty that persons convicted of a domestic-violence misdemeanor are wholly excluded from the Second Amendment right as originally understood."); *United States v. McCane*, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., concurring) ("[T]he felon dispossession dictum may lack the 'longstanding' historical basis that *Heller* ascribes to it. Indeed, the scope of what *Heller* describes as 'longstanding prohibitions on the possession of firearms by felons' . . . is [*21] far from clear.").

Of course, we are dealing in this appeal not with felons but people who have been convicted of domestic-violence misdemeanors. If the historical evidence on whether felons enjoyed the right to possess and carry arms is inconclusive, it would likely be even more so with respect to domestic-violence misdemeanants. The federal provision disarming domestic-violence misdemeanants is of recent vintage, having been enacted in 1996 as part of the Lautenberg Amendment to the Gun Control Act of 1968. *See* Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to -372 (1996). By contrast, the federal felon dispossession provision has existed in some form or another since the 1930s, and thus there is a much larger body of scholarly work considering the question of whether felons were originally excluded from the protection afforded by the Second Amendment. Commentators are nonetheless divided on the question of the categorical exclusion of felons from Second Amendment protection. *Compare* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 714 (2009) (reviewing founding-era precedents and explaining that, "much like the American authorities for [*22] a century and a half after the Second Amendment's adoption, the actual English antecedents point against lifetime total disarmament of all 'felons,' but do support lesser limitations"), *and* Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1376 (2009) (explaining that because state and federal "felon disarmament laws significantly postdate both the Second Amendment and the Fourteenth Amendment[,] [a]n originalist argument that sought to identify 1791 or 1868 analogues to felon disarmament laws would be quite difficult to make"), *with* Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 Hastings L.J. 1339, 1360 (2009) ("[T]here is every reason to believe that the Founding Fathers would have deemed persons convicted of any of the common law felonies not to be among 'the [virtuous] people' to whom they were guaranteeing the right to arms."), *and* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995) (opining that "felons, children, and the insane were excluded from the right to arms precisely as (and for the same [*23] reasons) they were excluded from the franchise").

The government has not contended that § 922(g)(9) is valid because Chester, having been convicted of a domestic violence misdemeanor, is wholly unprotected by the Second Amendment. Based on this and the lack of historical evidence in the record before us, we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors. We must assume, therefore, that Chester's Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense. [6] The question then becomes whether the government can justify, under the appropriate level of scrutiny, the burden imposed on Chester's Second Amendment rights by § 922(g)(9). *Cf. Marzzarella*, 614 F.3d at 95 (applying intermediate scrutiny after finding insufficient evidence to establish with certainty "that the possession of unmarked firearms in the home is excluded from the right to bear arms").

6 We do not address any issue with respect to possession of firearms for lawful hunting purposes under the Second Amendment as neither [*24] party has raised that as an issue in this case.

B.

Heller left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment, other than to indicate that rational-basis review would not apply in this context. *See Heller*, 128 S. Ct. at 2817, n.27 ("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."). Our task, therefore, is to select between strict scrutiny and intermediate scrutiny. Given *Heller's* focus on "core" Second Amendment conduct and the Court's frequent references to First Amendment doctrine, we agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment. *See Marzzarella*, 614 F.3d at 89 n.4; *Skoien*, 587 F.3d at 813-14.

Chester urges us to adopt a strict scrutiny standard because § 922(g)(9) severely burdens an enumerated, fundamental right. This argument is too broad. We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights. In the [*25] analogous First Amendment context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. For example, a "content-based speech restriction" on noncommercial speech is permissible "only if it satisfies strict scrutiny."*United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865(2000). But, courts review content-neutral time, place, and manner regulations using an intermediate level of scrutiny.*See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).Likewise, a law regulating commercial speech is subject to amore lenient intermediate standard of scrutiny in light of "its subordinate position in the scale of First Amendment values."*Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477, 109 S. Ct. 3028, 106 L. Ed. 2d 388(1989) (internal quotation marks omitted). As Judge Sykes observed in the now-vacated *Skoien* panel opinion:

> The Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden on Second Amendment rights, and individual assertions of the right will come in many forms. A severe burden on the core Second Amendment [*26] right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.

Skoien, 587 F.3d at 813-14.

Although Chester asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller*--the right of a *law-abiding*, responsible citizen to possess and carry a weapon for self-defense--by virtue of Chester's criminal history as a domestic violence misdemeanant. *Heller*, 128 S. Ct. at 2821. Accordingly, we conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons. *See Marzzarella*, 614 F.3d at 97; *cf. Skoien*, 614 F.3d at 641 (en banc) ("The United States concedes that some form of strong showing ('intermediate scrutiny,' many opinions say) is essential, and that § 922(g)(9) is valid only if substantially related to an important governmental objective. . . . The concession is prudent, and we need not get more deeply into the 'levels of scrutiny' quagmire [*27] . . ."). Accordingly, the government must demonstrate under the intermediate scrutiny standard that there is a "reasonable fit" between the challenged regulation and a "substantial" government objective. *Fox*, 492 U.S. at 480; *see Marzzarella*, 614 F.3d at 98 ("Although [the various forms of intermediate scrutiny] differ in precise terminology, they essentially share the same substantive requirements. They all require the asserted governmental end to be more than just legitimate, either 'significant,' 'substantial,' or 'important' . . . [and] require the fit between the challenged regulation and the asserted objective be reasonable, not perfect."). Significantly, intermediate scrutiny places the burden of establishing the required fit squarely upon the government. *See Fox*, 492 U.S. at 480-81.

We cannot conclude on this record that the government has carried its burden of establishing a reasonable fit between the important object of reducing domestic gun violence and § 922(g)(9)'s permanent disarmament of all domestic-violence misdemeanants. The government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important [*28] government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between § 922(g)(9) and an important governmental goal. Having established the appropriate

standard of review, we think it best to remand this case to afford the government an opportunity to shoulder its burden and Chester an opportunity to respond. Both sides should have an opportunity to present their evidence and their arguments to the district court in the first instance.

IV.

For the foregoing reasons, we vacate the order of the district court and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

CONCUR BY: DAVIS

CONCUR

DAVIS, Circuit Judge, concurring in the judgment:

I concur in the judgment.

In light of the highly persuasive decision of the Seventh Circuit in *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), *pet. for cert. pending*, sustaining the constitutionality of 18 U.S.C. § 922(g)(9), the district court should have no difficulty in concluding that the application of § 922(g)(9) to offenders such as Chester passes Second Amendment scrutiny, exactly as district courts have already concluded. *See United States v. Smith*, 2010 U.S. Dist. LEXIS 98511, 2010 WL 3743842 (S.D.W. Va. Sept. 20, 2010) [*29] (applying *Skoien* and sustaining statute); *United States v. Staten*, 2010 U.S. Dist. LEXIS 91653, 2010 WL 3476110 (S.D.W. Va. Sept. 2, 2010) (same).

I.

On April 26, 2004, Chester savagely attacked his 22-year-old daughter, Meghan Chester ("Meghan"). Apparently, their dispute arose over what Meghan had eaten for lunch that day. In this attack, Chester slammed his daughter on the kitchen table. Meghan attempted to leave but Chester followed her, threatened her, and punched her in the face. Meghan fell to the floor in pain, but Chester continued to attack her. He began kicking her as she lay on the ground, and also dumped buckets of water over his daughter's head. After her father "beat her up and assault[ed] her" for some time, J.A. 41, Meghan escaped from her father and locked herself in the bathroom. Eventually, Chester left the residence and Meghan's mother took Meghan to the hospital. Meghan had a swollen nose and a knot on her forehead. Based on his physical abuse of his daughter, on February 4, 2005, Chester was convicted in state court in Kanawha County, West Virginia for the misdemeanor crime of domestic battery and domestic assault in violation of W. Va. Code § 61-2-28(a) & (b).

On October 10, 2007, the Kanawha [*30] County police returned to the Chester family home in response to a second domestic violence call. This time, the call was placed by Mrs. Linda Guerrant-Chester ("Guerrant-Chester"), Chester's then-wife. When the officers arrived, Guerrant-Chester told them that she awoke at 5:00 a.m. and discovered her husband outside the house, receiving oral sex from a prostitute. When Chester realized that Guerrant-Chester had seen him, he yelled, "[s]o you fucking caught me" and proceeded to drag Guerrant-Chester inside the house. Once inside, Chester grabbed Guerrant-Chester's face and throat and strangled her while repeatedly shouting "I'm going to kill you!" Chester's daughter, Samantha Chester, heard Chester repeatedly threaten to kill Guerrant-Chester and came to the kitchen. She attempted to calm Chester down, and while she distracted him, Guerrant-Chester called the police. When the police arrived, they located a loaded 12-gauge shotgun in the kitchen pantry and a 9mm pistol in the defendant's bedroom. Both firearms belonged to Chester.

II.

On May 6, 2008, a federal grand jury indicted Chester for violating 18 U.S.C. § 922 (g)(9). Chester moved to dismiss the indictment, and after considering [*31] the parties' arguments in light of the Supreme Court's opinion in *Heller v. District of Columbia*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), the district court denied Chester's motion. In the district court's brief written opinion, it cited *Heller's* observation that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." J.A. 60 (citing *Heller*, 128 S. Ct. at 2816-17). The court then drew an analogy between non-violent felons and domestic violence misdemeanants, finding that the *Heller* language could, and in this case, should, be read to include both. The court analyzed the issue as follows:

> The thrust of the majority opinion in *Heller* leaves ample room for the

> government to control the possession of firearms by misdemeanants found guilty of domestic violence. Indeed, the need to bar possession of firearms by domestic violence misdemeanants in order to protect family members and society in general from potential violent acts of such individuals is quite often far greater than that of the similar prohibition of § 922(g)(1) on those who commit nonviolent felonies.

J.A. 61.

Chester then entered a conditional guilty [*32] plea, preserving his right to appeal the district court's denial of his motion to dismiss. He was sentenced to five months in prison, followed by a three-year term of supervised release. J.A. 5. Chester timely appealed; we have jurisdiction pursuant to 28 U.S.C. § 1291.

III.

A.

The majority holds that, "[a]lthough Chester asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller*--the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." Maj. Op. at 16. I agree. The majority further notes, however, "We cannot conclude on this record that the government has carried its burden of establishing a reasonable fit between the important object of reducing domestic gun violence and § 922(g)(9)'s permanent disarmament of domestic-violence misdemeanants." *Id.* at 17. I do not agree that the issue presented is whether § 922(g)(9), on its face, properly regulates "domestic-violence misdemeanants" as a group. This case is only about a congressional prohibition imposed on Appellant William Samuel Chester, Jr. More generally, I have concerns about the majority's invitation [*33] to import First Amendment doctrines into Second Amendment jurisprudence. But in any event, I am confident that the district court will have no difficulty satisfying the majority's mandate.

B.

Section 922(g)(9) was enacted in 1996 along with 18 U.S.C. § 922(g)(8) as part of the so-called Lautenberg Amendment to the Gun Control Act. It states, in pertinent part:

> (g) It shall be unlawful for any person--
>
> . . . .
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9). The term "misdemeanor crime of domestic violence" is defined as follows:

> (A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that-
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> *(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,* committed by a current or former spouse, parent, or guardian of the victim, by a person with [*34] whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.
>
> (B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless-
>
> (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
>
> (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial

> in the jurisdiction in which the case was tried, either
>
> (aa) the case was tried by a jury, or
>
> (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.
>
> (ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or [*35] restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33) (emphasis added). Thus, a defendant must use or attempt to use force before he is convicted of "a misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9).

C.

As has been amply discussed, in *Heller*, the Supreme Court invalidated a gun ban in the District of Columbia, holding that the Second Amendment guarantees to law-abiding citizens the right to possess handguns for the purposes of self-defense. The Court identified the right to self-defense as "the central component of the right itself," *Heller*, 128 S. Ct. at 2802, and it declared that the "core right" preserved by the Second Amendment was the right for "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 2821. *Heller* failed, however, to identify the proper standard of scrutiny for analyzing whether a statute that regulates gun possession infringes on Second Amendment rights, instead finding that the D.C.'s outright ban on possession would fail to survive under any "of the standards of scrutiny that we have applied to enumerated constitutional rights." [*36] *Id.* at 2817.

The Court acknowledged the existence of limits on the scope of the individual right protected by the Second Amendment, and explained that certain so-called "longstanding prohibitions" were "presumptively lawful regulatory measures." *Id.* at 2816-17 & n.26; *id.* at 2816 ("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."). The Court provided a non-exclusive, illustrative list of such "presumptively lawful" exceptions, including but not limited to "longstanding prohibitions on the possession of firearms by felons and the mentally ill," *id.* at 2816-17, but did not explain how lower courts were to identify other such "presumptively lawful" exceptions. More recently, the Court restated its belief in the existence of "presumptively lawful" regulations but again declined to provide any guidance to lower courts in our efforts to identify them. *McDonald v. Chicago*, 130 S. Ct. 3020, 3047, 177 L. Ed. 2d 894 (2010) (holding that the Second Amendment constrains state and local laws through its incorporation under the Fourteenth Amendment Due Process Clause). [*37] [1] *Post-Heller*, and now, *post-McDonald*, lower federal courts have theorized about the meanings of a "longstanding prohibition[ ]" and a "presumptively lawful regulatory measure[ ]", but, as the majority candidly concedes, no consensus has emerged.

1 The Court stated:

> We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." We repeat those assurances here.

McDonald, 130 S. Ct. at 3047 (internal citations omitted).

D.

The majority, on the basis of "the [*Heller*] Court's frequent references to First Amendment doctrine, . . .

look[s] to the First Amendment as a guide" in its analysis. Maj. Op. at 15. To be sure, *Heller* does refer to the First Amendment, but only for several quite limited purposes: (1) to compare its language, along with that of other amendments in the Bill of Rights, to the language of the Second Amendment, *see, e.g., Heller*, 128 S. Ct. at 2790; (2) to establish that constitutional [*38] rights are not limited to the use of equipment available at the time of ratification, but extend to modern analogues, *see id.* at 2791 (citing to First Amendment's protection of "modern forms of communication"); (3) to make the simple point that unqualified constitutional language does not imply an "unlimited" right, *id.* at 2799; (4) to note that initial recognition of a right sometimes comes long after ratification, *see id.* at 2816; and finally, (5) to remind its audience that our constitutional rights are "the very *product* of an interest-balancing by the people" and thus that balancing them away in the manner ascribed to Justice Breyer would be inappropriate, *id.* at 2821. Certainly the First Amendment, as a fount of rights the dissenting Justices have frequently championed, was a useful source for the *Heller* majority. But these limited references are hardly an invitation to import the First Amendment's idiosyncratic doctrines wholesale into a Second Amendment context, where, without a link to expressive conduct, they will often appear unjustified. To the extent some commentators and courts, frustrated with *Heller's* lack of guidance, have clung to these references and attempted to [*39] force unwieldy First Amendment analogies, they muddle, rather than clarify, analysis.

1.

Most problematic is the majority's suggestion that the government must show "a reasonable fit between the important object of reducing domestic gun violence and § 922(g)(9)'s permanent disarmament of domestic-violence misdemeanants" as a class. Maj. Op. at 17. Chester can plainly challenge the statute as applied to him. And insofar as any legislative enactment may be attacked on its face on the grounds "that no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *see also Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164 (4th Cir. 2000) (quoting Salerno and applying this rule in the abortion-regulation context), Chester may raise that claim as well. But Chester *cannot* simply complain that, while the statute is permissible as applied to him, there may be different sets of facts under which its application would be invalid.

This "second type of facial challenge," *United States v. Stevens*, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010), which presumes "a species of third party (*jus tertii*) standing," *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) [*40] (Stevens, J., concurring), has not been permitted outside of the First Amendment context, *see Salerno*, 481 U.S. at 745 ("The fact that [a statute] 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."). As the Supreme Court taught in *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973),

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, *in* other situations not before the Court. . . . [These principles] rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.

Id. at 610-11.

One of the only exceptions to this rule is the First Amendment's overbreadth doctrine, which is justified on grounds unique to the regulation of expressive conduct. Concerned about the [*41] chilling effect of overly broad regulations--the fear that a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression," *id.* at 612--the Supreme Court has "long . . . recognized that the First Amendment needs breathing space," *id.* at 611; and the overbreadth doctrine is the Court's solution to this speech-specific problem, *id.* at 611-12. With free expression, the classes of protected speech that are unduly burdened may be quite particularized--e.g., unpopular expression that has "serious literary, artistic, politics, or scientific value," *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). And as expression is, by its very nature, so mutable, overbroad regulations can easily encourage speakers to modify their

speech, shifting it away from controversy. No analogous arguments obtain in the Second Amendment context. As there can be little doubt that advocates of a robust individual right to bear arms will continue to challenge *all* firearm regulations, importing the overbreadth doctrine, an "extraordinary" exception to prudential standing requirements, *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), into the Second Amendment [*42] context would be inappropriate.

2.

As for the majority's observation that here "we are seeking to determine whether a person, rather than the person's conduct, is unprotected by the Second Amendment," Maj. Op. at 12, I am dubitante. This seems to invite a comparison to the First Amendment's application to expressive conduct and to suggest that, because here we would exclude a "person, rather than the person's conduct," from constitutional immunity, the government should bear a heavier burden in establishing that Chester's claim is outside the purview of the Second Amendment. Again, however, the First Amendment analogy breaks down. The law has long believed that "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion," and that "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring). This principle has no application to gun violence, and prohibiting violent criminals from owning guns cannot fairly be compared to permanently silencing some class of persons.

E.

Heller has left [*43] in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations. Many courts have upheld provisions of § 922(g) under the "presumptively lawful regulatory measure[ ]" or the "longstanding prohibition[]" language in Heller. These courts generally affirm a particular provision of § 922(g) either because *Heller* specifically stated the particular regulations were constitutional, as regarding felons and the mentally ill, §§ 922(g)(1) & (4), or, as did the district court here, via analogy to the so-called "presumptively lawful regulatory measures." [2] Other federal courts have individually analyzed the specific statutory provision at issue, determined the appropriate level of constitutional scrutiny, and then analyzed the statute in light of the factual circumstances before the court. [3]

2 We have upheld the statutory prohibitions on possession by felons and the mentally ill after *Heller* in unpublished, non-precedential, cases. *United States v. Brunson*, No. 07-4962, 292 Fed. Appx. 259, *261 (4th Cir. Sept. 11, 2008) (upholding § 922(g)(1)); *United States v. McRobie*, No. 08-4632, 2009 U.S. App. LEXIS 617, 2009 WL 82715, *1 (4th Cir. Jan. 14, 2009) (upholding [*44] § 922(g)(4)). Other circuits concluded similarly. *See, e.g.*, *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009) (upholding § 922(g)(1)); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (same); United States v. Stuckey, No. 08-0291, 317 Fed. Appx. 48, 50 (2d Cir. March 18, 2009) (same).

We have also previously analogized between perpetrators of domestic violence and felons. *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999). There, Bostic challenged the constitutionality of his conviction under § 922(g)(8). We upheld the statute, explaining:

> We disagree, however, with Bostic's premise that he remained an "ordinary citizen" after the [final protection] Order was entered against him. By engaging in abusive conduct toward Kelly and Ryan which led to the entry of the Order, Bostic removed himself from the class of ordinary citizens we discussed in *Langley. Like a felon, a person in Bostic's position cannot reasonably expect to be free from regulation when possessing a firearm.*

Id. at 722 (emphasis added).

Other federal courts *have* upheld § 922(g)(9) based on analogies between domestic violence misdemeanants and felons. *E.g.*, *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010); [*45] *United States v. Booker*, 570 F. Supp. 2d

161, 163-64 (D. Me. 2008) ("if anything, as a predictor of firearm misuse, the definitional net cast by 922(g)(9) is tighter than the net cast by 922(g)(1). . . . [and] the manifest need to protect the victims of domestic violence and to keep guns from the hands of the people who perpetuate such acts is well-documented and requires no further elaboration.").

3 *See, e.g., United States v. Miller*, 604 F. Supp. 2d 1162, 1171 (W.D. Tenn. 2009); *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231-34 (D. Utah 2009).

Recognizing that an attempt to operationalize the *Heller* Court's "longstanding" language would lead to "weird" results unconnected even to any court's divination of the ratifiers' original intent, the Seventh Circuit simply read this language to acknowledge that "exclusions [from *Heller's* qualified right to bear arms] need not mirror limits that were on the books in 1791." *Id.* at 641. I, too, find this the most persuasive interpretation of that passage in *Heller*.

The *Skoien* court then conducted a further analysis to determine whether the statute was constitutional. The court did not explicitly adopt a level of constitutional scrutiny, however. [*46] Instead, the court embraced the government's concession that "some form of strong showing ('intermediate scrutiny,' many opinions say) is essential, and that § 922(g)(9) is valid only if substantially related to an important governmental objective." *Skoien*, 614 F.3d at 641. Then, after disavowing involvement in the "'levels of scrutiny' quagmire," the court concluded that § 922(g)(9) satisfied the appropriate test, a test that appears to any discerning eye identical to intermediate scrutiny. *Id.* at 641-42 ("[F]or no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important government objective. Both logic and data establish a substantial relation between § 922(g)(9) and this objective."). The court went on to explain why the statute satisfied intermediate scrutiny, identifying three distinct justifications for the constitutionality of § 922(g)(9): domestic abusers often commit acts that would be charged as felonies if the victim were a stranger, but that are charged as misdemeanors because the victim is a relative; (2) firearms are deadly in domestic strife; and (3) persons convicted of domestic violence are likely to offend again. *Id.* at 643-44. Distilled to [*47] its essence, *Skoien* holds that § 922(g)(9) passes muster under the Second Amendment as applied to recidivist violent offenders.

IV.

Despite its hesitation to do so explicitly (in contrast to the majority in this case), the Seventh Circuit correctly applied intermediate scrutiny in *Skoien* and correctly sustained § 922(g)(9) against constitutional attack.

A.

Intermediate scrutiny is the proper level of scrutiny for § 922(g)(9). *Heller* eliminated rational basis scrutiny and Justice Breyer's proposed balancing test as possibilities. *Heller*, 128 S. Ct. at 2817 n.27; *id.* at 2821. The Court also made it clear that strict scrutiny is unwarranted in Second Amendment analysis. *See id.* at 2851 (Breyer, J., dissenting). Moreover, it is clear here that § 922(g)(9) does not even burden the core right of the Second Amendment as established by the Supreme Court in *Heller*, namely, the right for "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 2821. Undisputedly, those convicted for having committed violent assaults against cohabitants and family members in general, and Chester in particular, are not law-abiding, responsible citizens. Chester had been convicted of a [*48] serious crime in which violence is an element, 18 U.S.C. § 922(g)(9); W. Va. Code § 61-2-28(a) & (b), and in which the facts indicate that he acted particularly violently: he lashed out at his daughter, kicking and punching her, at times while she was on the ground. Further, our own precedent dictates that an individual who assaulted a family member thereby "'removed himself from the class of ordinary citizens' to the point where he could not 'reasonably expect to be free from regulation when possessing a firearm,'" *United States v. Mitchell*, 209 F.3d 319, 323 (4th Cir. 2000) (quoting *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999)), separately suggesting that strict scrutiny is inapplicable to Chester because of his previous criminal activity. For all these reasons, intermediate scrutiny is the proper approach for the district court's analysis.

Intermediate scrutiny queries whether a statute is substantially related to an important governmental interest. *See Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related

[*49] to achievement of those objectives."); *see also* Lehr v. Robertson, 463 U.S. 248, 265-66, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983) ("The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. . . . when there is no substantial relation between the disparity and an important state purpose") (internal citations omitted); Adkins v. Rumsfeld, 464 F.3d 456, 468 (4th Cir. 2006) (for facially neutral gender-based classifications we demand "at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."); *cf.* Skoien, 614 F.3d at 642.

The government contends that the governmental interests at stake here, and, indeed, the very purpose of § 922(g)(9), include, *inter alia*, to "keep[ ] firearms away from presumptively risky persons." Appellee's Br. at 9. I readily agree. Mitchell, 209 F.3d at 321 ("Congress determined that the possession of a gun by one convicted of domestic violence put the possessor's partner at undue risk."). In enacting legislation which prohibits certain classes of persons from possessing firearms, [*50] "Congress sought to rule broadly to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" Scarborough v. United States, 431 U.S. 563, 572, 97 S. Ct. 1963, 52 L. Ed. 2d 582 (1977) (quoting 114 Cong. Rec. 14773 (1968)).

More specifically, the government argues that the purpose of § 922(g)(9) is to keep firearms away from presumptively risky individuals with a demonstrated history of actual or attempted violence. Appellee's Br. at 10-13. Again, the government's argument is persuasive. In 1996, Congress recognized that existing felon-in-possession prohibitions were not keeping firearms out of the hands of domestic abusers, because such individuals, although dangerous, were often charged with misdemeanors instead of felonies. 142 Cong. Rec. S2646-02 (1996) (statement of Sen. Lautenberg) (explaining that "many people who engage in serious spousal or child abuse ultimately are not charged with convicted of felonies. . . and these people are still free under Federal law to possess firearms"). Thus, Congress enacted § 922(g)(9) to deny these violent offenders the right to possess guns. Hayes, 129 S. Ct. at 1087 (finding that "[f]irearms [*51] and domestic strife are a potentially deadly combination nationwide."); 142 Cong. Rec. at S2646-02 (explaining that adding domestic violence misdemeanants to the Gun Control Act of 1968 in 1996 was intended to "close this loophole, and will help keep guns out of the hands of people who have proven themselves to be violent and a threat to those closest to them."); *see also* United States v. Beavers, 206 F.3d 706, 710 (6th Cir. 2000) ("[I]t should not surprise anyone that the government has enacted legislation in an attempt to limit the means by which persons who have a history of domestic violence might cause harm in the future").

Under intermediate scrutiny, the governmental purpose must be *important*. But who could possibly dispute the importance of the governmental interest in keeping firearms away from individuals with a demonstrated history of actual or attempted assaultive violence? The need to protect victims of assaultive domestic violence from further, more lethal harm from gun violence is unquestionable; its unfortunate and horrifying effects are well-documented. As the government argues:

> Domestic violence misdemeanants, even more so than most convicted felons, have demonstrated [*52] a specific propensity for violence and thus pose and unacceptable risk of firearm misuse. Such persons have demonstrated an unwillingness or inability to resolve domestic disputes without threats of physical violence. Just because a domestic abuser does not employ a firearm in this first instance does not mean he will refrain from using a firearm the next time. Further, because victims of domestic violence often seek assistance from law enforcement agencies, domestic violence misdemeanants are likely to encounter law enforcement officers. The United States interest includes eliminating firearm possession by domestic violence misdemeanants during adverse encounters with law enforcement officers.

Appellee's Br. at 12. And sound research of unquestionable reliability (much of it empirical) indicates that the presence of firearms greatly increases the risk of death for women suffering from domestic abuse. For

example, in 2006, 1,905 women were murdered with guns and 4,772 women were treated in emergency rooms for gunshot wounds stemming from an assault. [4] On average, more than three women in the United States are murdered by their husbands or boyfriends every day. [5] *Abused women living* [*53] *in homes with firearms are six times more likely to be killed than other abused women.* [6] Women are more than twice as likely to be shot to death by their male partner as killed in any way by a stranger. [7] And women living in homes with guns are more than three times as likely to be victims of homicide. [8] Although it is the government's role to provide these data, courts have long taken judicial notice of dispositive facts in constitutional cases; judicial notice of the data underlying the government's interests is entirely appropriate.

4 CDC, Nat'l Ctr. for Injury Prevention & Control, *Injury Mortality Reports*, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (query for "Homicide" and "Firearm" and "Females" and "2006"); *Id., Nonfatal Injury Reports*, http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html (query for "Assault-All" and "Firearm" and "Females" and "2006").

5 U.S. Dep't of Justice, Bureau of Justice Statistics Crime Data Brief, *Intimate Partner Violence*, 1976-2001 (Feb. 2003), available at http://www.endabuse.org/userfiles/file/Children_and_Families/Children. pdf.

6 Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, Nat'l Inst. Just. J., [*54] Nov. 2003, at 15, 16, available at http://www.ncjrs.gov/pdffiles1/jr000250e .pdf. In another study, it was found that access to firearms increases the risk of intimate-partner homicide more than five-fold. Arthur L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084-91 (1993).

7 Arthur L. Kellerman & James A. Mercy, Men, Women, and Murder: Gender-Specific Differences in Rates of Fatal Violence and Victimization, 33 J. Trauma 1, 1 (1992).

8 James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 Archives of Internal Med. 777, 777 (1997).

It is also quite clear that § 922(g)(9) is substantially related to the government's important interests, as the statute directly prohibits the possession of firearms by those with a demonstrated history of actual or attempted violence. *See American Life League, Inc. v. Reno*, 47 F.3d 642, 651-52 (4th Cir. 1995). Section 922(g)(9) is not merely intended to accomplish bureaucratic shortcuts or administrative convenience. *Craig v. Boren*, 429 U.S. 190, 198-99, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), *reh'g denied*, 429 U.S. 1124, 97 S. Ct. 1161, 51 L. Ed. 2d 574 (1977); *Reed v. Reed*, 404 U.S. 71, 76, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), *mandate conformed to*, 94 Idaho 542, 493 P.2d 701 (1972). This [*55] statute, simply stated, is substantially related to the goal proffered by the government: to keep firearms from individuals with a demonstrated history of violence. This statute was intended to prevent individuals like William Samuel Chester, Jr., a violent man who has attacked and assaulted his own daughter and wife, from purchasing or possessing guns. Thus, based on readily available data of undoubted reliability, § 922(g)(9) satisfies intermediate scrutiny and is therefore constitutional.

V.

I can foresee no difficulty for the district court in sustaining the constitutional validity of the application of § 922(g)(9) in this case. Nevertheless, under the circumstances of the law's understandably slow evolutionary course of development, I am content to give Appellant Chester a full opportunity to offer evidence and argument showing the district court how and why he escapes the law's bite.

EXHIBIT 9

UNITED STATES OF AMERICA, Plaintiff, v. MELISSA A. HUET, Defendant.

Criminal No. 08-0215

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2010 U.S. Dist. LEXIS 123597

November 22, 2010, Filed

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JUDGES: ARTHUR J. SCHWAB, UNITED STATES DISTRICT JUDGE.

OPINION BY: ARTHUR J. SCHWAB

OPINION

Memorandum Opinion

I. Introduction

Pending before this Court are numerous pre-trial motions, including defendant Melissa A. Huet's (hereinafter "Huet" or "defendant Huet") Motion to Dismiss Count Three of a Three-Count Indictment charging her with aiding and abetting possession of a firearm by a convicted felon, from on or about August 10, 2007 to on or about January 11, 2008, in violation of Title 18, United States Code, Sections 922(g)(1) and 2(a).

Huet's co-defendant and paramour, Marvin E. Hall (hereinafter "Hall" or "defendant Hall"), was charged at Count One of the Indictment, with possession of a firearm by a convicted felon on or about January 11, 2008, in violation of Title 18, United States Code, Section 922(g)(1). Count Two charged Hall with transfer of unregistered firearms, on or about January 11, 2009, in violation [*2] of Title 26, United States Code, Section 5861(e). On February 1, 2010, defendant Hall pled guilty to Count One of the Indictment, and on June 25, 2010, Hall was sentenced by this Court to time served. [1] Defendant Hall already had served twenty four (24) months imprisonment in pretrial detention, and actually served more time than was called for under the advisory sentencing guideline range of fifteen (15) to twenty-one (21) months imprisonment. See the *Vue* case, 09-cr-48, doc. no. 120.

1 The government moved to dismiss Count Two, and the Court granted that motion. Doc. No. 133.

Defendant Huet moves to dismiss Count Three of the Indictment pursuant to Fed.R.Crim.P. 12(b)(3)(B) on the basis that: (1) it fails to state an offense under the aiding and abetting statute, 18 U.S.C. § 2, and/or (2) if it does state an offense under section 2, on the grounds that said offense violates the Second Amendment to the United States Constitution, as it has been construed *in District of*

Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L. Ed. 2d 637 (2008).

II. Legal Standard

Rule 12(b)(3)(B) permits a Court "at any time while the case is pending . . . [to] hear a claim that the indictment or information fails to . . [*3] . state an offense." When ruling on a motion to dismiss for failure to state an offense under Fed.R.Crim.P. 12(b)(3)(B), the Court is generally limited to reviewing the face of the Indictment, and the allegations of the Indictment are to be accepted as true for purposes of the motion to dismiss. *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990). A motion under Fed.R.Crim.P. 12(b)(3) is appropriate when it raises questions of law rather than fact. *See United States v. Levin*, 973 F.2d 463, 469 (6th Cir. 1992) (affirming the district court's dismissal of an Indictment when "undisputed extrinsic evidence" demonstrated that "the government was, as a matter of law, incapable of proving" an element of the offense). As the United States Court of Appeals for the Sixth Circuit explained in *United States v. Levin*:

> Rule 12 of the Federal Rules of Criminal Procedure and its component parts encourage district courts to entertain and dispose of pretrial criminal motions before trial if they are capable of determination without trial of the general issues. Moreover, district courts may make preliminary findings of fact necessary to decide questions of law presented by pretrial motions [*4] so long as the trial court's conclusions do not invade the province of the ultimate finder of fact.

973 F.2d 463, 469.

A pretrial motion raising factual issues may be ruled upon where there is no right to jury resolution of a factual dispute. *United States v. MacDougall*, 790 F.2d 1135 (4th Cir. 1986). Where, as here, the factual information underpinning the indictment is not in dispute and the only question is a legal one, motions to dismiss an Indictment may be ruled upon as a matter of law. See *United States v. Ali*, 557 F.3d 715, 719-29 (6th Cir. 2009)(court may rule on a motion to dismiss where defendant's motion pleads that undisputed facts did not give rise to the offense charged in the Indictment, or whether the Indictment, based on such undisputed facts failed to state an offense). *United States v. Todd*, 446 F.3d 1062, 1067 (10th Cir. 2006); *United States v. Flores*, 404 F.3d 320 (5th Cir. 2005).

The Indictment must include all of the elements of the crime alleged, *United States v. Spinner*, 180 F.3d 514 (3d. Cir. 1999), as well as specific facts that satisfy all those elements; a recitation "in general terms the essential elements of the offense" is not sufficient. *United States v. Panarella*, 277 F.3d 678, 684-85 (3d Cir. 2002). [*5] The dismissal of an Indictment is authorized only if its allegations are not sufficient to charge an offense, but such dismissals may not be based upon arguments related to the insufficiency of the evidence that will be offered to prove the charges in the Indictment. *United States v. DeLaurentis*, 230 F.3d 659, 660-661 (3d Cir. 2000).

This pretrial motion to dismiss is properly addressed and resolved by this Court because defendant Huet's argument that the Indictment fails to state an offense is based upon facts which are, for purposes of this Motion, either undisputed or resolved in the government's favor, and involve a constitutional claim involving her Second Amendment right to keep and bear arms.

III. Background Factual Information[2]

> 2 This Court, being mindful of, and adhering to the standard of review on a motion to dismiss the Indictment under Fed. R. Crim. P. 12(b)(3)(B), provides the following factual information mostly as background, and the Court has not relied upon facts outside of the four corners of the Indictment as a basis to dismiss this Indictment. However, the facts as set forth in the underlying guilty plea and other proceedings of co-defendant Hall are a matter of public [*6] record and therefore have been relied upon by this Court in fashioning this decision.

A. Investigation of Defendant Huet

Defendant Huet is 35 years old, has never been convicted of any crime, and is not disabled or otherwise prohibited from possessing a firearm under 18 U.S.C. § 922(g)(1), or its Pennsylvania counterpart, 18 Pa.C.S.A. § 6105.

Count Three (3) of the Indictment charges Huet with aiding and abetting the possession by her paramour,

defendant Hall, of a firearm identified as an SKS rifle, [3] from August 10, 2007 to January 18, 2008. During discovery, materials provided to defendant pursuant to Fed. R. Crim. P. 16 describe the rifle as an Interordnance M59/66 Rifle, Serial Number F151932 (hereinafter referred to as "the SKS rifle"), which as described more fully later in this Opinion is not an "assault" rifle (like an AK-47) but a "curio" or collectors' rifle. Defendant Hall's guilty plea and sentencing at Count One of the Indictment confirm that he had been convicted in March, 1999, of possessing an unregistered firearm in violation of Title 26, United States Code, Section 5861(d).

> 3 The Indictment had originally referred to the SKS rifle as an "assault rifle," but in its "Omnibus [*7] Brief and Responses to Pre-Trial Motions of Defendant," the government stated that it has "no objection to referring to the rifle merely as an SKS rifle, as the 'assault' designation has no bearing whatsoever on either the elements of the offense or the penalties Ms. Huet faces upon conviction." Doc. No. 134, at 14.

The genesis of the investigation by federal agents claims that they worked undercover "to penetrate a cell of militia extremists," and during their investigation, they met defendants Hall and Huet, while the agents pretended to have an interest in the activities of Morgan Jones, of Lucinda, Clarion County, including Jones' collection of guns and his hosting of an annual "flame-throwing" party in 2005. [4] See *United States v. Hall*, Doc. No. 44, Detention Hearing Transcript, June 11, 2008, p. 13-14.

> 4 According to testimony at the detention hearing of Hall, FBI Special Agent Yocca testified that according to "some of the defendants in this case" (although Huet is not mentioned), a flame-throwing party is one that certain militia members, as well as neighbors and other Pennsylvania gun owners attend, and it is held at Jones' property. Doc. No. 44 at 25-26. The government has not [*8] alleged that Huet took part in any of these alleged activities.

Under authority of a search warrant, federal agents seized the SKS rifle from an upstairs bedroom at the Hall/Huet home at Lawsonham Road in Clarion County, during a raid conducted on June 6, 2008. The raid occurred approximately nine (9) months to a year after the agent first met the couple, and nearly five (5) months from the end date of defendant Huet's "aiding and abetting" possession by a convicted felon charge pleaded in the Indictment. Doc. No. 120-1.

According to the Rule 16 discovery materials, at no time during the undercover investigation did agents observe either Huet or Hall actually handle the SKS rifle. They did not observe Huet handle or otherwise deliver the rifle to Hall or direct him to handle it. Importantly, at no time over the five (5) months period covered by the Indictment did agents observe Huet in the same room as the rifle. There is no allegation that it had been discharged, either legally or illegally, by either Hall or Huet, and in particular, there is no allegation that Huet directed Hall to discharge the rifle, or possess the rifle, nor that Huet was a "straw" [*9] purchaser of the rifle for Hall.

As set forth in the affidavit of probable cause, Huet indicated to one or more of the agents on August 10, 2007 the following:

> That she was angry that HALL had been showing off an SKS assault rifle. HUET said that if it happened again, she would take it back to MORGAN. HUET further elaborated that she was worried that if HALL 'gets in trouble with that, I get in trouble, too. Cause it's in my name and he's got it.' HALL invited [the undercover agent] into his residence, where the [undercover agent] observed an SKS rifle assault in HALL's computer room. Referring to the SKS rifle HALL said, 'That's her SKS rifle, I'm not allowed to have a gun.'

Doc. No. 120-1, ¶ 19.

According to the Agent's summary of Huet's June 8, 2009 (FBI Form 302) statement, government agents reported that after they told Huet that they raided her house, arrested Hall and had a warrant to search her truck, she told them that "the guns in her home belong to her and that it is not illegal for her to purchase weapons." Doc. No. 120-2.

While the affidavit is filled with labels of "assault" rifle and "militia" language, there are no allegations that SKS rifle is a "true" assault weapon (at [*10] least for the last 50 to 60 years), or that Huet was personally involved in any militia activities, legal or illegal. The

attempt to "label" Huet should not deter a thorough analysis in this case - - is the government, through the framework of "aiding and abetting," attempting to convert a lawful rifle owner into a criminal?

Importantly, absent from the Indictment are *any* facts supporting an inference that Huet did anything to aid and abet defendant Hall in "possessing" her firearm, the SKS rifle, or that Huet purchased or possessed the rifle as a means to assist Hall to avoid his restrictions. In other words, the government has set forth no facts addressing any specifics as to how defendant Huet aided and abetted Hall. The government simply charges *its conclusion* that Huet "knowingly and unlawfully aided and abetted the possession of a firearm, that is an SKS rifle assault rifle, in and affecting interstate commerce, by Marvin E. Hall." Doc. No. 1. The facts as gleaned from the underlying proceedings of defendant Hall, which are a matter of public record, also do not address how defendant Huet aided and abetted Hall.

B. The Firearm - - Not An Automatic "Assault" Weapon

The following [*11] brief historical review will be of assistance:

The SKS (or M59/66) is a legal, common semi-automatic rifle that is used as a hunting rifle and, like many hunting rifles, does not accept a magazine and cannot hold more than ten (10) rounds. The Interordance M59/66 is a semiautomatic carbine manufactured in the former Yugoslavia based upon the Russian SKS (Samorzaryadnyi Karabin Simonova) design of the 1940s. It carries a 7.62 x 39 mm cartridge in a *fixed* magazine holding up to ten (10) cartridges, and it has a barrel length of approximately 21 inches. This is important because, unlike an AK-47 or M-16, the SKS rifle cannot accept magazines and has a limited ammunition capacity of ten (10) rounds.

"Carbine" is derived from the French "carabine," the type of soldier who originally carried them. The "carbine" was designed as early as the 17th or 18th century as a lighter, shorter shoulder weapon for French and English cavalrymen. See Russell, Carl P., *Guns on the Early Frontier*, University of California Press, 1957), pp. 167-175. The term also referred to the inside diameter of the barrel, which was narrower than that of a musket. See Neumann, George C, *The History of Weapons of the American* [*12] *Revolution*, (Crown Publishers, Inc. 1967), pp. 36-39, 114-122. American carbines were manufactured and used for military purposes from approximately 1833.

Carbines were used by unmounted officers and others who sought a lighter, more compact weapon, and later were used as a sporting arm for hunting in heavy brush. The Russian SKS rifle is an example of this historical trend. The Russian SKS rifle was first used in the 1940s as a military weapon and was displaced in the late 1940s by the more deadly AK-47. The Russians shared the design of the SKS rifle with its post-World War II allies, and retained it largely for military ceremonial use. At least in the 1950s the Russian SKS rifle became the "standard hunting rifle for the majority of Russian hunters" for antelope, moose, boar, and brown bear. Doc. No. 120-4, S.P. Fjestad, *Blue Book of Gun Values*, 30th ed. (Blue Book Publications, Inc., 2009), p. 1559-61.

Ultimately, large military surpluses of Russian SKS rifles or rifles built upon the SKS design became widely available, including the M59/66 (manufactured in the former Yugoslavia), and were *lawfully* imported into the United States as sporting rifles. According to the *Blue Book of* [*13] *Gun Values*, it rapidly became one of the favorites for American hunters and shooters, based upon its affordability and durability. *Id.* Nothing indicates that the SKS rifle is a "weapon of choice" among criminals or gangs - - only of hunters and collectors.

The parties do not dispute for purposes of this Motion that the Interordnance M59/66, while a carbine by design, meets the definitions of "semiautomatic rifle" in 18 U.S.C. §§ 921(a)(7), (28). It is a firearm which is "intended to be fired from the shoulder," "which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge." *Id.* In contrast to semi-automatics, automatic weapons, also called machine guns, shoot multiple cartridges in response to a single trigger pull. 26 U.S.C. § 5845(b).

In 1994, Congress enacted a ten-year prospective ban on the manufacture, transfer or possession of a particular subset of semiautomatic rifles, which it characterized as "semiautomatic assault weapons." The ban *exempted* a large number of specifically-identified firearms, including any "semiautomatic rifles . . . that [*14] cannot accept a detachable magazine that holds more than 5

rounds of ammunition," and any semiautomatic shotgun "that cannot hold more than five rounds of ammunition in a fixed or detachable magazine." See former 18 U.S.C. § 922(v)(3). The M59/66 was *not* included in the ban. [5] Further, as early as 2001 (and certainly no later than 2005), the Yugoslavian M59/66 had been designated a "curio" by the Bureau of Alcohol, Tobacco and Firearms' under 27 CFR § 478.11.

> 5 There is nothing in the record to indicate that the rifle at issue was modified to accept a removable high capacity magazine.

Although the semiautomatic assault weapons ban ended in 2004, Congress's determination of which weapons were, and which weapons were not, dangerous, bears upon the constitutional inquiry regarding whether defendant Huet's rifle was "dangerous" or "unusual," especially since the SKS rifle was *not* within the ban (see *District of Columbia v. Heller, infra*), coupled with its "curio" or collectors' status.

IV. Analysis

A. Aiding and Abetting

As stated above, notably absent from the Indictment in this case are any facts setting forth *how* defendant Huet aided and abetted defendant Hall in his unlawful possession of [*15] the SKS rifle. The government's theory, disclosed on the record as set forth in defendant Hall's proceedings, appears to be that defendant Huet passively aided and abetted Hall in his possession of the curio firearm which *she* owned and kept in their shared residence. Supported by the June 8, 2008 statement made by Huet claiming ownership of this collectors' rifle, the government's theory in support of the aiding and abetting charge is that Huet owned the firearm and kept it unsecured in the home. At defendant Hall's guilty plea hearing, which is a matter of public record, government counsel stated that:

> Mr. Hall lived with . . . Melissa Huet, (who) had no prior record of which we are aware, but . . . bought firearms in her name for (sic) Morgan Jones, who on the side sold firearms. . . Miss Huet would allow Mr. Hall to have access to those firearms. In essence, that's the very basis of the charge against Mr. Hall to which he is pleading guilty today.

See *United States v. Hall*, Cr. No. 08-215, Change of Plea Hearing, 1/29/2010, Doc. No. 113 at 18.

Section 2 of Title 18 of the United States Code states that anyone who "directly commits an act or aid, abets, counsels, commands, induces or [*16] procures its commission, is punishable as a principal." In 1951, the aiding and abetting statute was amended to include the language "punishable as" in order to "eliminate all doubt that in the case of offense whose prohibition is directed at members of specified class (e.g. federal employees) a person who is not himself a member of that class may nonetheless be punished as a principal if he induces a person in that class to violate the prohibition." See S.Rep. 1020, 82d. Cong. 1st Sess., 7-8 (1951); See also, *Standefer v. United States*, 447 U.S. 10, 19, n. 11, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980).

In *United States v. Nolan*, 718 F.2d 589, 591 (3d Cir. 1983), quoting *Nye & Nissen v. United States*, 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919 (1949)(other citations omitted), the United States Court of Appeals for the Third Circuit held that in order to "aid and abet" another person to commit a crime it is required "that a defendant 'in some sort associate himself with the venture, that he participate in it as something that he wished to bring about, that he seek by his action to make it succeed."

In *United States v. Xavier*, the United States Court of Appeals for the Third Circuit held that one may be an aider and abetter to possession by a convicted [*17] felon charge under 18 U.S.C. §§ 2(a), and 922(g), upon proof that the aider and abetter knew or had cause to know of the possessor's status as a felon.

The United States Supreme Court's recent unanimous decision in *Abuelhawa v. United States*, 566 U.S. ___, 129 S.Ct. 2102, 173 L. Ed. 2d 982 (2009), limits the government's practice of invoking accomplice liability. In that case, the Supreme Court rejected a loose construction of 21 U.S.C. § 843(b), which makes it a felony to use a telephone to facilitate a drug transaction, to punish the buyer of small drug quantities who merely arranges the purchases over the telephone. The Supreme Court likened the word "facilitate" in section 843(b) with "aid", "abet" and "assist" in other criminal statutes, and relied upon its decision in *Gebardi v. United States*, 287 U.S. 112, 53 S. Ct. 35, 77 L. Ed. 206 (1932), which was a Mann Act decision which "refused to infer that the mere acquiescence of the woman transported [across state

lines] was intended to be condemned by the general language punishing those who aid and assist the transporter, any more than it has inferred that the purchaser of liquor was to be regarded as an abettor of the illegal sale." *Id.* at 2106.

Defendant argues, and this Court [*18] agrees, that based upon the government's undercover investigation, the government cannot successfully establish that Huet "participat[ed] in the venture as something that [she] wished to bring about," and application of the Supreme Court's unanimous decision in *Abuelhawa* changes the government's case from weak to legally deficient.

The facts in the Indictment fail to set forth *any* allegations to support the conclusion that defendant Huet aided and abetted defendant Hall in his unlawful possession of the SKS rifle. Here, as stated above, there are no allegations in the Indictment (nor any information at the proceedings produced in the proceeding of co-defendant Hall) that Huet was a straw purchaser of the SKS rifle, or that she ever witnessed defendant Hall handling or firing the weapon. The most the government proffers is that Huet stated that if defendant Hall got in trouble with the gun, she would get in trouble also because she was the owner of the rifle. This statement, which the Court accepts as undisputed, does nothing to advance the cause that defendant Huet knew, or had reason to know that defendant Hall was a felon in possession *and* that her owning a weapon somehow aided or [*19] abetted him in his unlawful possession of the SKS rifle. The Court therefore finds that Count Three (3) of the Indictment against defendant Huet must be dismissed for failure to state an offense under the aiding and abetting statute, 18 U.S.C. § 2.

B. Second Amendment

(1) The Nature of Defendant Huet's Second Amendment Challenge

At the outset, the Court must first determine whether the defendant is launching her attack on the constitutionality of the statutes at issue on their face, or on an as-applied basis. While a facial attack tests a law's constitutionality based on its text alone and does not address the facts or circumstances of the particular case, an as-applied attack does not allege that a law is unconstitutional as written, but that the application of the law to a particular person under particular circumstances deprives that person of his or her constitutional rights. *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010); *United States v. Marcavage*, 609 F.3d 264 (3d Cir. 2010).

Although defendant Huet does not specify whether the constitutional challenge is facial or as-applied, it appears to this Court that defendant attacks these statutes on an as-applied basis and under the facts of this case. Accordingly, the Court confines [*20] its analysis of the constitutionality of the laws as-applied to the factual scenario of this case. As previously noted, these facts have been gleaned primarily from the public judicial record of co-defendant Hall's proceedings.

(2) Summary of Conclusion

For the reasons set forth below, this Court finds that under the facts of this case, to punish Huet, who has not been convicted of a felony under 18 U.S.C. § 922(g)(1), as a principal, violates the core of the Second Amendment right to keep arms, at least, where, as here, the conduct said to have aided or abetted the substantive firearm possession is itself purely possessory.

(3) History of Second Amendment as Construed Through Recent Case Precedent

The language of the Second Amendment provides that: "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."

(a) District of Columbia v. Heller

In the landmark case of *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L. Ed. 2d 637 (2008), the United States Supreme Court, for the first time, addressed the scope of the individual right to bear arms and interpreted the meaning of the Second Amendment within the [*21] context of deciding whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment. The Supreme Court in *Heller* set forth an exhaustive analysis on the meaning and purpose of the Second Amendment, which, like the First and Fourth Amendments, codified a *pre-existing* right, and examined the meaning of the operative clause, "right of the people" to "keep and bear Arms", and the prefatory clause, "A well regulated Militia, being necessary to the security of a free State . . . ". *Id.* at 2789. Further, the Court evaluated the relationship between the operative clause and the prefatory clause of the Second Amendment, as well as the post-ratification

commentaries, pre-civil war case law, post-civil war legislation and commentaries, and ultimately struck down as unconstitutional two District of Columbia statutes which totally banned handgun possession in the home, and required all other firearms to be inoperable at all times.

Of note, the Court in *Heller* held that, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of founding." 128 S.Ct. at 2791-92. [*22] The Court characterized as "bordering on the frivolous" the argument that "only those arms in existence in the 18th Century are protected by the Second Amendment." *Id.* The Supreme Court wholesale rejected the argument based upon the language from *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939) that "only those weapons useful in warfare are protected." *Id.* at 2815. [6] The Court, however, noted that the right is not unlimited as the Second Amendment does not protect an individual's right to possess "dangerous and unusual weapons." *Id.* at 2817 (citations omitted).

> 6 In *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939), the United States Supreme Court upheld a section of the National Firearms Act making it unlawful to possess an unregistered sawed-off shotgun. The Court emphasized that "[i]n the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id.* at 178. The Court further stated that "it is not within judicial notice that this weapon is any part [*23] of the ordinary military equipment or that its use could contribute to the common defense." *Id.*

While the majority in *Heller* held that the Second Amendment provides an individual the right to possess a firearm unconnected with service in a militia and to use that arm for traditionally lawful purposes, especially the right of self defense within the home, the dissent (and petitioners) believed that it protects only the right to possess and carry a firearm in connection with militia service. *Id.* at 2789.

Although *Heller* did not settle on a standard of scrutiny, it unmistakably ruled out the deferential rational basis test that was applied in *Miller*. The Court in discussing the standard of scrutiny applicable to the hand gun prohibition, stated:

> [T]he 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, banning [*24] 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.

Id. at 2817-18. (Internal citations omitted).

While not recognizing an unalienable right of every citizen to possess any type of firearm and to brandish it wherever they wish, the majority in *Heller* held that the Second Amendment established a core right that protects a citizen's ability to possess firearms used by militia members in his or her home for personal protection, provided that the possessor is not disqualified by virtue of being a felon or insane.

(b) McDonald v. City of Chicago[7]

> 7 This Court required additional briefing from the parties on the effect of the decisions in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), *and McDonald v. City of Chicago*, 130 S. Ct. 3020, 3040, 177 L. Ed. 2d 894 (2010). See Text Orders of July 14, 2010 and August 12, 2010.

In the recent case *of McDonald v. City of Chicago*, U.S. , 130 S.Ct. 3020, 3047, 177 L. Ed. 2d 894 (2010), a four member plurality nearly identical to the majority in *Heller*, held that the Fourteenth Amendment's Due Process Clause, includes the right to bear arms as affirmed in *Heller*. Thus, [*25] the opinion at least arguably subjects numerous state and local firearms regulations to constitutional evaluation. The plurality in

McDonald reasoned that the Second Amendment's right to bear arms, though only recently illuminated in *Heller*, is nonetheless both "deeply rooted in this Nation's history and tradition," and "fundamental to our scheme of ordered liberty and system of justice." *Id.* at 3023. (Citations omitted).

The five opinions in *McDonald* are splintered in different directions on core approaches to American constitutional analysis as well as the right to bear arms. Nonetheless, the Justices share common ground, expressed by Justice Stevens' dissent, which acknowledges that, "a rule limiting the federal constitutional right to keep and bear arms to the home would be less intrusive on state prerogatives and easier to administer." *Id.* at 3105.

(c) United States v. Marzzarella

Most recently, in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), the United States Court of Appeals for the Third Circuit took its first run at the precedent established by the Supreme Court in the *Heller* case. In *Marzzarella*, defendant argued that his conviction under 18 U.S.C. § 922(k) [*26] for possession of a handgun with an obliterated serial number violated his Second Amendment right to keep and bear arms under the *Heller* decision.

The factual scenario and the offense charged are quite different and distinct from the facts in this case, and therefore, the holding of the Court of Appeals for the Third Circuit in *Marzzarella*, that the Second Amendment does not protect defendant's right to possess a handgun in his home with an obliterated serial number which places it in the category of "dangerous" or "unusual," is not directly applicable to this case.

However, the Court of Appeals interpreted the pronouncements of the Supreme Court to be garnered from *Heller*, and those pronouncements are most relevant to the instant case. According to the Court in *Marzzarella*, a central principle to be gleaned from *Heller* is that the Second Amendment "confer[s] an individual right to keep and bear arms . . . at least for the *core purpose* of allowing law-abiding citizens to use arms in defense of hearth and home." *Id.* at 92 (emphasis added). The Court of Appeals, also citing the discussion in *Heller* of the importance of hunting to the pre-ratification of the right to bear arms, noted, that [*27] "to some degree, it must protect the right of law-abiding citizens to possess firearms for other yet-undefined lawful purposes." *Id.* The Court of Appeals reiterated the Supreme Court's holding that "[t]he right is not unlimited, however, as the Second Amendment affords no protection for the possession of dangerous and unusual weapons, possession by felons, and the mentally ill, and the carrying of weapons in certain sensitive places." *Id.*, citing *Heller*, at 2816-17.

The Court of Appeals in *Marzzarella* highlighted the two-pronged approach to Second Amendment challenges as set forth in *Heller*. The Court must first ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, the Court's inquiry is complete. If it does, the Court must evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid. *Id.* at 89.

The Court, while ultimately adopting an intermediate, rather than strict level of scrutiny, seemed to acknowledge that the Second Amendment could impose more than one particular standard of scrutiny. Borrowing from the First Amendment [*28] speech context which employs the intermediate level of scrutiny, the Court stated that the asserted governmental end must be more than just legitimate, rather, it requires the end to be either "significant," "substantial," or "important." In other words, the fit between the challenged regulation and the asserted objective must be reasonable, not perfect. *Id.* at 97.

In *Marzzarella*, the Court found that the burden imposed by the statutory provision did not severely limit the possession of firearms, and the legislative intent behind the provision was not to limit the ability of persons to possess any class of firearms. The Court also contrasted the District of Columbia's handgun ban as an example of a law at the far end of the spectrum of infringement on Second Amendment rights. *Id.* at 97. ("It did not just regulate possession handguns; it prohibited it, even for the stated fundamental interest protect by the right -- the defense of hearth and home.")

(d) Application of Case Precedent

Applying the guiding principles set forth in *Heller*, and the above standard elucidated by the panel in *Marzzarella*, and evaluating the facts in the light most favorable to the government, defendant Huet's possession

[*29] of the gun - - which is the crux of the government's case against her - - at all times occurred within the home, where her right to possess is undoubtedly most sacrosanct. As Justice Stevens concluded in *McDonald*, "firearms kept inside the home generally pose a lesser threat to public welfare as compared to firearms taken outside . . . " *McDonald*, 130 S.Ct. at 3105.

At the time of the offense charged in this case, defendant Huet, who was charged with aiding and abetting, was neither a felon, nor insane. *Heller* at 2816; *McDonald* at 3047 (plurality opinion of Alito, J.)("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill . . ."). Rather, Huet allegedly aided and abetted another who was not permitted to lawfully possess a firearm, thus compounding an inchoate offense upon another inchoate offense.

The SKS rifle was owned by and kept in defendant Huet's home. Applying the aiding and abetting statute at section 2, together with the alleged violation of section 922(g)(1), under the facts of this case, implicates the protections of the Second Amendment. Were this [*30] Court to permit this Indictment to go forward, the Court would be countenancing the total elimination of the right of a sane, non-felonious citizen to possess a firearm, in her home, simply because her paramour is a felon, and not because of some affirmative act taken by the citizen. Under any level of scrutiny, said Indictment as to Huet is a substantial, if not unfettered, infringement on her Second Amendment right to keep arms.

Further, the SKS rifle owned by defendant Huet is a type of firearm that was *not* banned by the 1994 assault weapons ban and thus was *not* a "dangerous" or "unusual" weapon, such as a firearm with an obliterated serial number in *Marzzarella*. Instead, the Court takes judicial notice that as early as 2001 (and certainly no later than 2005), the Yugoslavian M59/66 had been designated a "curio" by the Bureau of Alcohol, Tobacco and Firearms' under 27 CFR § 478.11. The SKS rifle was commonly used as a sporting rifle, and was mass produced and is owned by American gun owners in the hundreds of thousands. Doc. Nos. 120-3, 120-5, 120-6.

Having determined that the prosecution of Huet, a non-felon, for possession of a firearm which she owns, in her own home, infringes [*31] on her "core" Second Amendment protections as set forth in *Heller*, the Court must next balance her rights against the government's interest.

As stated above, under 18 U.S.C. § 922(g)(1), certain classes of persons, most notably those convicted of felonies, are prohibited from possessing firearms. As *Marzzarella* and other cases have illuminated, by passing section 922(g)(1), "Congress sought to rule broadly - - to keep guns out of the hand of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society," 614 F.3d at 93 (citations omitted); *United States v. Walls*, 225 F.3d 858 (7th Cir. 2000)("Congress enacted section 922(g)(1) 'in order to keep firearms out of hands of those persons whose prior conduct indicated a heightened proclivity for using firearms to threaten community peace and the continued operation of the Government of the United States.'")

Broadening the scope of section 922(g)(1), by expanding the class to whom it applies to include non-felons, punishes a non-felon as a principal under a statute which, by its express terms, is applicable only to felons. Especially where, as here, the non-felon's allegedly culpable activity [*32] is inchoate - - in this case mere possessory - - the non-felon has not earned the title of "felon," and has done nothing to "demonstrate that [she] may not be trusted to possess a firearm without becoming a threat to society." *Id.* at 93.

Additionally, as defendant Huet highlights, and this Court agrees, persons convicted of felony antitrust violations are not included within the prohibition of section 922(g)(1), which is to say that Congress is capable of, and has, exempted persons outside the class to whom a penal statute is directed from accomplice liability. *Abuelhawa*, supra; see also *United States v. Shear*, 962 F.2d 488, 490-95 (5th Cir. 1992)(employee not culpable for aiding and abetting an employer's criminal offense under Occupational Safety and Health Act). Therefore, to attempt to punish defendant Huet, who has a guiltless past (or at least one free from any felonies or misdemeanors), and has done nothing to establish that she may not be trusted with a firearm without becoming a threat to society, *Marzzarella*, *supra*, places her in a more perilous position than other felons who are certainly less guiltless.

V. Conclusion

The Court finds that the Indictment fails to set forth

[*33] an offense under 18 U.S.C. § 2. Furthermore, under *Heller*, and its progeny, the Second Amendment protects defendant Huet's right to possess the firearm the government seeks to criminalize through the use of sections 2 and 922(g)(1). To hold otherwise would be to ignore *Heller*: defendant Huet, not being a felon, insane, or otherwise disabled from possessing a gun, is entitled to possess a lawful firearm in her home, a place which is recognized as sacrosanct for purposes of Second Amendment analysis.

In conclusion, this Court echoes the words of the United States Supreme Court *in Heller*, when it stated:

> The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people. . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Heller, at 2821.

Defendant Huet, is one such law [*34] abiding citizen, and she is entitled to at least keep arms (if not to bear arms) within the confines of her home. For these reasons, defendant's motion to dismiss (doc. no. 120) will be GRANTED, the other Pretrial Motions (doc. nos. 115, 116, 117, 118 and 119) will be DENIED AS MOOT, and the Indictment shall be DISMISSED. An appropriate Order follows.

/s/ Arthur Schwab

ARTHUR J. SCHWAB

UNITED STATES DISTRICT JUDGE

EXHIBIT 10

UNITED STATES OF AMERICA v. MICHAEL MARZZARELLA, Appellant

No. 09-3185

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

614 F.3d 85; 2010 U.S. App. LEXIS 15655

February 22, 2010, Argued
July 29, 2010, Filed

PRIOR HISTORY: [**1]

On Appeal from the United States District Court for the Western District of Pennsylvania. D.C. Criminal No. 07-cr-0024. Honorable Sean J. McLaughlin.
United States v. Marzzarella, 595 F. Supp. 2d 596, 2009 U.S. Dist. LEXIS 2836 (W.D. Pa., 2009)

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant was indicted for possession of a firearm with an obliterated serial number, in violation of 18 U.S.C.S. § 922(k). Defendant moved to dismiss the indictment. The United States District Court for the Western District of Pennsylvania denied the motion. Defendant entered a conditional guilty plea, reserving the right to appeal the constitutionality of § 922(k), and was sentenced. Defendant appealed.

OVERVIEW: The court first pointed out that the Second Amendment protected law-abiding citizens' rights to possess non-dangerous weapons, but that the right was not unlimited. The court assumed that defendant's Second Amendment rights were burdened and looked to First Amendment jurisprudence to determine that intermediate scrutiny was the appropriate standard of constitutional review because the burden imposed did not severely limit firearms possession, but rather regulated the manner in which persons could lawfully exercise Second Amendment rights. The law plainly served a law enforcement interest in enabling a substantial and important interest in weapons tracing via serial numbers. Further, § 922(k) reached only conduct creating a substantial risk of rendering a firearm untraceable and did not limit possession of any class of firearms. Moreover, there was no apparent lawful purpose for an unmarked firearm. Thus, § 922(k) passed muster under intermediate scrutiny. However, the court found that it would pass muster under strict scrutiny as well, as the interest was compelling, and the provision was narrowly tailored to serve it.

OUTCOME: The court affirmed the denial of defendant's motion to dismiss the indictment and affirmed his judgment of conviction and sentence.

COUNSEL: THOMAS W. PATTON, ESQUIRE (ARGUED), Office of Federal Public Defender, Erie, Pennsylvania, Attorney for Appellant.

LAURA S. IRWIN, ESQUIRE (ARGUED), ROBERT L. EBERHARDT, ESQUIRE, Office of the United States Attorney, Pittsburgh, Pennsylvania, Attorneys for Appellee.

JUDGES: Before: SCIRICA and CHAGARES, Circuit Judges, and RODRIGUEZ *, District Judge.

* The Honorable Joseph H. Rodriguez, United States District Judge for the District of New

Jersey, sitting by designation.

OPINION BY: SCIRICA

OPINION

[*87] OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

This appeal presents a single issue, whether Defendant Michael Marzzarella's conviction under 18 U.S.C. § 922(k) for possession of a handgun with an obliterated serial number violates his Second Amendment right to keep and bear arms. We hold it does not and accordingly will affirm the conviction.

I.

In April 2006, the Pennsylvania State Police were notified by a confidential informant that Marzzarella was involved in the sale of stolen handguns. On April 25, the confidential informant arranged a purchase of handguns from Marzzarella. [**2] The next day, State Trooper Robert Toski, operating in an undercover capacity, accompanied the informant to Marzzarella's [*88] home in Meadville, Pennsylvania, where Toski purchased a .25 caliber Titan pistol with a partially obliterated serial number for $ 200. On May 16, Marzzarella sold Toski a second firearm and informed him that its serial number could be similarly obliterated.

On June 12, 2007, Marzzarella was indicted for possession of a firearm with an obliterated serial number, in violation of § 922(k). [1] No charges were brought for the sale of the Titan pistol or the sale or possession of the second firearm. Marzzarella moved to dismiss the indictment, arguing § 922(k), as applied, violated his Second Amendment right to keep and bear arms, as recognized by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). The District Court denied the motion, holding the Second Amendment does not protect a right to own handguns with obliterated serial numbers and that § 922(k) does not meaningfully burden the "core" right recognized in *Heller*--the right to possess firearms for defense of hearth and home. Moreover, it held that because § 922(k) is designed to regulate [**3] the commercial sale of firearms and to prevent possession by a class of presumptively dangerous individuals, it is analogous to several longstanding limitations on the right to bear arms identified as presumptively valid in *Heller*. Finally, the District Court held that even if Marzzarella's possession of the Titan pistol was protected by the Second Amendment, § 922(k) would pass muster under intermediate scrutiny as a constitutionally permissible regulation of Second Amendment rights.

1 Section 922(k) provides:

> It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

We recognize the words "removed," "obliterated," and "altered" may denote distinct actions. *See United States v. Carter*, 421 F.3d 909, 912-13 (9th Cir. 2005) (detailing the difference in the ordinary meanings of "obliterated" and "altered" in U.S.S.G. § 2K2.1(b)(4)). [**4] Because the disposition of this case does not turn on their distinctions, we use these terms, as well as the term "unmarked," interchangeably.

After the denial of the motion to dismiss the indictment, Marzzarella entered a conditional guilty plea, reserving the right to appeal the constitutionality of § 922(k). The District Court sentenced him to nine months imprisonment. Marzzarella now appeals. [2]

2 The District Court had jurisdiction over Marzzarella's indictment under 18 U.S.C. § 3231. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review of a constitutional challenge to the application of a statute. *United States v. Fullmer*, 584 F.3d 132, 151 (3d Cir. 2009).

II.

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." U.S. Const. amend. II. To determine whether § 922(k) impermissibly burdens Marzzarella's Second Amendment rights, we begin with *Heller*. [3]

> 3 The Supreme Court recently issued its decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). *McDonald* dealt primarily with the incorporation of the Second Amendment [**5] against the states, *id.* at 3050 (plurality opinion of Alito, J.), and does not alter our analysis of the scope of the right to bear arms.

[*89] In *Heller*, the Supreme Court struck down several District of Columbia statutes prohibiting the possession of handguns and requiring lawfully owned firearms to be kept inoperable. 128 S. Ct. at 2817-18. The Court concluded the Second Amendment "confer[s] an individual right to keep and bear arms," *id.* at 2799, at least for the core purpose of allowing law-abiding citizens to "use arms in defense of hearth and home," *id.* at 2821. Although the Court declined to fully define the scope of the right to possess firearms, it did caution that the right is not absolute. *Id.* at 2816-17 ("Like most rights, the right secured by the Second Amendment is not unlimited. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . . . ."). But because the District of Columbia's laws prevented persons from possessing firearms even for self-defense in the home, they were unconstitutional under any form of means-end scrutiny applicable to assess the validity of limitations on constitutional rights. *Id.* at 2817-18 [**6] ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . [the statutes] would fail constitutional muster." (citation and footnote omitted)).

As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. *Cf. United States v. Stevens*, 533 F.3d 218, 233 (3d Cir. 2008), *aff'd* 130 S. Ct. 1577, 176 L. Ed. 2d 435 (recognizing the preliminary issue in a First Amendment challenge is whether the speech at issue is protected or unprotected). [4] If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

> 4 Because *Heller* is the first Supreme Court case addressing the scope of the individual right to bear arms, we look to other constitutional areas for guidance in evaluating Second Amendment challenges. We think the First Amendment is the natural choice. *Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment. *See, e.g.*, [**7] 128 S. Ct. at 2791-92 ("Just as the First Amendment protects modern forms of communications . . . the Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (citation omitted)); *id.* at 2799 ("Of course the right [to bear arms] was not unlimited, just as the First Amendment's right of free speech was not." (citation omitted)); *id.* at 2821 ("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions . . . but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people . . . ."). We think this implies the structure of First Amendment doctrine should inform our analysis of the Second Amendment.

A.

Our threshold inquiry, then, is whether § 922(k) regulates conduct that falls within the scope of the Second Amendment. In other words, we must determine whether the possession of an unmarked firearm in the home is protected by the right to bear arms. In defining the Second Amendment, the Supreme Court began by analyzing the [**8] text of the "operative clause," which provides that "the right of the people to keep and bear Arms, shall not be infringed." *Heller*, 128 S. Ct. at 2789-90. Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *id.* at 2821, the Court interpreted [*90] the text in light of its meaning at the time of ratification, *id.* at 2797-99. It concluded that the Second Amendment codified a pre-existing "individual right to possess and carry weapons in case of confrontation." *Id.* at 2797. The "prefatory clause"--providing "[a] well

regulated Militia being necessary to the security of a Free State"--explains only the purpose for codification, *viz.*, preventing the disbandment of the militia by the federal government. *Id.* at 2801. It says nothing about the content of the right to bear arms and does not mean the right was protected solely to preserve the militia. *Id.* "[M]ost [Americans] undoubtedly thought it even more important for self-defense and hunting," and the interest in self-defense "was the *central component* of the right itself." *Id.*

But the right protected by the Second Amendment is not unlimited. [5] *Id.* at 2816; *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047, 177 L. Ed. 2d 894 (2010) [**9] (plurality opinion of Alito, J.) (reiterating the limited nature of the right to bear arms). First, it does not extend to all types of weapons, only to those typically possessed by law-abiding citizens for lawful purposes. *Id.* at 2815-16 (interpreting *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)). In *Miller*, the Supreme Court reversed the dismissal of an indictment of two men for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of then 28 U.S.C. § 1332(c) and (d). 307 U.S. at 175. The Court held the shotgun was unprotected by the Second Amendment. *Id.* at 178. In *Heller*, the Court explained that "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons," 128 S. Ct. at 2814--those commonly owned by law-abiding citizens, *id.* at 2815-16. This proposition reflected a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 2817. Accordingly, the right to bear arms, as [*91] codified in the Second Amendment, affords no protection to "weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 2815-16.

> 5 There is some dispute [**10] over whether the language from *Heller* limiting the scope of the Second Amendment is dicta. *Compare United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (characterizing this language as dicta), *petition for cert. filed*, (U.S. June 1, 2010) (09-11204), *and United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., dissenting) (same), *cert. denied*, 130 S. Ct. 1686, 176 L. Ed. 2d 179 (2010) *with United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010) (stating this language is not dicta), *cert. denied*, 130 S. Ct. 3399, 177 L. Ed. 2d 313, 78 U.S.L.W. 3714 (U.S. June 7, 2010), *and United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (same). But even if dicta, it is Supreme Court dicta, and, as such, requires serious consideration. *See Heleva v. Brooks*, 581 F.3d 187, 188 n.1 (3d Cir. 2009) ("[W]e do not view [Supreme Court] dicta lightly." (alterations in original) (internal quotation marks omitted)); *see also Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) ("[T]here is dicta and then there is dicta, and then there is Supreme Court dicta."). Several other courts of appeals have followed this dicta. *See, e.g., United States v. Skoien*, No. 08- 3770, 2010 U.S. App. LEXIS 14262, 2010 WL 2735747, at *3 (July 13, 2010 7th Cir.) [**11] (en banc); *United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010) (extending it to cover a ban on possession by domestic violence offenders); *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009) (finding the prohibition of juvenile possession of firearms was consistent with the approach of *Heller*'s dicta), *cert. denied*, 130 S. Ct. 1109, 175 L. Ed. 2d 921 (2010); *McCane*, 573 F.3d at 1047 (relying solely on this dicta to conclude a ban on possession of firearms by felons did not offend the Second Amendment); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009), *cert. denied*, 129 S. Ct. 2814, 174 L. Ed. 2d 308 (2009); *United States v. Fincher*, 538 F.3d 868, 873-74 (8th Cir. 2008) (upholding a ban on machine guns), *cert. denied*, 129 S. Ct. 1369, 173 L. Ed. 2d 591 (2009). Moreover, the Court itself reaffirmed the presence of these limitations in *McDonald*, 130 S.Ct. at 3047 (plurality opinion of Alito, J.).

Moreover, the Court identified several other valid limitations on the right similarly derived from historical prohibitions. *Id.* at 2816-17.

> 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 [**12] 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.

Id. The Court explained that this list of "presumptively lawful regulatory measures" was merely exemplary and not exhaustive. *Id.* at 2817 n.26.

We recognize the phrase "presumptively lawful" could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny. Both readings are reasonable interpretations, but we think the better reading, based on the text and the structure of *Heller,* is the former--in other words, that these longstanding limitations are exceptions to the right to bear arms. [6] Immediately following the above-quoted passage, the Court discussed "another important limitation" on the Second Amendment--restrictions [**13] on the types of weapons individuals may possess. *Heller,* 128 S. Ct. at 2817. The Court made clear that restrictions on the possession of dangerous and unusual weapons are not constitutionally suspect because these weapons are outside the ambit of the amendment. *Id.* at 2815-16 ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . ."). By equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons, we believe the Court intended to treat them equivalently--as exceptions to the Second Amendment guarantee.

> 6 *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis,* 84 N.Y.U. L. Rev. 375, 413 (2009) ("*Heller* categorically excludes certain types of 'people' and 'Arms' from Second Amendment coverage, denying them any constitutional protection whatsoever.").

This reading is also consistent with the historical approach *Heller* used to define the scope of the right. If the Second Amendment codified a pre-existing right to bear arms, *id.* at 2797, it codified the pre-ratification understanding of that right, *id.* at 2821 ("Constitutional rights are enshrined [**14] with the scope they were understood to have when the people adopted them . . . ."). Therefore, if the right to bear arms as commonly understood at the time of ratification did not bar restrictions on possession by felons or the mentally ill, it follows that by constitutionalizing this understanding, the Second Amendment carved out these limitations from the right. Moreover, the specific language chosen by the Court refers to "prohibitions" on the possession of firearms by felons and the mentally ill. *Id.* at 2816-17. The endorsement of prohibitions as opposed to regulations, whose validity would turn on the presence or absence of certain circumstances, suggests felons and the mentally [*92] ill are disqualified from exercising their Second Amendment rights. [7] The same is true for "laws forbidding the carrying of firearms in sensitive places." [8] *Heller,* 128 S. Ct. at 2817.

> 7 *See* Blocher, *supra* note 5, at 414 (reading this language to stand for the proposition that "felons and the mentally ill, however defined, are excluded entirely from Second Amendment coverage").
>
> 8 Commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment under this reading. *Heller* [**15] endorsed "laws imposing conditions and qualifications on the commercial sale of firearms." 128 S. Ct. at 2817. In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition. If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller.*

Accordingly, *Heller* delineates some of the boundaries of the Second Amendment right to bear arms. [9] At its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous [10] weapons for self-defense in the home. *Id.* at 2821 ("[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). And certainly, to some degree, it must protect the right of law-abiding citizens to possess firearms for other, as-yet-undefined,

lawful purposes. *See, e.g., id.* at 2801 (discussing hunting's importance to the pre-ratification [**16] conception of the right); *id.* (discussing the right to bear arms as a bulwark against potential governmental oppression). The right is not unlimited, however, as the Second Amendment affords no protection for the possession of dangerous and unusual weapons, possession by felons and the mentally ill, and the carrying of weapons in certain sensitive places. *Id.* at 2816-17.

> 9 *McDonald* concerns primarily the incorporation of the Second Amendment; its discussion of the scope of the right to bear arms is coextensive with *Heller*'s.
>
> 10 By "non-dangerous weapons," we refer to weapons that do not trigger *Miller*'s exception for dangerous and unusual weapons.

But *Heller* did not purport to fully define all the contours of the Second Amendment, *id.* at 2816 ("[W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment . . . ."), and accordingly, much of the scope of the right remains unsettled. While the Second Amendment clearly protects possession for certain lawful purposes, it is not the case that all possession for these purposes is protected conduct. For example, although the Second Amendment protects the individual right to possess firearms for defense [**17] of hearth and home, *Heller* suggests, and many of our sister circuits have held, a felony conviction disqualifies an individual from asserting that interest. *See* 128 S. Ct. at 2816-17; *United States v. Rozier*, 598 F.3d 768, 770 (11th Cir. 2010) ("We find 18 U.S.C. § 922(g)(1) to be constitutional, even if a felon possesses a firearm purely for self-defense."), *cert. denied*, 130 S. Ct. 3399, 177 L. Ed. 2d 313, 78 U.S.L.W. 3714 (U.S. June 7, 2010); *see also United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009), *cert. denied*, 129 S. Ct. 2814, 174 L. Ed. 2d 308 (2009). This is so, even if a felon arguably possesses just as strong an interest in defending himself and his home as any law-abiding individual.

Moreover, *Heller*'s list of presumptively lawful regulations is not exhaustive, 128 S. Ct. at 2817 n.26, and accordingly, the [*93] Second Amendment appears to leave intact additional classes of restrictions. But the approach for identifying these additional restrictions is also unsettled. *Heller*'s identified exceptions all derived from historical regulations, but it is not clear that pre-ratification presence is the only avenue to a categorical exception. For example, does 18 U.S.C. § 922(g)(3)'s [**18] prohibition of possession by substance abusers violate the Second Amendment because no restrictions on possession by substance abusers existed at the time of ratification? Or is it valid because it presumably serves the same purpose as restrictions on possession by felons--preventing possession by presumptively dangerous individuals? *See Scarborough v. United States*, 431 U.S. 563, 572, 97 S. Ct. 1963, 52 L. Ed. 2d 582 (1977) ("[By prohibiting possession by felons,] Congress sought to rule broadly--to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." (internal quotation marks omitted)); *United States v. Cheeseman*, 600 F.3d 270, 280 (3d Cir. 2010) (noting, in a criminal forfeiture action, that congressional intent in passing § 922(g)(3) was "to keep firearms out of the possession of drug abusers, a dangerous class of individuals"), *petition for cert. filed*, 78 U.S.L.W. 3731 (U.S. June 1, 2010) (No. 09-1470). Therefore, prudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*. *Cf. Stevens*, 533 F.3d at 225 (counseling restraint when extending the logic of categorical exceptions [**19] for unprotected speech to new types of speech).

Section 922(k)'s prohibition of the possession of firearms with "removed, obliterated, or altered" serial numbers is one of those regulations unmentioned by *Heller*. Marzzarella argues § 922(k) is unconstitutional because the Second Amendment categorically protects the right to possess unmarked firearms. *Heller* defined the Second Amendment by looking to what the right meant at the time of ratification. 128 S. Ct. at 2798-99. Because the Second Amendment protects weapons "of the kind in common use at the time," *id.* at 2815 (quoting *Miller*, 307 U.S. at 179), it must, says Marzzarella, protect firearms in common use at the time of ratification. He alleges that firearms in common use in 1791 did not possess serial numbers. Accordingly, he contends the Second Amendment must protect firearms without serial numbers.

We are not persuaded by Marzzarella's historical syllogism. His argument rests on the conception of unmarked firearms as a constitutionally recognized class of firearms, in much the same way handguns constitute a class of firearms. That premise is unavailing. *Heller*

cautions against using such a historically fact-bound approach when [**20] defining the types of weapons within the scope of the right. 128 S. Ct. at 2791 ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way."). Moreover, Marzzarella himself asserts that serial numbers on firearms did not exist at the time of ratification. [11] Accordingly, [*94] they would not be within the contemplation of the pre-existing right codified by the Second Amendment. It would make little sense to categorically protect a class of weapons bearing a certain characteristic when, at the time of ratification, citizens had no concept of that characteristic or how it fit within the right to bear arms.

> 11 Marzzarella does not cite to any source for this assertion, but it appears that serial numbers arose only with the advent of mass production of firearms. *See* Thomas Henshaw, The History of Winchester Firearms 1866-1992, at ix (6th ed. 1993) (listing the first recorded serial number on a Winchester firearm as appearing in 1866); National Park Service, U.S. Department of the Interior, Springfield Armory National Historic Site -- M1865-88 rifles, http://www.nps.gov/spar/historyculture/m1865-88-rifles.htm [**21] (last visited July 8, 2010) (stating that no serial numbers appeared on Springfield Armory weapons until 1868).

Furthermore, it also would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility. *Heller* distinguished handguns from other classes of firearms, such as long guns, by looking to their functionality. *Id.* at 2818 (citing handguns' ease in storage, access, and use in case of confrontation). But unmarked firearms are functionally no different from marked firearms. The mere fact that some firearms possess a nonfunctional characteristic should not create a categorically protected class of firearms on the basis of that characteristic.

Although there is no categorical protection for unmarked firearms, Marzzarella's conduct may still fall within the Second Amendment because his possession of the Titan pistol in his home implicates his interest in the defense of hearth and home--the core protection of the Second Amendment. While the burden on his ability to defend himself is not as heavy as the one involved in *Heller,* infringements on protected rights can be, depending on the facts, as constitutionally suspect [**22] as outright bans. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree."). Marzzarella contends that by preventing him from possessing this particular handgun in his home, § 922(k) unconstitutionally limited his ability to defend himself. [12]

> 12 The Government argues Marzzarella did not possess the firearm for self-defense purposes because he intended to sell it to Toski. But the Government elected to indict Marzzarella only for possession of the handgun, not the sale. If he possessed the pistol for self-defense purposes, its subsequent sale would not somehow retroactively eliminate that interest.

We are skeptical of Marzzarella's argument that possession in the home is conclusive proof that § 922(k) regulates protected conduct. Because the presence of a serial number does not impair the use or functioning of a weapon in any way, the burden on Marzzarella's ability to defend himself is arguably *de minimis.* Section 922(k) did not bar Marzzarella from possessing any otherwise lawful marked firearm for the [**23] purpose of self-defense, and a person is just as capable of defending himself with a marked firearm as with an unmarked firearm. With or without a serial number, a pistol is still a pistol. Furthermore, it cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances. By this rationale, any type of firearm possessed in the home would be protected merely because it could be used for self-defense. Possession of machine guns or short-barreled shotguns--or any other dangerous and unusual weapon--so long as they were kept in the home, would then fall within the Second Amendment. But the Supreme Court has made clear the Second Amendment does not protect those types of weapons. *See Miller*, 307 U.S. at 178 (holding that short-barreled shotguns are unprotected); *see also United States v.* [*95] *Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."), *cert. denied,* 129 S. Ct.

1369, 173 L. Ed. 2d 591 (2009).

It is arguably possible to extend the exception [**24] for dangerous and unusual weapons to cover unmarked firearms. "[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . ." *Heller*, 128 S. Ct. at 2815-16. The District Court could not identify, and Marzzarella does not assert, any lawful purpose served by obliterating a serial number on a firearm. Because a firearm with a serial number is equally effective as a firearm without one, there would appear to be no compelling reason why a law-abiding citizen would prefer an unmarked firearm. These weapons would then have value primarily for persons seeking to use them for illicit purposes. *See United States v. Carter*, 421 F.3d 909, 910 (9th Cir. 2005) (noting that unmarked firearms have a "greater flexibility to be utilized in illicit activities" (alteration and internal quotation marks omitted)); *cf. United States v. Tagg*, 572 F.3d 1320, 1326 (11th Cir. 2009) (finding no Second Amendment protection for pipe bombs because they could not be used for legitimate lawful purposes); *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850) (holding concealed weapons could be prohibited because of their tendency to be used in violent [**25] crimes on unsuspecting victims). Nevertheless, a handgun with an obliterated serial number seems distinct from a weapon like a short-barreled shotgun. While a short-barreled shotgun is dangerous and unusual in that its concealability fosters its use in illicit activity, it is also dangerous and unusual because of its heightened capability to cause damage. *See United States v. Amos*, 501 F.3d 524, 532 (6th Cir. 2007) (McKeague, J., dissenting) ("With its shorter barrel, a sawed-off shotgun can be concealed under a large shirt or coat. It is the combination of low, somewhat indiscriminate accuracy, large destructive power, and the ability to conceal that makes a sawed-off shotgun useful for only violence against another person . . . ."); *see also United States v. Upton*, 512 F.3d 394, 404 (7th Cir. 2008) (likening sawed-off shotguns to "other dangerous weapons like bazookas, mortars, pipe bombs, and machine guns"). An unmarked firearm, on the other hand, is no more damaging than a marked firearm.

Accordingly, while the Government argues that § 922(k) does not impair any Second Amendment rights, we cannot be certain that the possession of unmarked firearms in the home is excluded from the [**26] right to bear arms. Because we conclude § 922(k) would pass constitutional muster even if it burdens protected conduct, we need not decide whether Marzzarella's right to bear arms was infringed.

B.

Assuming § 922(k) burdens Marzzarella's Second Amendment rights, we evaluate the law under the appropriate standard of constitutional scrutiny. *Heller* did not prescribe the standard applicable to the District of Columbia's handgun ban. 128 S. Ct. at 2817-18. Instead, it held that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights [the ban] . . . would fail constitutional muster." *Id.* (footnote omitted).

The Government argues a rational basis test [13] should apply to § 922(k), but *Heller* [*96] rejects that standard for laws burdening Second Amendment rights. *Id.* at 2816 n.27. The Court noted that even a law as burdensome as the District of Columbia's handgun ban would be constitutional under a rational basis test. *Id.* The fact that the ban was struck down, therefore, indicates some form of heightened scrutiny must have applied. Moreover, "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment [**27] would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.*

13 A rational basis test presumes the law is valid and asks only whether the statute is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Marzzarella, on the other hand, contends we must apply strict scrutiny [14] because the right to bear arms is an enumerated fundamental constitutional right. *See McDonald*, 130 S. Ct. at 3050 (plurality opinion of Alito, J.). Whether or not strict scrutiny may apply to particular Second Amendment challenges, it is not the case that it must be applied to all Second Amendment challenges. Strict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat First Amendment challenges that way. [15] Strict scrutiny is triggered by content-based restrictions on speech in a public forum, *see Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009), but content-neutral time, place, and manner restrictions in a public forum trigger a form of intermediate scrutiny, *see*

Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (upholding such restrictions [**28] if they "are justified without reference to the content of the regulated speech, . . . they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984))). Regulations on nonmisleading commercial speech trigger another form of intermediate scrutiny, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (requiring the regulation to directly advance a substantial governmental interest and not be more burdensome than necessary to serve that interest), whereas disclosure requirements for commercial speech trigger a rational basis test, *see Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985) ("We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. . . . But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."). In sum, the right to free speech, an undeniably [**29] enumerated fundamental right, *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see [*97] no reason why the Second Amendment would be any different.

> 14 Strict scrutiny asks whether the law is narrowly tailored to serve a compelling government interest. *Playboy Entm't Group*, 529 U.S. at 813.
>
> 15 While we recognize the First Amendment is a useful tool in interpreting the Second Amendment, we are also cognizant that the precise standards of scrutiny and how they apply may differ under the Second Amendment.

If the Second Amendment can trigger more than one particular standard of scrutiny, § 922(k) should merit a less stringent standard than the one that would have applied to the District of Columbia's handgun ban. While it is not free from doubt, we think this means that § 922(k) should be evaluated under intermediate scrutiny. The burden imposed by the law does not severely limit the possession of firearms. The District of Columbia's handgun ban is an example of a law at the far end of the spectrum of infringement on protected Second Amendment rights. *Heller*, 128 S. Ct. at 2818 [**30] ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."). It did not just regulate possession of handguns; it prohibited it, even for the stated fundamental interest protected by the right--the defense of hearth and home. *Id.* But § 922(k) does not come close to this level of infringement. It leaves a person free to possess any otherwise lawful firearm he chooses--so long as it bears its original serial number.

Furthermore, the legislative intent behind § 922(k) was not to limit the ability of persons to possess any class of firearms. While the intent of the District of Columbia's ban was to prevent the possession of handguns, § 922(k) permits possession of all otherwise lawful firearms. As Congress indicated with respect to the Omnibus Crime Control and Safe Streets Act of 1968--which included § 922(k)'s predecessor:

> It is not the purpose of the title to place any undue or unnecessary restrictions or burdens on responsible, law-abiding citizens with respect to the acquisition, possession, transporting, or use of firearms appropriate to . . . personal protection, or any other lawful activity. The title is not intended to discourage [**31] or eliminate the private ownership of such firearms by law-abiding citizens for lawful purposes . . . .

S. Rep. 90-1097, at 28 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2114. Section 922(k) is designed to prohibit possession of only unmarked firearms, while leaving the possession of marked firearms untouched.

Because § 922(k) was neither designed to nor has the effect of prohibiting the possession of any class of firearms, it is more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights. The distinction between limitations on the exercise of protected conduct and regulation of the form in which that conduct occurs also appears in the First Amendment context. Discrimination against particular messages in a public

forum is subject to the most exacting scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). Regulations of the manner in which that speech takes place, however, receive intermediate scrutiny, under the time, place, and manner doctrine. *See Ward*, 491 U.S. at 791. Accordingly, we think § 922(k) also should merit intermediate, rather than strict, scrutiny.

In the First Amendment speech context, [**32] intermediate scrutiny is articulated in several different forms. *See Turner Broad. Sys.*, 512 U.S. at 662 (requiring the regulation serve "an important or substantial" interest and not "burden substantially more speech than is necessary" to further that interest (internal quotation marks omitted)); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (requiring a "substantial" governmental goal and a "reasonable fit" between the [*98] regulation and that objective); *Ward*, 491 U.S. at 791 (applying the time, place, and manner standard which asks whether the regulation is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication); *Cent. Hudson*, 447 U.S. at 566 (requiring the regulation directly advance a substantial interest and be no more extensive than necessary to serve the interest). Although these standards differ in precise terminology, they essentially share the same substantive requirements. They all require the asserted governmental end to be more than just legitimate, either "significant," "substantial," or "important." *See, e.g., Turner Broad. Sys.*, 512 U.S. at 662; *Ward*, 491 U.S. at 791. They generally [**33] require the fit between the challenged regulation and the asserted objective be reasonable, not perfect. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001); *Fox*, 492 U.S. at 480. The regulation need not be the least restrictive means of serving the interest, *see, e.g., Turner Broad. Sys.*, 512 U.S. at 662; *Ward*, 491 U.S. at 798, but may not burden more speech than is reasonably necessary, *see, e.g., Turner Broad. Sys.*, 512 U.S. at 662; *Ward*, 491 U.S. at 800.

Those requirements are met here. First, we think it plain that § 922(k) serves a law enforcement interest in enabling the tracing of weapons via their serial numbers. Section 922(k) was enacted by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1221. [16] The objective of this Act was "to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett v. United States*, 423 U.S. 212, 218, 96 S. Ct. 498, 46 L. Ed. 2d 450 (1976). The goal of § 922(k), in particular, is to assist law enforcement by making it possible to use the serial number of a firearm recovered in a crime to trace and identify its owner and source. *See United States v. Adams*, 305 F.3d 30, 34 (1st Cir. 2002) ("[A]nyone can [**34] see what Congress was getting at in the statute. . . . [T]he statute aims to punish one who possesses a firearm whose principal means of tracing origin and transfers in ownership--its serial number--has been deleted or made appreciably more difficult to make out."); *United States v. Mobley*, 956 F.2d 450, 454 (3d Cir. 1992) ("It is no secret that a chain of custody for a firearm greatly assists in the difficult process of solving crimes. When a firearm is stolen, determining this chain is difficult and when serial numbers are obliterated, it is virtually impossible."). Firearms without serial numbers are of particular value to those engaged in illicit activity because the absence of serial numbers helps shield recovered firearms and their possessors from identification. *See Carter*, 421 F.3d at 910. Their prevalence, therefore, makes it more difficult for law enforcement to gather information on firearms recovered in crimes. Accordingly, preserving the ability of law enforcement to conduct serial number tracing--effectuated by limiting the availability of untraceable firearms--constitutes a substantial or important interest.

16 This restriction was originally enacted by the Federal Firearms [**35] Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250, 1251.

Section 922(k) also fits reasonably with that interest in that it reaches only conduct creating a substantial risk of rendering a firearm untraceable. Because unmarked weapons are functionally no different [*99] from marked weapons, § 922(k) does not limit the possession of any class of firearms. Moreover, because we, like the District Court, cannot conceive of a lawful purpose for which a person would prefer an unmarked firearm, the burden will almost always fall only on those intending to engage in illicit behavior. Regulating the possession of unmarked firearms--and no other firearms--therefore fits closely with the interest in ensuring the traceability of weapons. Accordingly, § 922(k) passes muster under intermediate scrutiny.

Although we apply intermediate scrutiny, we

conclude that even if strict scrutiny were to apply to § 922(k), the statute still would pass muster. For a law to pass muster under strict scrutiny, it must be "narrowly tailored to serve a compelling state interest." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007). We presume the law is invalid, and the government bears the burden of rebutting that presumption. [**36] *Playboy Entm't Group*, 529 U.S. at 817.

While First Amendment jurisprudence has articulated a comprehensive doctrine around what can and cannot be a compelling interest for restrictions on speech, *see, e.g.*, Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417, 2419-21 (1996), Second Amendment jurisprudence is not yet so developed. As we discussed above, serial number tracing serves a governmental interest in enabling law enforcement to gather vital information from recovered firearms. Because it assists law enforcement in this manner, we find its preservation is not only a substantial but a compelling interest. *See United States v. Salerno*, 481 U.S. 739, 749, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (holding that the government interest in preventing crime is compelling).

Marzzarella would have us conclude that serial number tracing is not a genuine compelling interest because current federal law does not mandate an intensive enough registration and tracing system to always provide a picture of the entire chain of custody of a recovered firearm. If a regulation fails to cover a substantial amount of conduct implicating the asserted compelling interest, its underinclusiveness [**37] can be evidence that the interest is not significant enough to justify the regulation. *See Carey v. Brown*, 447 U.S. 455, 465, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980); *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 541-42, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989) (Scalia, J., concurring) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (citation and internal quotations marks omitted)). As Marzzarella points out, firearms are normally traceable only to the first retail purchaser. [17] Because private sellers are not required to record their sales, firearms sold secondhand generally cannot be tracked by serial number. [18] Moreover, even federally licensed dealers, who must record their sales, are only required to keep these records for twenty years, not in perpetuity. 27 C.F.R. § 478.129(e). The [*100] absence of a more comprehensive recordation scheme means the serial number tracing of a recovered firearm generally does not permit law enforcement agencies to follow the firearm through every transfer from the initial retail sale to the end user. Marzzarella argues this renders § 922(k) fatally underinclusive.

17 *See* Department of the Treasury, Bureau of [**38] Alcohol, Tobacco & Firearms, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* x (2000), *available at* http://www.mayorsagainstillegalguns.org/downloads/pdf/Following_the_Gun%202000.p df. Although the ATF report *Following the Gun* does not appear in the record, Marzzarella cites to it in his opening brief. We consider its use unobjectionable.

18 *See id.* at 17 (referring to firearms sold secondhand as "untraceable").

We see no reason to view serial number tracing so narrowly. The direct tracing of the chain of custody of firearms involved in crimes is one useful means by which serial numbers assist law enforcement. [19] But serial number tracing also provides agencies with vital criminology statistics--including a detailed picture of the geographical source areas for firearms trafficking and "time-to-crime" statistics which measure the time between a firearm's initial retail sale and its recovery in a crime [20]--as well as allowing for the identification of individual dealers involved in the trafficking of firearms and the matching of ballistics data with recovered firearms. [21] Section 922(k), therefore, "demonstrate[s] [Congress's] commitment to advancing" the compelling [**39] interest of preserving serial number tracing. *Fla. Star*, 491 U.S. at 540.

19 *See Following the Gun, supra* note 17, at 44 ("[T]racing was used as an investigative tool to gain information on recovered crime guns in 60 percent of the investigations . . . .").

20 The reporting of trace data by the ATF has been partially restricted by the Tiahrt Amendments to federal appropriations bills, Pub. L. No. 111-8, 123 Stat. 524, 575 (2009) (codified as Note to 18 U.S.C. § 923). Currently, the restriction prevents the ATF from publicly disclosing trace data, and precludes the data from

being disclosed or used in any civil action. *Id.* It does not restrict the reporting of this data to law enforcement agencies. *Id.*

21 *See Following the Gun, supra* note 17, at 41-44.

Section 922(k) must also be narrowly tailored to serve that interest. Narrow tailoring requires that the regulation actually advance the compelling interest it is designed to serve. *See Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 226, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989). The law must be the least-restrictive method of serving that interest, and the burdening of a significant amount of protected conduct not implicating the interest is evidence the regulation is [**40] insufficiently tailored. *See Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). Section 922(k) restricts possession only of weapons which have been made less susceptible to tracing. Because it does not limit the possession of any otherwise lawful firearm, it does not burden more possession than necessary to protect the interest in serial number tracing.

Marzzarella argues § 922(k) is overinclusive and, therefore, fails narrow tailoring. Because in certain cases--such as Marzzarella's--it is possible through laboratory procedures to discern the original serial number of a firearm despite efforts to remove, obliterate, or alter it, he contends § 922(k) goes further than is required. Presumably, Marzzarella believes the overinclusiveness could be cured by applying § 922(k) only where, upon recovery of the firearm and subsequent laboratory testing, the serial number still cannot be read. 22 But we do not think the fact that, in some cases, ex post circumstances [*101] can allow for the deciphering of a serial number renders § 922(k) insufficiently tailored. The statute protects the compelling interest of tracing firearms by discouraging the possession and use of firearms that are harder or impossible [**41] to trace. It does this by criminalizing the possession of firearms which have been altered to make them harder or impossible to trace. That these actions sometimes fail does not make the statute any less properly designed to remedy the problem of untraceable firearms. Accordingly, we find § 922(k) is narrowly tailored.

22 We have our doubts about the administrability of such a standard. For starters, how much effort by law enforcement agencies would be required before courts could determine the serial number was unreadable? Moreover, the standard would provide uneven deterrence because persons would be unaware at the time of commission whether their conduct would lead to criminal liability or not. Section 922(k), read in this manner, would likely be difficult to apply.

III.

Second Amendment doctrine remains in its nascency, and lower courts must proceed deliberately when addressing regulations unmentioned by *Heller.* Accordingly, we hesitate to say Marzzarella's possession of an unmarked firearm in his home is unprotected conduct. But because § 922(k) would pass muster under either intermediate scrutiny or strict scrutiny, Marzzarella's conviction must stand.

For the foregoing reasons, we [**42] will affirm the District Court's denial of Marzzarella's motion to dismiss the indictment and affirm his judgment of conviction and sentence.

EXHIBIT 11

VALLEY FORGE CHRISTIAN COLLEGE v. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

No. 80-327

SUPREME COURT OF THE UNITED STATES

454 U.S. 464; 102 S. Ct. 752; 70 L. Ed. 2d 700; 1982 U.S. LEXIS 22; 50 U.S.L.W. 4103

November 4, 1981, Argued
January 12, 1982, Decided

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

DISPOSITION: 619 F.2d 252, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner religious institution appealed a decision of the United States Court of Appeals for the Third Circuit, which held that respondents, an organization and its employees advocating separation of church and state, had standing to seek declaratory and injunctive relief on the ground that the conveyance of property to petitioner by the United States pursuant to 40 U.S.C.S. § 471 et seq. violated respondents' rights under U.S. Const. art. I.

OVERVIEW: Respondents, a nonprofit organization and its employees, brought an action to compel petitioner religious institution to transfer property back to the United States on the ground that the conveyance of the property to petitioner under the Federal Property and Administrative Services Act of 1949, 40 U.S.C.S. § 471 et seq., was unconstitutional. The trial court dismissed respondents' action for lack of standing, and on appeal the circuit court reversed, finding that respondents had standing as citizens alleging a violation of their personal rights under the Establishment Clause, U.S. Const. art. I. On further appeal, the Court reversed again, holding that enforcement of the Establishment Clause did not create an exception to the requirement under U.S. Const. art. III that a plaintiff had to allege a distinct and palpable injury to himself in order to invoke judicial power. Also, respondents did not have standing as taxpayers because they were challenging an administrative ruling rather than congressional action, and the ruling was authorized under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, rather than the Taxing and Spending Clause of Article I.

OUTCOME: The judgment holding that respondents had standing to challenge a federal agency's conveyance of property to petitioner religious institution was reversed where the Court found that such standing would violate constitutional limits on judicial power because respondents had failed to identify a personal, distinct and palpable injury to be addressed and were challenging an administrative ruling rather than congressional action.

SYLLABUS

Pursuant to its authority under the Property Clause, Congress enacted the Federal Property and Administrative Services Act of 1949 to provide an economical and efficient system for the disposal of

surplus Federal Government property. Under the statute, property that has outlived its usefulness to the Government is declared "surplus" and may be transferred to private or other public entities. The Act authorizes the Secretary of Health, Education, and Welfare (HEW) (now the Secretary of Education) to assume responsibility for disposing of surplus real property for educational use, and he may sell such property to nonprofit, tax-exempt educational institutions for consideration that takes into account any benefit which has accrued or may accrue to the United States from the transferee's use of the property. Property formerly used as a military hospital was declared to be "surplus property" under the Act and was conveyed by the Department of HEW to petitioner church-related college. The appraised value of the property, $ 577,500, was discounted by the Secretary of HEW's computation of a 100% public benefit allowance, thus permitting petitioner to acquire the property without making any financial payment. Respondents, an organization dedicated to the separation of church and State and several of its employees, brought suit in Federal District Court, challenging the conveyance on the ground that it violated the Establishment Clause of the First Amendment, and alleging that each member of respondent organization "would be deprived of the fair and constitutional use of his (her) tax dollars." The District Court dismissed the complaint on the ground that respondents lacked standing to sue as taxpayers under *Flast v. Cohen*, 392 U.S. 83, and failed to allege any actual injury beyond a generalized grievance common to all taxpayers. The Court of Appeals reversed, holding that although respondents lacked standing as taxpayers to challenge the conveyance, they had standing merely as "citizens," claiming "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion,'" which standing was sufficient to satisfy the "case or controversy" requirement of Art. III.

Held: Respondents do not have standing, either in their capacity as taxpayers or as citizens, to challenge the conveyance in question. Pp. 471-490.

(a) The exercise of judicial power under Art. III is restricted to litigants who can show "injury in fact" resulting from the action that they seek to have the court adjudicate. Pp. 471-476.

(b) Respondents are without standing to sue as taxpayers, because the source of their complaint is not a congressional action but a decision by HEW to transfer a parcel of federal property and because the conveyance in question was not an exercise of Congress' authority conferred by the Taxing and Spending Clause but by the Property Clause. Cf. *Flast v. Cohen, supra.* Pp. 476-482.

(c) Nor have respondents sufficiently alleged any other basis for standing to bring suit. Although they claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not injury sufficient to confer standing under Art. III. While respondents are firmly committed to the constitutional principle of separation of church and State, standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. Pp. 482-487.

(d) Enforcement of the Establishment Clause does not justify special exceptions from the standing requirements of Art. III. There is no place in our constitutional scheme for the philosophy that the business of the federal courts is correcting constitutional errors and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. And such philosophy does not become more palatable when the underlying merits concern the Establishment Clause. Pp. 488-490.

COUNSEL: C. Clark Hodgson, Jr., argued the cause and filed a brief for petitioner.

Solicitor General Lee argued the cause for the federal parties as respondents under this Court's Rule 19.6 in support of petitioner. With him on the briefs were former Solicitor General McCree, Deputy Solicitor General Geller, Deputy Solicitor General Shapiro, Leonard Schaitman, and Bruce Bagni.

Lee Boothby argued the cause for respondents. With him on the brief was Robert W. Nixon. *

* Briefs of amici curiae urging affirmance were filed by Nathan Z. Dershowitz and Marc D. Stern for the American Jewish Congress et al.; and by Leo Pfeffer for the National Coalition for Public Education and Religious Liberty et al.

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, post, p. 490. STEVENS, J., filed a dissenting opinion, post, p. 513.

OPINION BY: REHNQUIST

OPINION

[*466] [**755] [***705] JUSTICE REHNQUIST delivered the opinion of the Court.

I

Article IV, § 3, cl. 2, of the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Shortly after the termination of hostilities in the Second World War, Congress enacted the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U. S. C. § 471 *et seq.* (1976 ed. and Supp. III). The Act was designed, in part, to provide "an economical and efficient system for . . . the disposal of surplus property." 63 Stat. 378, 40 U. S. C. § 471. In furtherance of this policy, federal agencies are directed to maintain adequate inventories of the property under their control and to identify excess property for transfer to other agencies able to use it. See 63 Stat. 384, 40 U. S. C. §§ 483(b), (c). [1] Property that has outlived its usefulness to the Federal Government is declared "surplus" [2] and may be transferred to private [*467] or other public entities. See generally 63 Stat. 385, as amended, 40 U. S. C. § 484.

1 The Act defines "excess property" as "property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities." 63 Stat. 378, 40 U. S. C. § 472(e).

2 The Act defines "surplus property" as "any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator [of General Services]." 63 Stat. 379, 40 U. S. C. § 472(g).

[***706] The Act authorizes the Secretary of Health, Education, and Welfare (now the Secretary of Education [3]) to assume responsibility for disposing of surplus real property "for school, classroom, or other educational use." 63 Stat. 387, as amended, 40 U. S. C. § 484(k)(1). Subject to the disapproval of the Administrator of General Services, the Secretary may sell or lease the property to nonprofit, tax-exempt educational institutions for consideration that [**756] takes into account "any benefit which has accrued or may accrue to the United States" from the transferee's use of the property. 63 Stat. 387, 40 U. S. C. §§ 484(k)(1)(A), (C). [4] By regulation, the Secretary has provided for the computation of a "public benefit allowance," which discounts the transfer price of the property "on the basis of benefits to the United States from the use of such property for educational purposes." 34 CFR § 12.9(a) (1980). [5]

3 See 20 U. S. C. §§ 3411, 3441(a)(2)(P) (1976 ed., Supp. III).

4 The property is to "be awarded to the applicant having a program of utilization which provides, in the opinion of the Department [of Education], the greatest public benefit." 34 CFR § 12.5 (1980). Applicants must be willing and able to assume immediate responsibility for the property and must demonstrate the financial capacity to implement the approved program of educational use. § 12.8(b).

5 In calculating the public benefit allowance, the Secretary considers factors such as the applicant's educational accreditation, sponsorship of public service training, plans to introduce new instructional programs, commitment to student health and welfare, research, and service to the handicapped. 34 CFR pt. 12, Exh. A (1980).

The property which spawned this litigation was acquired by the Department of the Army in 1942, as part of a larger tract of approximately 181 acres of land northwest of Philadelphia. The Army built on that land the Valley Forge General Hospital, and for 30 years thereafter, that hospital provided medical care for members of the Armed Forces. In April 1973, as part of a plan to reduce the number of military [*468] installations in the United States, the Secretary of Defense proposed to close the hospital, and the General Services Administration declared it to be "surplus property."

The Department of Health, Education, and Welfare

(HEW) eventually assumed responsibility for disposing of portions of the property, and in August 1976, it conveyed a 77-acre tract to petitioner, the Valley Forge Christian College. [6] The appraised value of the property at the time of conveyance was $ 577,500. [7] This appraised value was discounted, however, by the Secretary's computation of a 100% public benefit allowance, which permitted petitioner to acquire the property without making any financial payment for it. The deed from HEW conveyed the land in fee simple with certain conditions subsequent, which required petitioner to use the property for 30 years solely for the educational purposes described in petitioner's application. In that description, petitioner [***707] stated its intention to conduct "a program of education . . . meeting the accrediting standards of the State of Pennsylvania, The American Association of Bible Colleges, the Division of Education of the General Council of the Assemblies of God and the Veterans Administration."

6 The remaining property was conveyed to local school districts for educational purposes or set aside for park and recreational use. At the time of the conveyance, petitioner was known as the Northeast Bible College.

7 The appraiser placed no value on the buildings and fixtures situated on the tract. The buildings had been constructed for use as an Army hospital and, in his view, the expense necessary to render them useful for other purposes would have offset the value of such an endeavor.

Petitioner is a nonprofit educational institution operating under the supervision of a religious order known as the Assemblies of God. By its own description, petitioner's purpose is "to offer systematic training on the collegiate level to men and women for Christian service as either ministers or laymen." App. 34. Its degree programs reflect this orientation by providing courses of study "to train leaders for church related ministries." *Id.*, at 102. Faculty members [*469] must "have been baptized in the Holy Spirit and be living consistent Christian lives," *id.*, at 37, and all members of the college administration must be affiliated with the Assemblies of God, *id.*, at 36. In its application for the 77-acre tract, petitioner represented that, if it obtained the property, it would make "additions to its offerings in the arts and humanities," and would strengthen its "psychology" and "counselling" courses to provide services in inner-city areas.

[**757] In September 1976, respondents Americans United for Separation of Church and State, Inc. (Americans United), and four of its employees, learned of the conveyance through a news release. Two months later, they brought suit in the United States District Court for the District of Columbia, later transferred to the Eastern District of Pennsylvania, to challenge the conveyance on the ground that it violated the Establishment Clause of the First Amendment. [8] See *id.*, at 10. In its amended complaint, Americans United described itself as a nonprofit organization composed of 90,000 "taxpayer members." The complaint asserted that each member "would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution." *Ibid.* Respondents sought a declaration that the conveyance was null and void, and an order compelling petitioner to transfer the property back to the United States. *Id.*, at 12.

8 "Congress shall make no law respecting an establishment of religion. . . ."

On petitioner's motion, the District Court granted summary judgment and dismissed the complaint. App. to Pet. for Cert. A42. The court found that respondents lacked standing to sue as taxpayers under *Flast v. Cohen*, 392 U.S. 83 (1968), and had "failed to allege that they have suffered any actual or concrete injury beyond a generalized grievance common to all taxpayers." App. to Pet. for Cert. A43.

[*470] Respondents appealed to the Court of Appeals for the Third Circuit, which reversed the judgment of the District Court by a divided vote. *Americans United v. U.S. Dept. of HEW*, 619 F.2d 252 (1980). All members of the court agreed that respondents lacked standing as taxpayers to challenge the conveyance under *Flast v. Cohen*, *supra*, since that case extended standing to taxpayers *qua* taxpayers only to challenge congressional exercises of the power to tax and spend conferred by Art. I, § 8, of the Constitution, and this conveyance was authorized [***708] by legislation enacted under the authority of the Property Clause, Art. IV, § 3, cl. 2. Notwithstanding this significant factual difference from *Flast*, the majority of the Court of Appeals found that respondents had standing merely as "citizens," claiming "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" 619 F.2d,

at 261. In the majority's view, this "citizen standing" was sufficient to satisfy the "case or controversy" requirement of Art. III. One judge, perhaps sensing the doctrinal difficulties with the majority's extension of standing, wrote separately, expressing his view that standing was necessary to satisfy "the need for an available plaintiff," without whom "the Establishment Clause would be rendered virtually unenforceable" by the judiciary. *Id.*, at 267, 268. The dissenting judge expressed the view that respondents' allegations constituted a "generalized grievance . . . too abstract to satisfy the injury in fact component of standing." *Id.*, at 269. He therefore concluded that their standing to contest the transfer was barred by this Court's decisions in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), and *United States v. Richardson*, 418 U.S. 166 (1974). 619 F.2d, at 270-271.

[***LEdHR1A] [1A]Because of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the Court of Appeals, we granted certiorari, 450 U.S. 909 (1981), and we now reverse.

[*471] II

[***LEdHR2] [2]Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity [**758] "to adjudge the legal rights of litigants in actual controversies." *Liverpool S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892). Otherwise, the power "is not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States." *United States v. Ferreira*, 13 How. 40, 48 (1852).

As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit. The term "standing" [***709] subsumes a blend of constitutional requirements and prudential considerations, see *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and it has not always been clear in the opinions of this Court whether particular features of the "standing" requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution. See *Flast v. Cohen*, *supra*, at 97.

[*472] [***LEdHR3] [3]A recent line of decisions, however, has resolved that ambiguity, at least to the following extent: at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).[9] In this manner does Art. III limit the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S., at 97.

> 9 See *Watt* v. *Energy Action Educational Foundation*, *ante*, at 161; *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261, 262 (1977); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218, 220-221 (1974); *United States v. Richardson*, 418 U.S. 166, 179-180 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974); *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617-618 (1973).

The requirement of "actual injury redressable by the court," *Simon*, *supra*, at 39, serves several of the "implicit

policies embodied in Article III," *Flast, supra*, at 96. It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The "standing" requirement serves other purposes. [**759] Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

[*473] The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their authority which would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 [***710] (1973). Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums. As we said in *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972):

"The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."

The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show "injury in fact" resulting from the action which they seek to have the court adjudicate.

The exercise of the judicial power also affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch. While the exercise of that "ultimate and supreme function," *Chicago & Grand Trunk R. Co.* v. *Wellman, supra*, at 345, is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role. While the propriety of such action by a federal court has been recognized since [*474] *Marbury v. Madison*, 1 Cranch 137 (1803), it has been recognized as a tool of last resort on the part of the federal judiciary throughout its nearly 200 years of existence:

"[Repeated] and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches." *United States v. Richardson*, 418 U.S., at 188 (POWELL, J., concurring).

Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury. Thus, this Court has "[refrained] from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Blair v. United States*, 250 U.S. 273, 279 [***711] (1919). The importance of this precondition should not be underestimated as a means of "[defining] the role assigned to the judiciary in a tripartite allocation of power." *Flast v. Cohen, supra*, at 95.

[**760] Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S., at 499. [10] In addition, even when the plaintiff has alleged [*475] redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches.

Id., at 499-500. [11] Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970). [12]

10 See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, *supra*, at 80; *Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976).

11 See *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, at 100; *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S., at 80.

12 See *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, at 100, n. 6; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39, n. 19 (1976).

[***LEdHR4] [4]Merely to articulate these principles is to demonstrate their close relationship to the policies reflected in the Art. III requirement of actual or threatened injury amenable to judicial remedy. But neither the counsels of prudence nor the policies implicit in the "case or controversy" requirement should be mistaken for the rigorous Art. III requirements themselves. Satisfaction of the former cannot substitute for a demonstration of "'distinct and palpable injury' . . . that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S., at 100 (quoting *Warth* v. *Seldin*, *supra*, at 501). That requirement states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called "prudential" considerations.

We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition. But of one thing we may be sure: Those who do not possess Art. III standing may [*476] not litigate as suitors in the courts [***712] of the United States. [13] Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if [**761] possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals.

13 JUSTICE BRENNAN's dissent takes us to task for "[tending] merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law." *Post*, at 490. Were this Court constituted to operate a national classroom on "the meaning of rights" for the benefit of interested litigants, this criticism would carry weight. The teaching of Art. III, however, is that constitutional adjudication is available only on terms prescribed by the Constitution, among which is the requirement of a plaintiff with standing to sue. The dissent asserts that this requirement "overrides no other provision of the Constitution," *post*, at 493, but just as surely the Art. III power of the federal courts does not wax and wane in harmony with a litigant's desire for a "hospitable forum," *post*, at 494. Article III obligates a federal court to act only when it is assured of the power to do so, that is, when it is called upon to resolve an actual case or controversy. Then, and only then, may it turn its attention to other constitutional provisions and presume to provide a forum for the adjudication of rights. See *Ashwander* v. *TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

III

[***LEdHR1B] [1B] [***LEdHR5A] [5A]The injury alleged by respondents in their amended complaint is the "[deprivation] of the fair and constitutional use of [their] tax dollar." App. 10. [14] As a result, our discussion [*477] must begin with *Frothingham* v. *Mellon*, 262 U.S. 447 (1923) (decided with *Massachusetts* v. *Mellon*). In that action a taxpayer brought suit challenging the constitutionality of the Maternity Act of 1921, which provided federal funding to the States for the purpose of improving maternal and infant health. The injury she alleged consisted of the burden of taxation in support of an unconstitutional regime, which she characterized as a

deprivation of property without due process. "Looking through forms of words to the substance of [the] complaint," the Court concluded that the only "injury" was the fact "that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional." *Id.*, at 488. Any tangible effect of the challenged statute on the plaintiff's tax burden was "remote, fluctuating and uncertain." *Id.*, at 487. In rejecting this as a cognizable injury sufficient to establish standing, the Court admonished:

[***713] "The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . . Here the parties plaintiff have no such case." *Id.*, at 488.

14 [***LEdHR5B] [5B]

> Respondent Americans United has alleged no injury to itself as an organization, distinct from injury to its taxpayer members. As a result, its claim to standing can be no different from those of the members it seeks to represent. The question is whether "its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S., at 511. See *Simon v. Eastern Kentucky Welfare Rights Org.*, *supra*, at 40; *Sierra Club v. Morton*, 405 U.S. 727, 739-741 (1972).

Following the decision in *Frothingham*, the Court confirmed that the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer. In *Doremus v. Board of Education*, 342 U.S. 429 (1952), plaintiffs brought suit as citizens and taxpayers, claiming that a New Jersey law which authorized public school teachers in the classroom to read passages from [*478] the Bible violated the Establishment Clause of the First Amendment. The Court dismissed the appeal for lack of standing:

"This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure. . . . Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'" *Id.*, at 433-434 (quoting *Frothingham v. Mellon*, *supra*, at 488) (citations omitted).

In short, the Court found that plaintiffs' grievance was "not a direct dollars-and-cents injury but is a religious difference." 342 U.S., at 434. A case or controversy did not exist, even though the "clash of interests [was] real and . . . strong." *Id.*, at 436 (Douglas, J., dissenting).

The Court again visited the problem of taxpayer standing in *Flast v. Cohen*, 392 U.S. 83 (1968). The taxpayer plaintiffs in *Flast* sought to enjoin the expenditure of federal funds under the Elementary and Secondary Education Act of 1965, which they alleged were being used to support religious schools in violation of the Establishment Clause. The Court developed a two-part test to determine whether the plaintiffs had standing to sue. First, because a taxpayer alleges injury only by virtue of his liability for taxes, the Court held that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." [*479] *Id.*, at 102. Second, the Court required the taxpayer to "show that the challenged enactment exceeds [***714] specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Id.*, at 102-103.

The plaintiffs in *Flast* satisfied this test because "[their] constitutional challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare," *id.*, at 103, and because the Establishment Clause, on which plaintiffs' complaint

rested, "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8," *id.*, at 104. The Court distinguished *Frothingham v. Mellon, supra*, on the ground that Mrs. Frothingham had relied, not on a specific limitation on the power to tax and spend, but on a more general claim based on the Due Process Clause. 392 U.S., at 105. Thus, the Court reaffirmed that the "case or controversy" aspect of standing is unsatisfied "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.*, at 106.

Unlike the plaintiffs in *Flast*, respondents fail the first prong of the test for taxpayer standing. Their claim is deficient in two respects. First, the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property. [15] *Flast* limited taxpayer standing to challenges directed "only [at] exercises of congressional power." *Id.*, at 102. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S., at 228 (denying standing because the taxpayer plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch").

15 Respondents do not challenge the constitutionality of the Federal Property and Administrative Services Act itself, but rather a particular Executive Branch action arguably authorized by the Act.

[*480] [**762] Second, and perhaps redundantly, the property transfer about which respondents complain was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8. The authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2. [16] [**763] Respondents do not dispute this conclusion, see Brief for Respondents Americans United [***715] et al. 10, and it is decisive of any claim of taxpayer standing under the *Flast* precedent. [17]

16 The Act was designed "to simplify the procurement, utilization, and disposal of Government property" in order to achieve an "efficient, businesslike system of property management." S. Rep. No. 475, 81st Cong., 1st Sess., 1 (1949). See H. R. Rep. No. 670, 81st Cong., 1st Sess., 1-2 (1949). Among the central purposes of the Act was the "maximum utilization of property already owned by the Government and minimum purchasing of new property." S. Rep. No. 475, *supra*, at 4. Congress recognized, however, that from time to time certain property would become surplus to the Government, and in particular, property acquired by the military to meet wartime contingencies. Congress provided a means of disposing of this property to meet well-recognized public priorities, including education. See S. Rep. No. 475, *supra*, at 4-5; H. R. Rep. No. 670, *supra*, at 5-6.

17 Although not necessary to our decision, we note that any connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent. Although public funds were expended to establish the Valley Forge General Hospital, the land was acquired and the facilities constructed 30 years prior to the challenged transfer. Respondents do not challenge this expenditure, and we do not immediately perceive how such a challenge might now be raised. Nor do respondents dispute the Government's conclusion that the property has become useless for federal purposes and ought to be disposed of in some productive manner. In fact, respondents' only objection is that the Government did not receive adequate consideration for the transfer, because petitioner's use of the property will not confer a public benefit. See Brief for Respondents Americans United et al. 13. Assuming, *arguendo*, that this proposition is true, an assumption by no means clear, there is no basis for believing that a transfer to a different purchaser would have added to Government receipts. As the Government argues, "the ultimate purchaser would, in all likelihood, have been another non-profit institution or local school district rather than a purchaser for cash." Brief for Federal Respondents 30. Moreover, each year of delay in disposing of the property *depleted* the Treasury by the amounts necessary to maintain a facility that had lost its value to the Government. Even if respondents had brought their claim within the outer limits of *Flast*, therefore, they still would have encountered serious difficulty in establishing that they "personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S., at 508.

[*481] Any doubt that once might have existed concerning the rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied should have been erased by this Court's recent decisions in *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, *supra*. In *Richardson*, the question was whether the plaintiff had standing as a federal taxpayer to argue that legislation which permitted the Central Intelligence Agency to withhold from the public detailed information about its expenditures violated the Accounts Clause of the Constitution. [18] We rejected plaintiff's claim of standing because "his challenge [was] not addressed to the taxing or spending power, but to the statutes regulating the CIA." 418 U.S., at 175. The "mere recital" of those claims "[demonstrated] how far he [fell] short of the standing criteria of *Flast* and how neatly he [fell] within the *Frothingham* holding left undisturbed." *Id.*, at 174-175.

> 18 U.S. Const., Art. I, § 9, cl. 7 ("[And] a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time").

The claim in *Schlesinger* was marred by the same deficiency. Plaintiffs in that case argued that the Incompatibility Clause of Art. I [19] prevented certain Members of Congress from holding commissions in the Armed Forces Reserve. We summarily rejected their assertion of standing as taxpayers because they "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status." 418 U.S., at 228 (footnote omitted).

> 19 U.S. Const., Art. I, § 6, cl. 2 ("[No] Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office").

[*482] Respondents, therefore, are plainly without standing to sue as taxpayers. The Court of Appeals apparently reached the same conclusion. [***716] It remains to be seen [**764] whether respondents have alleged any other basis for standing to bring this suit.

IV

[***LEdHR1C] [1C] Although the Court of Appeals properly doubted respondents' ability to establish standing solely on the basis of their taxpayer status, it considered their allegations of taxpayer injury to be "essentially an assumed role." 619 F.2d, at 261.

"Plaintiffs have no reason to expect, nor perhaps do they care about, any personal tax saving that might result should they prevail. The crux of the interest at stake, the plaintiffs argue, is found in the Establishment Clause, not in the supposed loss of money as such. As a matter of primary identity, therefore, the plaintiffs are not so much taxpayers as separationists. . . ." *Ibid.*

In the court's view, respondents had established standing by virtue of an "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" *Ibid.* The court distinguished this "injury" from "the question of 'citizen standing' as such." *Id.*, at 262. Although citizens generally could not establish standing simply by claiming an interest in governmental observance of the Constitution, respondents had "set forth instead a particular and concrete injury" to a "personal constitutional right." *Id.*, at 265.

[***LEdHR6] [6]The Court of Appeals was surely correct in recognizing that the Art. III requirements of standing are not satisfied by "the abstract injury in nonobservance of the Constitution asserted by . . . citizens." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S., at 223, n. 13.This Court repeatedly has rejected claims of standing predicated on "'the right, possessed by every citizen, to require that the [*483] Government be administered according to law. . . .' *Fairchild v. Hughes*, 258 U.S. 126, 129 [1922]." *Baker v. Carr*, 369 U.S. 186, 208 (1962). See *Schlesinger v. Reservists Committee to Stop the War*, *supra*, at 216-222; *Laird v. Tatum*, 408 U.S. 1 (1972); *Ex parte Levitt*, 302 U.S. 633 (1937). Such claims amount to little more than attempts "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Flast v. Cohen*, 392 U.S., at 106.

In finding that respondents had alleged something more than "the generalized interest of all citizens in constitutional governance," *Schlesinger*, *supra*, at 217, the Court of Appeals relied on factual differences which we do not think amount to legal distinctions. The court decided that respondents' claim differed from those in *Schlesinger* and *Richardson*, which were predicated, respectively, on the Incompatibility and Accounts

Clauses, because "it is at the very least arguable that the Establishment Clause creates in each citizen a 'personal constitutional right' to a government that does not establish religion." 619 F.2d, at 265 (footnote omitted). The court found it unnecessary to determine whether this "arguable" proposition was correct, since it judged the mere allegation [***717] of a legal right sufficient to confer standing.

This reasoning process merely disguises, we think with a rather thin veil, the inconsistency of the court's results with our decisions in *Schlesinger* and *Richardson*. The plaintiffs in those cases plainly asserted a "personal right" to have the Government act in accordance with their views of the Constitution; indeed, we see no barrier to the *assertion* of such claims with respect to any constitutional provision. But assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.

[*484] [**765] Nor can *Schlesinger* and *Richardson* be distinguished on the ground that the Incompatibility and Accounts Clauses are in some way less "fundamental" than the Establishment Clause. Each establishes a norm of conduct which the Federal Government is bound to honor -- to no greater or lesser extent than any other inscribed in the Constitution. To the extent the Court of Appeals relied on a view of standing under which the Art. III burdens diminish as the "importance" of the claim on the merits increases, we reject that notion. The requirement of standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen, supra*, at 99. Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complementary "sliding scale" of standing which might permit respondents to invoke the judicial power of the United States. [20] [*485] "The proposition [***718] that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S., at 227.

20 JUSTICE BRENNAN's dissent is premised on a revisionist reading of our precedents which leads to the conclusion that the Art. III requirement of standing is satisfied by any taxpayer who contends "that the Federal Government has exceeded the bounds of the law in allocating its largesse," *post*, at 508. "The concept of taxpayer injury necessarily recognizes the continuing stake of the taxpayer in the disposition of the Treasury to which he has contributed his taxes, and his right to have those funds put to lawful uses." *Post*, at 497-498. On this novel understanding, the dissent reads cases such as *Frothingham* and *Flast* as decisions on the merits of the taxpayers' claims. *Frothingham* is explained as a holding that a taxpayer ordinarily has no legal right to challenge congressional expenditures. *Post*, at 499. The dissent divines from *Flast* the holding that a taxpayer *does* have an enforceable right "to challenge a federal bestowal of largesse" for religious purposes. *Post*, at 509. This right extends to "the Government as a whole, regardless of which branch is at work in a particular instance," *post*, at 511, and regardless of whether the challenged action was an exercise of the spending power, *post*, at 512.

However appealing this reconstruction of precedent may be, it bears little resemblance to the cases on which it purports to rest. *Frothingham* and *Flast* were decisions that plainly turned on *standing*, and just as plainly they rejected any notion that the Art. III requirement of direct injury is satisfied by a taxpayer who contends "that the Federal Government has exceeded the bounds of the law in allocating its largesse." *Post*, at 508. Moreover, although the dissent's view may lead to a result satisfying to many in this case, it is not evident how its substitution of "legal interest," *post*, at 499, for "standing" enhances "our understanding of the meaning of rights under law," *post*, at 490. Logically, the dissent must shoulder the burden of explaining why taxpayers with standing have no "legal interest" in congressional expenditures except when it is possible to allege a violation of the Establishment Clause: yet it does not attempt to do so.

Nor does the dissent's interpretation of standing adequately explain cases such as *Schlesinger* and *Richardson*. According to the dissent, the taxpayer plaintiffs in those cases

lacked standing, not because they failed to challenge an exercise of the spending power, but because they did not complain of "the distribution of Government largesse." *Post*, at 511. And yet if the standing of a taxpayer is established by his "continuing stake . . . in the disposition of the Treasury to which he has contributed his taxes," *post*, at 497-498, it would seem to follow that he can assert a right to examine the budget of the CIA, as in *Richardson*, see 418 U.S., at 170, and a right to argue that Members of Congress cannot claim Reserve pay from the Government, as in *Schlesinger*, see 418 U.S., at 211. Of course, both claims have been rejected, precisely because Art. III requires a demonstration of redressable injury that is not satisfied by a claim that tax moneys have been spent unlawfully.

[***LEdHR7] [7]The complaint in this case shares a common deficiency with those in *Schlesinger* and *Richardson*. Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in [*486] constitutional terms. It is evident that [**766] respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[That] concrete adverseness which sharpens the presentation of issues," *Baker v. Carr*, 369 U.S., at 204, is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself. [21]

21 In *Schlesinger*, we rejected the argument that standing should be recognized because "the adverse parties sharply conflicted in their interests and views and were supported by able briefs and arguments." 418 U.S., at 225:

"We have no doubt about the sincerity of respondents' stated objectives and the depth of their commitment to them. But the essence of standing 'is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct.' *Doremus v. Board of Education*, 342 U.S. 429, 435 (1952)." *Id.*, at 225-226.

[***LEdHR8A] [8A]In reaching this conclusion, we do not retreat from our earlier holdings that standing may be predicated on noneconomic injury. See, *e. g.*, *United States v. SCRAP*, 412 U.S., at 686-688; *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S., at 153-154. We simply cannot see that respondents have alleged an *injury of any* kind, economic or otherwise, sufficient to confer standing. [22] Respondents [***719] complain [*487] of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; [23] their organizational headquarters are located in Washington, D. C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. [24] The federal courts were [**767] simply not constituted as ombudsmen of the general welfare.

22 Respondents rely on our statement in *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S., at 154, that "[a] person or family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. *Abington School District v. Schempp*, 374 U.S. 203 [1963]." Respondents apparently construe this language to mean that any person asserting an Establishment Clause violation possesses a "spiritual stake" sufficient to confer standing. The language will not bear that weight. First, the language cannot be read apart from the context of its accompanying reference to *Abington School District v. Schempp*, 374 U.S. 203 (1963). In *Schempp*, the Court invalidated laws that required Bible reading in the public schools. Plaintiffs were children who attended the schools in question, and their parents. The Court noted:

"It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. . . . The

parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain." *Id.*, at 224, n. 9.

The Court also drew a comparison with *Doremus v. Board of Education*, 342 U.S. 429 (1952), in which the identical substantive issues were raised, but in which the appeal was "dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers." 374 U.S., at 224, n. 9. The Court's discussion of the standing issue is not extensive, but it is sufficient to show the error in respondents' broad reading of the phrase "spiritual stake." The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause -- for as *Doremus* demonstrated, that is insufficient -- but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them. Respondents have alleged no comparable injury.

23 Respondent Americans United claims that it has certain unidentified members who reside in Pennsylvania. It does not explain, however, how this fact establishes a cognizable injury where none existed before. Respondent is still obligated to allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution.

24 [***LEdHR8B] [8B]

Respondents also claim standing by reference to the Administrative Procedure Act, 5 U. S. C. § 702, which authorizes judicial review at the instance of any person who has been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III. See, *e. g.*, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S., at 100; *Warth v. Seldin*, 422 U.S., at 501. Respondents do not allege that the Act creates a legal right, "the invasion of which creates standing," *Linda R. S.* v. *Richard D.*, 410 U.S., at 617, n. 3, and there is no other basis for arguing that its existence alters the rules of standing otherwise applicable to this case.

[*488] V

[***LEdHR9] [9]The Court of Appeals in this case ignored unambiguous limitations on taxpayer and citizen standing. It appears to have done so out of the conviction that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege "'distinct and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S., at 100 (quoting *Warth v. Seldin*, 422 U.S., at 501). The court derived precedential comfort from *Flast* v. *Cohen*: "The underlying justification for according standing [***720] in *Flast* it seems, was the implicit recognition that the Establishment Clause does create in every citizen a personal constitutional right, such that any citizen, including taxpayers, may contest under that clause the constitutionality of federal expenditures." 619 F.2d, at 262. [25] The concurring opinion was even more direct. In its view, "statutes alleged to violate the Establishment Clause may not have an [*489] individual impact sufficient to confer standing in the traditional sense." *Id.*, at 267-268. To satisfy "the need for an available plaintiff," *id.*, at 267, and thereby to assure a basis for judicial review, respondents should be granted standing because, "as a practical matter, no one is better suited to bring this lawsuit and thus vindicate the freedoms embodied in the Establishment Clause," *id.*, at 266.

25 The majority believed that the only thing which prevented this Court from openly acknowledging this position was the fact that the complaint in *Flast* had alleged no basis for standing other than the plaintiffs' taxpayer status. 619 F.2d, at 262. As the dissent below pointed out, this view is simply not in accord with the facts. See *id.*, at 269-270. The *Flast* plaintiffs and several *amici* strongly urged the Court to adopt the same view of standing for which respondents argue in this case. The Court plainly chose not to do so. Even if respondents were correct in arguing that the Court in *Flast* was bound by a "perceived limitation in the pleadings," 619 F.2d, at 262, we are not so bound in this case, and we find no merit in respondents' vision of standing.

[***LEdHR10] [10]Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause. Respondents' claim of standing implicitly rests on the presumption that violations of the Establishment Clause typically will not cause injury sufficient to confer standing under the "traditional" view of Art. III. But "[the] assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S., at 227. This view would convert standing into a requirement that must be observed only when satisfied. Moreover, we are unwilling to assume that injured parties are nonexistent simply because they have not joined respondents in their suit. The law of averages is not a substitute for standing.

Were we to accept respondents' claim of standing in this case, there would be no principled basis for confining our exception [**768] to litigants relying on the Establishment Clause. Ultimately, that exception derives from the idea that the judicial power requires nothing more for its invocation than important issues and able litigants. [26] The existence of injured [*490] [***721] parties who might not wish to bring suit becomes irrelevant. Because we are unwilling to countenance such a departure from the limits on judicial power contained in Art. III, the judgment of the Court of Appeals is reversed.

26 Were we to recognize standing premised on an "injury" consisting solely of an alleged violation of a "'personal constitutional right' to a government that does not establish religion," *id.*, at 265, a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution.

It is so ordered.

DISSENT BY: BRENNAN; STEVENS

DISSENT

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

A plaintiff's standing is a jurisdictional matter for Art. III courts, and thus a "threshold question" to be resolved before turning attention to more "substantive" issues. See *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 616 (1973). But in consequence there is an impulse to decide difficult questions of substantive law obliquely in the course of opinions purporting to do nothing more than determine what the Court labels "standing"; this accounts for the phenomenon of opinions, such as the one today, that tend merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law. The serious by-product of that practice is that the Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses "standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits." [1]

1 *Barlow v. Collins*, 397 U.S. 159, 178 (1970) (BRENNAN, J., concurring in result and dissenting).

The opinion of the Court is a stark example of this unfortunate trend of resolving cases at the "threshold" while obscuring [*491] the nature of the underlying rights and interests at stake. The Court waxes eloquent on the blend of prudential and constitutional considerations that combine to create our misguided "standing" jurisprudence. *But not one word is said about the Establishment Clause right that the plaintiff seeks to enforce.* And despite its pat recitation of our standing decisions, the opinion utterly fails, except by the sheerest form of *ipse dixit*, to explain why this case is unlike *Flast v. Cohen*, 392 U.S. 83 (1968), and is controlled instead by *Frothingham v. Mellon*, 262 U.S. 447 (1923).

I

There is now much in the way of settled doctrine in our understanding of the injury-in-fact requirement of Art. III. At the core is the irreducible minimum that

persons seeking judicial relief from an Art. III court have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends. . . ." Baker v. Carr, 369 U.S. 186, 204 (1962). See *Duke Power Co.* v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978). Cases of this Court have identified the two essential components of this "personal stake" requirement. Plaintiff [***722] must have suffered, or be threatened with, some "distinct and palpable injury," Warth v. Seldin, 422 U.S. 490, 501 (1975). In addition, there must be some causal connection [**769] between plaintiff's asserted injury and defendant's challenged action. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41 (1976); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261 (1977). The Constitution requires an Art. III court to ascertain that both requirements are met before proceeding to exercise its authority on behalf of any plaintiff, whether the form of relief requested is equitable or monetary.

But the existence of Art. III injury "often turns on the nature and source of the claim asserted." Warth v. Seldin, [*492] *supra*, at 500. [2] Neither "palpable injury" nor "causation" is a term of unvarying meaning. There is much in the way of "mutual understandings" and "common-law traditions" that necessarily guides the definitional inquiry. [3] *In addition*, the Constitution, and by legislation the Congress, may impart a new, and on occasion unique, meaning to the terms "injury" and "causation" in particular statutory or constitutional contexts. The Court makes a fundamental mistake when it determines that a plaintiff has failed to satisfy the two-pronged "injury-in-fact" test, or indeed any other test of "standing," without first determining whether the Constitution or a statute defines injury, and creates a cause of action for redress of that injury, in precisely the circumstance presented to the Court.

2 "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S.* v. Richard D., 410 U.S. 614, 617, n. 3 (1973). The Framers of the Constitution, of course could, and did, exercise the same power.

3 Justice Frankfurter identified two sources to assist in the definitional inquiry concerning injury:

> "A litigant ordinarily has standing to challenge a governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. Or standing may be based on an interest created by the Constitution or a statute." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (concurring opinion) (citations omitted). In identifying the types of injuries that might be recognized in private law actions as a basis for suits against the Government, Justice Frankfurter felt free to draw on principles of "common law." *Id.*, at 152-153, 157-160.

It may of course happen that a person believing himself injured in some obscure manner by government action will be held to have no legal right under the constitutional or statutory provision upon which he relies, and will not be permitted to complain of the invasion of another person's "rights." [4] It [*493] is quite another [***723] matter to employ the rhetoric of "standing" to deprive a person, whose interest is clearly [**770] protected by the law, of the opportunity to prove that his own rights have been violated. It is in precisely that dissembling enterprise that the Court indulges today.

4 Of course, we generally permit persons to press federal suits even when the injury complained of is not obviously within the realm of injuries that a particular statutory or constitutional provision was designed to guard against. We term that circumstance one of "third-party standing." In such situations, the Constitution requires us to determine whether the injury alleged is sufficiently "palpable" to fall within the contemplation of Art. III. If plaintiff *has* suffered injury in fact within the contemplation of Art. III, but is *not* obviously within the reach of the particular statutory or constitutional provision upon which the plaintiff founds his claim, we then bring prudential considerations to bear to determine whether the plaintiff should be allowed to maintain his action. See *Duke Power Co.* v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 80-81 (1978). In evaluating a claim of "third-party standing," we are, by definition, without specific constitutional or congressional direction, and are thus free to draw upon a wisdom peculiarly judicial in character -- to elaborate upon the meaning of

constitutionally cognizable injury, and then to weigh considerations of policy along with gleanings of legislative and constitutional intent, in order to determine whether the plaintiff should be permitted to maintain his claim.

With the understanding that "the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met," *id.*, at 81, we have only rarely interposed a bar to "third-party standing," particularly when constitutional violations are alleged. Indeed, the only firm exception to this generally permissive attitude toward third-party suits is the restriction on taxpayer suits. *Id.*, at 79-81.

The "case and controversy" limitation of Art. III overrides no other provision of the Constitution. [5] To construe that Article to deny standing "'to the class for whose sake [a] constitutional protection is given,'" *Jones v. United States*, 362 U.S. 257, 261 (1960), quoting *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160 (1907), simply turns the Constitution on its head. Article III was designed to provide a [*494] hospitable forum in which persons enjoying rights under the Constitution could assert those rights. How are we to discern whether a particular person is to be afforded a right of action in the courts? The Framers did not, of course, employ the modern vocabulary of standing. But this much is clear: The drafters of the Bill of Rights surely intended that the particular beneficiaries of their legacy should enjoy rights legally enforceable in courts of law. [6] See *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943).

5 When the Constitution makes it clear that a particular person is to be protected from a particular form of government action, then that person has a "right" to be free of that action; when that right is infringed, then there is injury, and a personal stake, within the meaning of Art. III.

6 As James Madison noted, if a bill of rights were "incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789).

With these observations in mind, I turn to the problem of taxpayer standing in general, and this case in particular.

II

A

Frothingham v. Mellon, 262 U.S. 447 (1923), involved a challenge to the Maternity Act of 1921, 42 Stat. 224, which provided financial grants to States that agreed to cooperate in programs designed to reduce infant and maternal mortality. Appellant contended that Congress, in enacting the program, had exceeded its authority under Art. I, and had intruded on authority reserved to the States. The Court described Mrs. Frothingham's claim as follows:

[***724] "[This] plaintiff alleges . . . that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law. The right of a taxpayer to enjoin the execution [*495] of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court." 262 U.S., at 486.

The Court conceded that it had historically treated the interest of a *municipal* taxpayer in the application of the municipality's funds as sufficiently direct and immediate to warrant injunctive relief to prevent misuse. *Ibid.* *Bradfield v. Roberts*, 175 U.S. 291 (1899), in which the Court permitted a federal taxpayer to present an Establishment Clause challenge to the use of federal money for the construction of hospital buildings in the District of Columbia, was held to fall within this rule because it was appropriate to treat the District of Columbia as a municipality. [7] But the Court distinguished [**771] Mrs. Frothingham's action against the United States:

"[The] relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury -- partly realized from

taxation and partly from other sources -- is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

[*496] "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern." 262 U.S., at 487.

After noting the importance of judicial restraint, the Court concluded:

"The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*, at 488.

7 As an attempt to afford a taxpayer living in the District of Columbia with the same rights as a taxpayer living in a municipality, the Court's treatment of *Bradfield* has some persuasive force. But if the ban on federal taxpayer standing had been considered to be of constitutional origin, no analogy could have sufficed to cure the jurisdictional defect. Appellant had not alleged that he was a taxpayer of the District of Columbia, but rather that he was a "citizen and taxpayer *of the United States* and a *resident* of the District of Columbia." 175 U.S., at 295 (emphasis added). Although the court below deemed the suit to be against Ellis H. Roberts, not as Treasurer of the United States but as Treasurer of the District of Columbia, *Roberts v. Bradfield*, 12 App. D. C. 453, 459-460 (1898), standing plainly rested on appellant's federal taxpayer status.

Frothingham's reasoning remains [***725] obscure. [8] The principal interpretive difficulty lies in the manner in which *Frothingham* chose to blend the language of policy with seemingly absolute statements about jurisdiction. For example, the Court commented with significance on the sheer number of taxpayers who might have raised a claim similar to that of Mrs. Frothingham. *Id.*, at 487. Yet it can hardly be argued that the Constitution bars from federal court a plaintiff who has suffered injury merely because others are similarly aggrieved. "[Standing] is not to be denied simply [*497] because many people suffer the same injury." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). And it is equally clear that the Constitution draws no distinction between injuries that are large, and those that are comparatively small. The line between more dollars and less is no valid constitutional measure. Cf. *Everson v. Board of Education*, 330 U.S. 1, 48-49 (1947) (Rutledge, J., dissenting). The only distinction that a Constitution guaranteeing justice to all can recognize is one between some injury and none at all. [9]

8 The question apparently remains open whether *Frothingham* stated a prudential limitation or identified an Art. III barrier. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S., at 79, n. 25; *United States v. Richardson*, 418 U.S. 166, 181, 196, n. 18 (1974) (POWELL, J., concurring). It was generally agreed at the time of *Flast v. Cohen*, 392 U.S. 83, 92, n. 6, 101 (1968), and clearly the view of Justice Harlan in dissent, *id.*, at 130, that the rule stated reflected prudential and policy considerations, not constitutional limitations. Perhaps the case is most usefully understood as a "substantive" declaration of the legal rights of a taxpayer with respect to Government spending, coupled with a prudential restriction on the taxpayer's ability to raise the claims of third parties. Under any construction, however, *Frothingham* must give way to a taxpayer's suit brought under the Establishment Clause.

9 Indeed, as noted in *Flast, supra*, the stake in the federal Treasury of major corporate taxpayers was not in any sense trivial. Indeed there was a time when a federal program involving an expenditure from the Treasury of $ 10 billion would very likely result in an increase of $ 150 million in the tax bill of a major corporation such as General Motors. See Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pt. 2, p. 493 (1966) (letter from K. C. Davis to Sen. Sam Ervin); Note, 69 Yale L. J. 895, 917, n. 127 (1960).

[**772] *Frothingham* also stressed the indirectness of the taxpayer's injury. But, *as a matter of Art. III standing*, if the causal relationship is sufficiently certain, the length of the causal chain is irrelevant. [10] See [***726] *Warth v. Seldin*, 422 U.S., at 505. The financial stake of a federal taxpayer in the outcome of a lawsuit challenging an allegedly unlawful federal expenditure is not qualitatively different from that of a state or a municipal taxpayer attacking a local expenditure. More importantly, the injury suffered by a taxpayer is not dependent on the extent of his tax payment. The concept of taxpayer injury necessarily recognizes the continuing stake of the taxpayer in the disposition of the Treasury to which he [*498] has contributed his taxes, and his right to have those funds put to lawful uses. Until *Frothingham* there was nothing in our precedents to indicate that this concept, so comfortably applied to municipal taxpayers, was inconsistent with the framework of rights and remedies established by the Federal Constitution.

10 Even if actual impact on the taxpayer's pocketbook were deemed the test of taxpayer standing, the cases in which a tenuous causal connection between the injury alleged and the challenged action formed the basis for denying plaintiffs standing do not control the case of a taxpayer challenging a Government expenditure. Compare *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973); with *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, *supra*; and *United States v. SCRAP*, 412 U.S. 669 (1973). Frothingham's obstacle was not an inability to show that the alleged injury was "likely to be redressed by a favorable decision." *Simon*, *supra*, at 38.

In each of the above-cited cases in which standing was denied, the difficulty was that an intermediate link in the causal chain -- a third party beyond the control of the court -- might serve to bar effective relief. Even if the court acceded to plaintiffs' view of the law, the court's decree might prove ineffectual to relieve plaintiffs' injury because of the independent action of some third party. See 426 U.S., at 41-42; *Warth v. Seldin*, *supra*, at 505-507. The situation of the taxpayer is not comparable because there is no problem of intervening cause. The defendant has the full power to correct the plaintiff's difficulty and, if the court concludes that as a matter of law and fact plaintiff is indeed required to provide defendant redress, it has the power to provide relief. The factual aspect of the causal connection is sure.

The explanation for the limit on federal taxpayer "standing" imposed by *Frothingham* must be sought in more substantive realms. Justice Harlan, dissenting in *Flast*, came close to identifying what I consider the unstated premise of the *Frothingham* rule:

"[The] taxpayer's complaint can consist only of an allegation that public funds have been, or shortly will be, expended for purposes inconsistent with the Constitution. The taxpayer cannot ask the return of any portion of his previous tax payments, cannot prevent the collection of any existing tax debt, and cannot demand an adjudication of the propriety of any particular level of taxation. His tax payments are received for the general purposes of the United States, and are, upon proper receipt, lost in the general revenues." 392 U.S., at 128.

[*499] In a similar vein, the Government argued in *Flast* that taxpayer suits involve only a disagreement by the taxpayer with the uses to which tax revenues were committee, and that the resolution of such disagreements is entrusted to branches of the Federal Government other than the judiciary. *Id.*, at 98. The arguments of both the Government and Justice Harlan are phrased, as they must be, not in the language of "standing," but of "legal rights" and "justiciable issues."

The *Frothingham* rule may be seen as founded solely on the prudential judgment by the Court that precipitate and unnecessary [**773] interference in the activities of a coequal branch of government should be avoided. Alternatively, *Frothingham* may be construed as resting upon an unarticulated, constitutionally established barrier between Congress' power to tax and its power to spend, which barrier makes it analytically impossible to mount an assault on the former through a challenge to the latter. But it is sufficient for present purposes to say that *Frothingham* held that the federal taxpayer [***727] has no continuing legal interest in the affairs of the Treasury analogous to a shareholder's continuing interest in the conduct of a corporation.

Whatever its provenance, the general rule of *Frothingham* displays sound judgment: Courts must be circumspect in dealing with the taxing power in order to avoid unnecessary intrusion into the functions of the Legislative and Executive Branches. Congress' *purpose* in taxing will not ordinarily affect the validity of the tax. Unless the tax *operates* unconstitutionally, see, *e. g.*, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the taxpayer may not object to the use of his funds. Mrs. Frothingham's argument, that the use of tax funds for purposes unauthorized by the Constitution amounted to a violation of due process, did not provide her with the required legal interest because the Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability. See *Flast v. Cohen*, 392 U.S., at 105. Mrs. Frothingham's claim was thus reduced [*500] to an assertion of "the States' interest in their legislative prerogatives," *ibid.*, a third-party claim that could properly be barred. [11] But in *Flast* the Court faced a different sort of constitutional claim, and found itself compelled to retreat from the general assertion in *Frothingham* that taxpayers have *no* interest in the disposition of their tax payments. To understand why *Frothingham*'s bar necessarily gave way in the face of an Establishment Clause claim, we must examine the right asserted by a taxpayer making such a claim.

> 11 With respect to the enforcement of constitutional restrictions, we have not been overly elegant in defining the class of persons who may object to particular forms of government action. Only the constitutional minimum of injury in fact has been required. As the Court recently noted: "We . . . cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S., at 79. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 225, n. 15 (1974). Nevertheless, I do not suggest that the *Frothingham* limitation on federal taxpayer suits should be abandoned. The barrier it evinces between the taxing power and the spending power, whether it be deemed one of constitutional construction or judicial prudence, reflects fundamental conceptions about the nature of the legislative process, and is, in any event, now firmly embedded in our cases. That barrier is necessarily pierced, however, by an Establishment Clause claim.

B

In 1947, nine Justices of this Court recognized that the Establishment Clause does impose a very definite restriction on the power to tax. [12] The Court held in *Everson v. Board of Education*, 330 U.S., at 15, that the "'establishment of religion' clause of the First Amendment means at least this:"

[*501] [***728] "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt, to teach or practice religion." *Id.*, at 16.

> 12 Justice Black, joined by Chief Justice Vinson, and Justices Reed, Douglas, and Murphy, wrote for the majority and concluded that the challenged activity was not a support of religion; Justice Jackson wrote one dissent joined in by Justice Frankfurter; Justice Rutledge also authored a dissent, in which Justices Jackson, Frankfurter, and Burton joined. Both dissents clearly affirmed this constitutional restriction on the power to tax. 330 U.S., at 22, 33.

[**774] The Members of the Court could not have been more explicit. "One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" *Id.*, at 22 (Jackson, J., dissenting). "[Apart] from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through the use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function. . . . [Money] taken by taxation from one is not to be used or given to support another's religious training of belief, or indeed one's own." *Id.*, at 44 (Rutledge, J., dissenting).

In determining whether the law challenged in *Everson* was one "respecting an establishment of religion," the Court did not fail to examine the historic meaning of the constitutional language, "particularly with respect to the imposition of taxes." *Id.*, at 8. For as Justice Rutledge pointed out in his dissent: "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history." *Id.*, at 33. That history bears a brief repetition in the present context.

Many of the early settlers of this Nation came here to escape the tyranny of laws that compelled the support of government-sponsored churches and that inflicted punishments for the failure to pay establishment taxes and tithes. *Id.*, at 8-9. But the inhabitants of the various Colonies soon displayed [*502] a capacity to recreate the oppressive practices of the countries that they had fled. Once again persons of minority faiths were persecuted, and again such persons were subjected -- this time by the colonial governments -- to tithes and taxes for support of religion. *Id.*, at 10, and n. 8; *Reynolds v. United States*, 98 U.S. 145, 162-163 (1879).

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." *Everson, supra*, at 11 (footnotes omitted).

In 1784-1785, before the adoption of the Constitution, the continuing conflict between those who saw state [***729] aid to religion as but the natural expression of "commonly shared" religious sentiments, and those who saw such support as a threat to the very notion of civil government, culminated in the battle fought in the Virginia House of Delegates over "a bill establishing provision for teachers of the Christian religion." [13] *Reynolds, supra*, at 162-163. The introduction of that bill in the state assembly prompted James Madison to prepare and circulate his famous "Memorial and Remonstrance Against Religious Assessments," imploring the legislature to establish and maintain the complete separation of religion and civil authority, and thus to reject the bill. In the end, the bill was rejected by the Virginia Legislature, and in its place Madison succeeded in securing the enactment of "A Bill for Establishing Religious Freedom," first introduced in the Virginia General Assembly seven years earlier by Thomas Jefferson. 98 U.S., at 163; *Everson*, 330 U.S., [*503] at 11-13 (majority opinion); *id.*, at 35-40 (Rutledge, J., dissenting). Because Madison and Jefferson played [**775] such leading roles in the events leading to the adoption of the First Amendment, the *Everson* opinions did not hesitate to reproduce the partial text of their Virginia bill as a primary source for understanding the objectives, and protections, afforded by the more concise phrasing of the Establishment Clause. *Everson, supra*, at 12-13, 28; see *Reynolds, supra*, at 163-164. Extracts from that bill also bear repeating in the present context. The preamble provided, in part:

"[To] compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern." 12 Hening's Stat. 85.

Its operative language emphatically stated:

"That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . ." *Id.*, at 86. [14]

13 The bill, and Madison's Remonstrance, are both appended to the dissenting opinion of Justice Rutledge in *Everson*. *Id.*, at 63-74.

14 Although the bill is in some sense merely the pronouncement of a small legislative body, its proscription was intended to transcend temporal bounds. The enactment concludes:

"And though we well know that this Assembly, enacted by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act

will be an infringement of natural right." 12 Hening's Stat. 86.

By incorporation of its principles in the Bill of Rights, the bill was transformed from mere hortatory expression, into a guarantee of lasting and binding rights against the Government.

[***730] Justice Rutledge summed up Madison's views in the following terms:

"In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even 'three pence' contribution was thus to be exacted from [*504] any citizen for such a purpose. Tithes had been the life-blood of establishment before and after other compulsions disappeared. Madison and his coworkers made no exceptions or abridgments to the complete separation [between church and state] they created. Their objection was not to small tithes. It was to any tithes whatsoever. 'If it were lawful to impose a small tax for religion, the admission would pave the way for oppressive levies.' Not the amount, but 'the principle of the assessment was wrong.'" *Everson, supra*, at 40-41 (citation omitted).

It is clear, in the light of this history, that one of the primary purposes of the Establishment Clause was to prevent the use of tax moneys for religious purposes. *The taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion.* [15] This basic understanding [**776] of the meaning of the Establishment Clause explains why the Court in *Everson*, while rejecting appellant's claim on the merits, [*505] perceived the issue presented there as it did. The appellant sued "in his capacity as a district taxpayer," 330 U.S., at 3, challenging the actions of the Board of Education in passing a resolution providing reimbursement to parents for the cost of transporting their children to parochial schools, and seeking to have that resolution "set aside." Appellant's Establishment Clause claim was precisely that the "statute . . . forced inhabitants to pay taxes to help support and maintain" church schools. *Id.*, at 5. It seems obvious that all the Justices who participated in *Everson* would have agreed with Justice Jackson's succinct statement of the question presented: "Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?" *Id.*, at 21 (dissenting opinion). Given this view of the issues, could it fairly be doubted that this taxpayer alleged injury in precisely the form that the Establishment Clause sought to make actionable? [16]

15 The position of a taxpayer with respect to a Government grant of a tax exemption to a religious institution is qualitatively different from the position of a taxpayer objecting to a subsidy.

"A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, '[in] the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while '[in] the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.'" *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 690-691 (1970) (BRENNAN, J., concurring) (footnote omitted), quoting Gianella, Religious Liberty, Nonestablishment, and Doctrinal Development, pt. 2, 81 Harv. L. Rev. 513, 533 (1968).

Of course, irrespective of the taxpayers' stake in the controversy, in terms of the prohibition on government action imposed by the [***731] Establishment Clause, there is also a qualitative difference between a subsidy and an exemption. *Ibid.*

16 Justice Jackson, writing for the Court in *Doremus v. Board of Education*, 342 U.S. 429 (1952), explored the limitations of taxpayer standing under the Establishment Clause. In that case two New Jersey taxpayers challenged a New Jersey law that directed public school teachers to read selected passages from the Bible, seeking a declaratory judgment that such a law violated the Establishment Clause. The Court concluded that the taxpayer lacked standing:

"There is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax

they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it." *Id.*, at 433.

The Court had no difficulty distinguishing *Everson*:

"Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not." 342 U.S., at 434.

The difference between the two cases is relevant to the "standing" of taxpayers generally and most especially to taxpayers asserting claims under the Establishment Clause, for it is clear that even under the Establishment Clause the taxpayer's protection was against the use of his funds and not against the conduct of the government generally. The distinction between *Doremus* and *Everson* may be phrased alternatively: Everson was injured in a manner comprehended by the Establishment Clause, and Doremus was not.

C

In *Flast v. Cohen*, 392 U.S. 83 (1968), federal taxpayers sought to challenge the Department of Health, Education, and Welfare's administration of the Elementary and Secondary [*506] Education Act of 1965: specifically the Department's practice of allowing funds distributed under that Act to be used to finance instruction in religious schools. Appellants urged that the use of federal funds for such a purpose violated the Establishment and Free Exercise Clauses of the First Amendment, and sought a declaration that this use of federal funds was not authorized by the Act, or that to the extent the use was authorized, the Act was "unconstitutional and void." Appellants further sought an injunction to bar appellees from approving any expenditure of funds for the allegedly unconstitutional purposes. *Id.*, at 86-88. The *Frothingham* rule stood as a seemingly absolute barrier to the maintenance of the claim. The Court held, however, that the *Frothingham* barrier could be overcome by any claim that met both requirements of a two-part "nexus" test.

The Justices who participated in *Flast* were not unaware of the Court's continued recognition of a federally cognizable "case or controversy" when a *local* taxpayer seeks to challenge as unconstitutional the use of a *municipality*'s funds -- [*507] the propriety of which had, of course, gone unquestioned in *Everson*. [17] The Court was aware [**777] as well of the rule stated in *Doremus v. Board of Education*, 342 U.S. 429 (1952), that the interest of a taxpayer, even one raising an Establishment Clause claim, was limited [***732] to the actions of a government involving the expenditure of funds. But in reaching its holding, it is also quite clear that the Court was responding, not only to *Everson*'s continued acceptance of municipal taxpayer actions but also to *Everson*'s exposition of the history and meaning of the Establishment Clause. See *Flast, supra*, at 103-104.

17 The anomaly of allowing a municipality's actions to be challenged by a local taxpayer in federal court as a violation of the Establishment Clause, made applicable to the States by virtue of the Fourteenth Amendment, while exempting the Federal Government, whose use of the taxing power in aid of religion was the target of the Framers' adoption of the Establishment Clause, also must have been apparent to the Court.

It is at once apparent that the test of standing formulated by the Court in *Flast* sought to reconcile the developing doctrine of taxpayer "standing" with the Court's historical understanding that the Establishment Clause was intended to prohibit the Federal Government from using tax funds for the advancement of religion, and thus the constitutional imperative of taxpayer standing in certain cases brought pursuant to the Establishment Clause. The two-pronged "nexus" test offered by the Court, despite its general language, [18] is [*508] best understood as "a determinant of standing of plaintiffs alleging only injury as taxpayers who challenge alleged violations of the Establishment and Free Exercise Clauses of the First Amendment," and not as a general statement of standing principles. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 238 (1974) (BRENNAN, J., dissenting); *Flast*, 392 U.S., at 102. The test explains what forms of governmental action may be attacked by someone alleging *only* taxpayer status, and, without ruling out the possibility that history might reveal another similarly founded provision, explains why an Establishment Clause claim is treated differently from any other assertion that the Federal Government has exceeded the bounds of the law in allocating its largesse. Thus, consistent with *Doremus, Flast* required, as the first prong of its test, that the taxpayer demonstrate a

logical connection between his taxpayer status and the type of legislation attacked. *Flast, supra,* at 102. Appellants' challenge to a program of grants to educational institutions clearly satisfied this first requirement. 392 U.S., at 103. As the second prong, consistent with the prohibition of taxpayer claims of the kind advanced in *Frothingham*, appellants were required to show a connection between their status and the precise nature of the infringement alleged. *Flast,* 392 U.S., at 102. [***733] They had no difficulty meeting this requirement: the Court agreed that the Establishment Clause jealously protects taxpayers from diversion of their funds to the support of religion through the offices of the Federal Government. *Id.,* at 103-104.

18 The test was formulated with the Establishment Clause in mind, but the Court wisely sought to phrase the principle it stood for in general terms:

"We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." 392 U.S., at 105-106.

In the years since the announcement of the *Flast* test we have yet to recognize a similar restriction on Congress' power to tax, and I know of none. Nevertheless, like the Justices who joined in the Court opinion in *Flast*, I remain reluctant to rule out the possibility.

[*509] [**778] The nexus test that the Court "announced," *id.,* at 102-103, sought to maintain necessary continuity with prior cases, and set forth principles to guide future cases involving taxpayer standing. But *Flast* did not depart from the principle that no judgment about standing should be made without a fundamental understanding of the rights at issue. *Id.,* at 102. The two-part *Flast* test did not supply the rationale for the Court's decision, but rather its exposition: That rationale was supplied by an understanding of the nature of the restrictions on government power imposed by the Constitution and the intended beneficiaries of those restrictions.

It may be that Congress can tax for *almost* any reason, or for no reason at all. There is, so far as I have been able to discern, but one constitutionally imposed limit on that authority. Congress cannot use tax money to support a church, or to encourage religion. That is *"the* forbidden exaction." *Everson v. Board of Education,* 330 U.S., at 45 (Rutledge, J., dissenting) (emphasis added). See *Flast, supra,* at 115-116 (Fortas, J., concurring). In absolute terms the history of the Establishment Clause of the First Amendment makes this clear. History also makes it clear that the federal taxpayer is a singularly "proper and appropriate party to invoke a federal court's jurisdiction" to challenge a federal bestowal of largesse as a violation of the Establishment Clause. Each, and indeed every, federal taxpayer suffers precisely the injury that the Establishment Clause guards against when the Federal Government directs that funds be taken from the pocketbooks of the citizenry and placed into the coffers of the ministry.

A taxpayer cannot be asked to raise his objection to such use of his funds at the time he pays his tax. Apart from the unlikely circumstance in which the Government announced in advance that a particular levy would be used for religious subsidies, taxpayers could hardly assert that they were being injured until the Government actually lent its support to a religious venture. Nor would it be reasonable to require him to address his claim to those officials charged with the collection [*510] of federal taxes. Those officials would be without the means to provide appropriate redress -- there is no practical way to segregate the complaining taxpayer's money from that being devoted to the religious purpose. Surely, then, a taxpayer must have standing at the time that he learns of the Government's alleged Establishment Clause violation to seek equitable relief in order to halt the continuing and intolerable burden on his pocketbook, his conscience, and his constitutional rights.

III

Blind to history, the Court attempts to distinguish this case from [***734] *Flast* by wrenching snippets of language from our opinions, and by perfunctorily applying that language under color of the first prong of *Flast*'s two-part nexus test. The tortuous distinctions thus produced are specious, at best: at worst, they are pernicious to our constitutional heritage.

First, the Court finds this case different from *Flast* because here the "source of [plaintiffs'] complaint is not a *congressional* action, but a decision by HEW to transfer a parcel of federal property." *Ante*, at 479 (emphasis added). This attempt at distinction cannot withstand scrutiny. *Flast* involved a challenge to the actions of the Commissioner of Education, and other officials of HEW, in disbursing funds under the Elementary and Secondary Education Act of 1965 to "religious and sectarian" schools. Plaintiffs disclaimed "any [intention] to challenge . . . all programs under . . . the Act." *Flast, supra*, at 87. Rather, they claimed that defendant-administrators' approval of such expenditures was not authorized by the Act, or alternatively, to the extent the expenditures were authorized, the Act was "unconstitutional and void." *Ibid.* In the present case, respondents challenge HEW's [**779] grant of property pursuant to the Federal Property and Administrative Services Act of 1949, seeking to enjoin HEW "from making a grant of this and other property to the [defendant] so long as such a grant will violate the Establishment Clause." App. 12. It may be that the Court is concerned with the adequacy of respondents' pleading; respondents [*511] have not, in so many words, asked for a declaration that the "Federal Property and Administrative Services Act is unconstitutional and void to the extent that it authorizes HEW's actions." I would not construe their complaint so narrowly.

More fundamentally, no clear division can be drawn in this context between actions of the Legislative Branch and those of the Executive Branch. To be sure, the First Amendment is phrased as a restriction on Congress' legislative authority; this is only natural since the Constitution assigns the authority to legislate and appropriate only to the Congress. But it is difficult to conceive of an expenditure for which the last governmental actor, either implementing directly the legislative will, or acting within the scope of legislatively delegated authority, is not an Executive Branch official. The First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance.

The Court's second purported distinction between this case and *Flast* is equally unavailing. The majority finds it "decisive" that the Federal Property and Administrative Services Act of 1949 "was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2," *ante*, at 480, while the Government action in *Flast* was taken under Art. I, § 8. The Court relies on *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), to support the distinction between the two Clauses, noting that those cases involved alleged deviations from the requirements of Art. I, § 9, cl. 7, and [***735] Art. I, § 6, cl. 2, respectively. The standing defect in each case was *not*, however, the failure to allege a violation of the Spending Clause; rather, the taxpayers in those cases had not complained of the distribution of Government largesse, and thus failed to meet the essential requirement of taxpayer standing recognized in *Doremus*.

It can make no constitutional difference in the case before us whether the donation to the petitioner here was in the form of a cash grant to build a facility, see *Tilton v. Richardson*, [*512] 403 U.S. 672 (1971), or in the nature of a gift of property including a facility already built. That this is a meaningless distinction is illustrated by *Tilton*. In that case, taxpayers were afforded standing to object to the fact that the Government had not received adequate assurance that if the property that it financed for use as an educational facility was later converted to religious uses, it would receive full value for the property, as the Constitution requires. The complaint here is precisely that, although the property at issue is actually being used for a sectarian purpose, the Government has not received, nor demanded, full value payment. [19] Whether undertaken [**780] pursuant to the Property Clause or the Spending Clause, the breach of the Establishment Clause, and the relationship of the taxpayer to that breach, is precisely the same. [20]

19 It is uncontested here that the property at issue was initially purchased with tax funds, and bears the mark of $ 10 million in federal improvements. At the time of its transfer to the petitioner, its fair market value was approximately $ 1.3 million. *Americans United v. U.S. Dept. of*

HEW, 619 F.2d 252, 253 (CA3 1980).

The Federal Property and Administrative Services Act of 1949 clearly requires that, whenever possible, fair market value is to be received for property transferred pursuant to its provisions. See 40 U. S. C. §§ 484(e)(1), 484(e)(3)(G). Proceeds "from any sale, lease, or other disposition of surplus property, shall be covered into the Treasury as miscellaneous receipts. . . ." 40 U. S. C. § 485(a).

The Act provides, however, that "surplus real property, including buildings, fixtures and equipment situated thereon" may be designated by HEW as necessary for "school, classroom, or other educational use." 40 U. S. C. § 484(k)(1). Such property may be transferred to a "nonprofit educational institution." 40 U. S. C. § 484(k)(1)(A). In fixing the price of such property, the Secretary is required to consider any benefit that may accrue to the United States from the use of the property. 40 U. S. C. § 484(k)(1)(C). By failing to require any payment from petitioner college, the Secretary apparently determined that the benefit to the United States exceeded the fair market value. But it is entirely clear from *Tilton* that if the facility is and was used for sectarian purposes, the Government was required to obtain full market value at the time such use commences. 20 The Framers of the First Amendment could not have viewed it as less objectionable to the taxpayer to learn that his tax funds were used by his Government to purchase property, construct a church, and deed the property to a religious order, than to find his Government providing the funds to a church to undertake its own construction. So far as the Establishment Clause and the position of the taxpayer are concerned, the situations are interchangeable. Surely James Madison perceived no nice distinction between a grant of land and a grant of funds, when he vetoed a bill providing certain land to a church:

"[The] bill in reserving a certain parcel of land of the United States for the use of said [church] comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" 1 J. Richardson, Messages and Papers of the Presidents 490 (1897).

Nor has Congress perceived a distinction between an appropriation of money and an appropriation of property. For example, in 1896 Congress included in its Appropriation Act for the District of Columbia a statement declaring it "to be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or aiding by payment for services, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control." 29 Stat. 411. See *Lemon v. Kurtzman*, 403 U.S. 602, 648 (1971) (opinion of BRENNAN, J.).

[*513] [***736] IV

Plainly hostile to the Framers' understanding of the Establishment Clause, and *Flast*'s enforcement of that understanding, the Court vents that hostility under the guise of standing, "to slam the courthouse door against plaintiffs who [as the Framers intended] are entitled to full consideration of their [Establishment Clause] claims on the merits." *Barlow v. Collins*, 397 U.S. 159, 178 (1970) (BRENNAN, J., concurring in result and dissenting). Therefore, I dissent.

JUSTICE STEVENS, dissenting.

In Parts I, II, and III of his dissenting opinion, JUSTICE BRENNAN demonstrates that respondent taxpayers have standing to mount an Establishment Clause challenge against the Federal Government's transfer of property worth $ 1,300,000 to the Assemblies of God. For the Court to hold [*514] that plaintiffs' standing depends on whether the Government's transfer was an exercise of its power to spend money, on the one hand, or its power to dispose of tangible property, on the other, is to trivialize the standing doctrine.

One cannot read the Court's opinion and the concurring opinions of Justice Stewart and Justice Fortas in *Flast v. Cohen*, 392 U.S. 83, without forming the firm conclusion that the plaintiffs' invocation of the Establishment Clause was of decisive importance in resolving the standing issue in that case. Justice Fortas