IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER,

Plaintiffs and Respondents,

v.

THE STATE OF CALIFORNIA; KAMALA D. HARRIS, in her official capacity as Attorney General for the State of California; AND THE CALIFORNIA DEPARTMENT OF JUSTICE,

Defendants and Appellants.

Case No. F062490

Fresno County Superior Court, Case No. 10CECG02116
The Honorable Jeff Hamilton, Judge

JOINT APPENDIX
VOLUME VI
Pages JA001478-JA001696

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There are no even-numbered page between JA002879 and JA003423 in the Joint Appendix. This gap was created by a production error at the numbering stage. Rather than print blank pages with these numbers, they have been omitted.

EXHIBIT "4"

1 of 1 DOCUMENT

CITY OF CHICAGO, PETITIONER v. JESUS MORALES ET AL.

No. 97-1121

SUPREME COURT OF THE UNITED STATES

527 U.S. 41; 119 S. Ct. 1849; 144 L. Ed. 2d 67; 1999 U.S. LEXIS 4005; 67 U.S.L.W. 4415; 72 A.L.R.5th 665; 99 Cal. Daily Op. Service 4488; 99 Daily Journal DAR 5760; 1999 Colo. J. C.A.R. 3223; 12 Fla. L. Weekly Fed. S 331

December 9, 1998, Argued
June 10, 1999, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

DISPOSITION: *177 Ill. 2d 440, 687 N. E. 2d 53*, affirmed.

DECISION:

Chicago ordinance that prohibited loitering together in any public place by two or more people, of whom at least one was criminal street gang member, held to be impermissibly vague, in violation of *Fourteenth Amendment's due process clause.*

SUMMARY:

The city of Chicago enacted a "gang congregation" ordinance that prohibited loitering together in any public place by two or more people, of whom at least one was a "criminal street gang member." The ordinance created a criminal offense that was punishable by a fine of up to 500, imprisonment for not more than 6 months, and a requirement to perform up to 120 hours of community service. Under the ordinance, which defined "loitering" as remaining in any one place with no apparent purpose, (1) a police officer who observed a person whom the officer reasonably believed to be a criminal street gang member loitering in a public place with one or more persons was required to order all of the persons to disperse, and (2) any person, regardless of whether the person was a gang member, who disobeyed such a dispersal order was guilty of violating the ordinance. The Chicago Police Department promulgated guidelines that purported to prevent arbitrary or discriminatory enforcement of the ordinance by confining arrest authority to designated officers, establishing detailed criteria for defining street gangs and membership in such gangs, and providing for designated but publicly undisclosed enforcement areas. After 2 trial judges upheld the federal constitutionality of the ordinance but 11 others held that it was invalid, the Illinois Appellate Court, in affirming the judgments in the cases in which the ordinance was held invalid and reversing the convictions in the other cases, determined that the ordinance violated the Federal Constitution and the state constitution. The Illinois Supreme Court, in affirming the Appellate Court judgment, expressed the view that the ordinance violated due process of law, in that the ordinance was impermissibly vague on its face and was an arbitrary restriction on personal liberties (*177 Ill 2d 440, 687 NE 2d 53*).

On certiorari, the United States Supreme Court affirmed. In those portions of an opinion by Stevens, J., which constituted the opinion of the court and were joined by O'Connor, Kennedy, Souter, Ginsburg and Breyer, JJ., it was held that the ordinance was impermissibly vague, in violation of the due process clause of the *Federal Constitution's Fourteenth Amendment*, because the broad sweep of the ordinance violated the requirement that a legislature establish minimal guidelines to govern law enforcement, where (1) the ordinance's mandatory language directed the police to issue a dispersal order without making any inquiry about the possible purposes of persons who stood or sat in the company of a gang member, (2) the ordinance required no harmful purpose and applied to nongang members as well as suspected gang members, (3) the most harmful gang loitering was motivated by an apparent purpose, and (4) the police guidelines did not sufficiently limit the discretion

granted to the police in enforcing the ordinance. Also, Stevens, J., joined by Souter and Ginsburg, JJ., expressed the view that (1) the freedom to loiter for innocent purposes is part of the liberty protected by the due process clause, (2) the ordinance was vague in the sense that it specified no standard of conduct, and (3) the ordinance afforded too little notice to citizens who wished to use the public streets.

O'Connor, J., joined by Breyer, J., concurring in part and concurring in the judgment, expressed the view that the ordinance was unconstitutionally vague, because it lacked sufficient minimal standards to guide law enforcement officers.

Kennedy, J., concurring in part and concurring in the judgment, expressed the view that the fact that a citizen had to disobey an order to disperse before being guilty of violating the ordinance was not sufficient to eliminate doubts regarding the adequacy of notice under the ordinance.

Breyer, J., concurring in part and concurring in the judgment, expressed the view that the ordinance was unconstitutional, because it allowed a police officer too much discretion in every case, there being no way to distinguish in the ordinance's terms between one application of discretion and another.

Scalia, J., dissenting, expressed the view that (1) the minor limitation upon the free state of nature that the ordinance imposed was a small price to pay for liberation of the streets of a city which had been afflicted with criminal street gangs, and (2) the court invalidated a perfectly reasonable measure by (a) ignoring rules governing facial challenges, (b) elevating loitering to a constitutionally guaranteed right, and (c) discerning vagueness where, according to the court's usual standards, none existed.

Thomas, J., joined by Rehnquist, Ch. J., and Scalia, J., dissenting, expressed the view that (1) the ordinance (a) was not vague in all of it applications, and (b) did not violate the due process clause; and (2) there is no fundamental right to loiter, as loitering has been consistently criminalized throughout the nation's history.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

MUNICIPAL CORPORATIONS §37.7

-- gang congregation ordinance -- vagueness

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

A city "gang congregation" ordinance that prohibits loitering together in any public place by two or more people, of whom at least one is a "criminal street gang member"--where (1) the ordinance (a) defines "loitering" as remaining in any one place with no apparent purpose, (b) provides that a police officer who observes a person whom the officer reasonably believes to be a criminal street gang member loitering in a public place with one or more persons shall order all of the persons to disperse, and (c) makes guilty of a crime any person, regardless of whether the person is a gang member, who disobeys such a dispersal order; and (2) the city police department has promulgated guidelines that purport to prevent arbitrary or discriminatory enforcement of the ordinance by (a) confining arrest authority to designated officers, (b) establishing detailed criteria for defining criminal street gangs and membership in such gangs, and (c) providing for designated but publicly undisclosed enforcement areas--is impermissibly vague, in violation of the due process clause of the *Federal Constitution's Fourteenth Amendment*, because the broad sweep of the ordinance violates the requirement that a legislature establish minimal guidelines to govern law enforcement, as (1) the ordinance's mandatory language directs the police to issue a dispersal order without making any inquiry about the possible purposes of persons who stand or sit in the company of gang members; (2) the fact that the ordinance does not apply to people who are moving does not address the question of how much discretion the police enjoy in deciding which stationary persons to disperse; (3) the fact that the ordinance does not permit an arrest until a dispersal order has been disobeyed provides no guidance to an officer deciding whether to issue such an order; (4) the ordinance requires no harmful purpose and applies to nongang members as well as suspected gang members; (5) the most harmful gang loitering is motivated by an apparent purpose either to publicize the gang's dominance of certain territory or to conceal ongoing commerce in illegal drugs; and (6) as to the police guidelines limiting enforcement of the ordinance to publicly undisclosed designated areas, (a) the guidelines will not provide a defense to a loiterer who might be arrested elsewhere, and (b) a person who knowingly loiters with a well-known gang member anywhere in the city cannot safely assume that they will not be ordered to disperse, no matter how innocent and harmless their loitering might be. (Scalia and Thomas, JJ., and Rehnquist, Ch. J., dissented from this holding.)

[***LEdHN2]

COURTS §805

-- construction of state statute

Headnote:[2]

The United States Supreme Court has no authority to construe the language of a state statute more narrowly than the construction given by that state's highest court.

[***LEdHN3]

COURTS §92.3

-- power -- construction of statute

Headnote:[3]

The power of a court to determine the meaning of a statute carries with it the power to describe its extent and limitations as well as the method by which they shall be determined.

[***LEdHN4]

COURTS §817

-- gang congregation ordinance -- construction

Headnote:[4]

For purposes of determining whether a city "gang congregation" ordinance that prohibits loitering--which the ordinance defines as remaining in any one place with no apparent purpose--together in any public place by two or more people, of whom at least one is a "criminal street gang member is vague, in violation of the due process clause of the *Federal Constitution's Fourteenth Amendment*, the United States Supreme Court must assume that the ordinance means what it says and that it has no application to people whose purpose is apparent, where the highest court for the state in which the city is located has not placed any limiting construction on the language of the ordinance.

SYLLABUS

Chicago's Gang Congregation Ordinance prohibits "criminal street gang members" from loitering in public places. Under the ordinance, if a police officer observes a person whom he reasonably believes to be a gang member loitering in a public place with one or more persons, he shall order them to disperse. Anyone who does not promptly obey such an order has violated the ordinance. The police department's General Order 92-4 purports to limit officers' enforcement discretion by confining arrest authority to designated officers, establishing detailed criteria for defining street gangs and membership therein, and providing for designated, but publicly undisclosed, enforcement areas. Two trial judges upheld the ordinance's constitutionality, but eleven others ruled it invalid. The Illinois Appellate Court affirmed the latter cases and reversed the convictions in the former. The State Supreme Court affirmed, holding that the ordinance violates due process in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties.

Held: The judgment is affirmed.

177 Ill. 2d 440, 687 N.E.2d 53, 227 Ill. Dec. 130, affirmed.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, and V, concluding that the ordinance's broad sweep violates the requirement that a legislature establish minimal guidelines to govern law enforcement. *Kolender v. Lawson, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855.* The ordinance encompasses a great deal of harmless behavior: In any public place in Chicago, persons in the company of a gang member "shall" be ordered to disperse if their purpose is not apparent to an officer. Moreover, the Illinois Supreme Court interprets the ordinance's loitering definition -- "to remain in any one place with no apparent purpose" -- as giving officers absolute discretion to determine what activities constitute loitering. See *id. at 359.* This Court has no authority to construe the language of a state statute more narrowly than the State's highest court. See *Smiley v. Kansas, 196 U.S. 447, 455, 49 L. Ed. 546, 25 S. Ct. 289.* The three features of the ordinance that, the city argues, limit the officer's discretion -- (1) it does not permit issuance of a dispersal order to anyone who is moving along or who has an apparent purpose; (2) it does not permit an arrest if individuals obey a dispersal order; and (3) no order can issue unless the officer reasonably believes that one of the loiterers is a gang member -- are insufficient. Finally, the Illinois Supreme Court is correct that General Order 92-4 is not a sufficient limitation on police discretion. See *Smith v. Goguen, 415 U.S. 566, 575.* Pp. 16-20, *39 L. Ed. 2d 605, 94 S. Ct. 1242.*

JUSTICE STEVENS, joined by JUSTICE SOUTER and JUSTICE GINSBURG, concluded in Parts III, IV, and VI:

1. It was not improper for the state courts to conclude that the ordinance, which covers a significant amount of activity in addition to the intimidating conduct that is its factual predicate, is invalid on its face. An enactment may be attacked on its face as impermissibly vague if, *inter alia,* it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty. *Kolender v. Lawson, 461 U.S. at 358.* The freedom to loiter for innocent purposes is part of such "liberty." See, *e.g., Kent v. Dulles, 357 U.S. 116, 126, 2 L. Ed. 2d 1204, 78 S. Ct. 1113.* The ordinance's vagueness makes a facial challenge appropriate. This is not an enactment that simply regulates business behavior and contains a scienter requirement. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186.* It is a criminal law that contains no *mens rea* requirement, see *Colautti v. Franklin, 439 U.S. 379, 395, 58 L. Ed. 2d 596, 99 S. Ct. 675,* and infringes on constitutionally protected rights, see *id. at 391.* Pp. 7-12.

2. Because the ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted, it is impermissibly vague. See, *e.g., Coates v. Cincinnati, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 91 S. Ct. 1686.* The term "loiter" may have a common and accepted meaning, but the ordinance's definition of that term -- "to remain in any one place with no apparent purpose" -- does not. It is difficult to imagine how any Chicagoan standing in a public place with a group of people would know if he or she had an "apparent purpose." This vagueness about what loitering is covered and what is not dooms the ordinance. The city's principal response to the adequate notice concern -- that loiterers are not subject to criminal sanction until after they have disobeyed a dispersal order -- is unpersuasive for at least two reasons. First, the fair notice requirement's purpose is to enable the ordinary citizen to conform his or her conduct to the law. See *Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618.* A dispersal order, which is issued only after prohibited conduct has occurred, cannot retroactively provide adequate notice of the boundary between the permissible and the impermissible applications of the ordinance. Second, the dispersal order's terms compound the inadequacy of the notice afforded by the ordinance, which vaguely requires that the officer "order all such persons to disperse and remove themselves from the area," and thereby raises a host of questions as to the duration and distinguishing features of the loiterers' separation. Pp. 12-16.

JUSTICE O'CONNOR, joined by JUSTICE BREYER, concluded that, as construed by the Illinois Supreme Court, the Chicago ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers; in particular, it fails to provide any standard by which police can judge whether an individual has an "*apparent* purpose." This vagueness alone provides a sufficient ground for affirming the judgment below, and there is no need to consider the other issues briefed by the parties and addressed by the plurality. It is important to courts and legislatures alike to characterize more clearly the narrow scope of the Court's holding. Chicago still has reasonable alternatives to combat the very real threat posed by gang intimidation and violence, including, *e.g.,* adoption of laws that directly prohibit the congregation of gang members to intimidate residents, or the enforcement of existing laws with that effect. Moreover, the ordinance could have been construed more narrowly to avoid the vagueness problem, by, *e.g.,* adopting limitations that restrict the ordinance's criminal penalties to gang members or interpreting the term "apparent purpose" narrowly and in light of the Chicago City Council's findings. This Court, however, cannot impose a limiting construction that a state supreme court has declined to adopt. See, *e.g., Kolender v. Lawson, 461 U.S. 352, 355-356, n. 4, 75 L. Ed. 2d 903, 103 S. Ct. 1855.* The Illinois Supreme Court misapplied this Court's precedents, particularly *Papachristou v. Jacksonville, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839,* to the extent it read them as *requiring* it to hold the ordinance vague in all of its applications. Pp. 1-5.

JUSTICE KENNEDY concluded that, as interpreted by the Illinois Supreme Court, the Chicago ordinance unconstitutionally reaches a broad range of innocent conduct, and, therefore, is not necessarily saved by the requirement that the citizen disobey a dispersal order before there is a violation. Although it can be assumed that disobeying some police commands will subject a citizen to prosecution whether or not the citizen knows why the order is given, it does not follow that any unexplained police order must be obeyed without notice of its lawfulness. The predicate of a dispersal order is not sufficient to eliminate doubts regarding the adequacy of notice under this ordinance. A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to such an order based on the officer's own knowledge of the identity or affiliations of other persons with whom the citizen is congregating; nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose. Pp. 1-2.

JUSTICE BREYER concluded that the ordinance violates the Constitution because it delegates too much discretion to the police, and it is not saved by its limitations requiring that the police reasonably believe that the person ordered to disperse (or someone accompanying him) is a gang member, and that he remain in the public place "with no apparent purpose." Nor does it violate this Court's usual rules governing facial challenges to forbid the city to apply the unconstitutional ordinance in this case. There is no way to distinguish in the ordinance's terms between one application of unlimited police discretion and another. It is unconstitutional, not because a policeman applied his discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications. See *Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618.* Contrary to JUSTICE SCALIA's suggestion, the ordinance does not escape facial invalidation simply because it may provide fair warning to some individual defendants that it prohibits the conduct in which they are engaged. This ordinance is unconstitutional, not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide the police. See *Coates v. Cincinnati, 402 U.S. 611, 614.* Pp. 1-5, *29 L. Ed. 2d 214, 91 S. Ct. 1686.*

COUNSEL: Lawrence Rosenthal argued the cause for petitioner.

Harvey Grossman argued the cause for respondents.

JUDGES: STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts III, IV, and VI, in which SOUTER and GINSBURG, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined. KENNEDY, J., and BREYER, J., filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined.

OPINION BY: STEVENS

OPINION

[*45] [**1854] [***73] JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, and an opinion with respect to Parts III, IV, and VI, in which JUSTICE SOUTER and JUSTICE GINSBURG join.

[***74] [***LEdHR1A] [1A]In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang [*46] members" from "loitering" with one another or with other persons in any public place. The question presented is whether the Supreme Court of Illinois correctly held that the ordinance violates the *Due Process Clause of the Fourteenth Amendment to the Federal Constitution.*

I

Before the ordinance was adopted, the city council's Committee on Police and Fire conducted hearings to explore the problems created by the city's street gangs, and more particularly, the consequences of public loitering by gang members. Witnesses included residents of the neighborhoods where gang members are most active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment. [1]

1 The findings are quoted in full in the opinion of the *Supreme Court of Illinois. 177 Ill. 2d 440, 445, 687 N.E.2d 53, 58, 227 Ill. Dec. 130 (1997).* Some of the evidence supporting these findings is quoted in JUSTICE THOMAS' dissenting opinion. *Post*, at 3-4.

The council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes. It noted that in many neighborhoods throughout the city, "the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." *177 Ill. 2d 440, 445, 687 N.E.2d 53, 58, 227 Ill. Dec. 130 (1997).* Furthermore, the council stated that gang members "establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas; and . . . members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present . . . ." *Ibid.* It further found that "loitering in public places by [*47] criminal street gang members creates a justifiable fear for the safety of persons and property in the area" and that "aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear." Moreover, the council concluded that the city "has an interest in discouraging all persons from loitering in public places with criminal gang members." *Ibid.*

The ordinance creates a criminal offense punishable by a fine of up to $ 500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang member." Second, the persons must be "loitering," which the ordinance defines as "remaining in any one place with no apparent purpose." Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area." Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance. *Ibid.* [2]

2 The ordinance states in pertinent part:

"(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

" (b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

"(c) As used in this section:

"(1) 'Loiter' means to remain in any one place with no apparent purpose.

"(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

. . . . .

"(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.

"(e) Any person who violates this Section is subject to a fine of not less than $ 100 and not more than $ 500 for each offense, or imprisonment for not more than six months, or both.

"In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to section 1-4-120 of this Code." Chicago Municipal Code § 8-4-015 (added June 17, 1992), reprinted in App. to Pet. for Cert. 61a-63a.

[*48] [**1855] Two months after the ordinance [***75] was adopted, the Chicago Police Department promulgated General Order 92-4 to provide guidelines to govern its enforcement. [3] That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way." Chicago Police Department, General Order 92-4, reprinted in App. to Pet. for Cert. 65a. The limitations confine the authority to arrest gang members who violate the ordinance to sworn "members of the Gang Crime Section" and certain other designated officers, [4] and establish detailed criteria for defining street gangs and membership in such gangs. *Id. at 66*a-67a. In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the designated [*49] areas." *Id. at 68*a-69a. The city, however, does not release the locations of these "designated areas" to the public. [5]

3 As the Illinois Supreme Court noted, during the hearings preceding the adoption of the ordinance, "representatives of the Chicago law and police departments informed the city counsel that any limitations on the discretion police have in enforcing the ordinance would be best developed through police policy, rather than placing such limitations into the ordinance itself." *177 Ill. 2d at 445, 687 N.E.2d at 58-59.*

4 Presumably, these officers would also be able to arrest all nongang members who violate the ordinance.

5 Tr. of Oral Arg. 22-23.

II

During the three years of its enforcement, [6] the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the [***76] ordinance. [7] In the ensuing enforcement proceedings, two trial judges upheld the constitutionality of the ordinance, but eleven others ruled that it was invalid. [8] In respondent Youkhana's case, the trial judge held that the "ordinance fails to notify individuals what conduct [*50] is prohibited, and it encourages arbitrary and capricious enforcement by police." [9]

6 The city began enforcing the ordinance on the effective date of the general order in August 1992 and stopped enforcing it in December 1995, when it was held invalid in *Chicago v. Youkhana, 277 Ill. App. 3d 101, 660 N.E.2d 34, 213 Ill. Dec. 777 (1995)*. Tr. of Oral Arg. 43.

7 Brief for Petitioner 16. There were 5,251 arrests under the ordinance in 1993, 15,660 in 1994, and 22,056 in 1995. City of Chicago, R. Daley & T. Hillard, Gang and Narcotic Related Violent Crime: 1993-1997, p. 7 (June 1998).

The city believes that the ordinance resulted in a significant decline in gang-related homicides. It notes that in 1995, the last year the ordinance was enforced, the gang-related homicide rate fell by 26%. In 1996, after the ordinance had been held invalid, the gang-related homicide rate rose 11%. Pet. for Cert. 9, n. 5. However, gang-related homicides fell by 19% in 1997, over a year after the suspension of the ordinance. Daley & Hillard, at 5. Given the myriad factors that influence levels of violence, it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy. Cf. Harcourt, Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, *97 Mich. L. Rev. 291, 296 (1998)* (describing the "hotly contested debate raging among . . . experts over the causes of the decline in crime in New York City and nationally").

8 See Poulos, Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws, *83 Cal. L. Rev. 379, 384, n. 26 (1995).*

9 *Chicago* v. *Youkhana,* Nos. 93 MCI 293363 et al. (Ill. Cir. Ct., Cook Cty., Sept. 29, 1993), App. to Pet. for Cert. 45a. The court also concluded that the ordinance improperly authorized arrest on the basis of a person's status instead of conduct and that it was facially overbroad under the *First Amendment to the Federal Constitution* and *Art. 1, § 5, of the Illinois Constitution. Id. at 59*a.

[**1856] The Illinois Appellate Court affirmed the trial court's ruling in the *Youkhana* case, [10] consolidated and affirmed other pending appeals in accordance with *Youkhana,* [11] and reversed the convictions of respondents Gutierrez, Morales, and others. [12] The Appellate Court was persuaded that the ordinance impaired the freedom of assembly of non-gang members in violation of the *First Amendment to the Federal Constitution* and Article I of the Illinois Consti- tution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the *Fourth Amendment.* [13]

10 *Chicago v. Youkhana, 277 Ill. App. 3d 101, 660 N.E.2d 34, 213 Ill. Dec. 777 (1995).*

11 *Chicago* v. *Ramsey,* Nos. 1-93-4125 et al. (Ill. App., Dec. 29, 1995), reprinted in App. to Pet. for Cert. 39a.

12 *Chicago* v. *Morales,* Nos. 1-93-4039 et al. (Ill. App., Dec 29, 1995), reprinted in App. to Pet. for Cert. 37a.

13 *Chicago v. Youkhana, 277 Ill. App. 3d at 106, 660 N.E.2d at 38; id. at 112, 660 N.E.2d at 41; id. at 113, 660 N.E.2d at 42.*

The Illinois Supreme Court affirmed. It held "that the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties." *177 Ill. 2d at 447, 687 N.E.2d at 59.* The court did not reach the contentions that the ordinance "creates a status offense, permits arrests without probable cause or is overbroad." *Ibid.*

In support of its vagueness holding, the court pointed out that the definition of "loitering" in the ordinance drew no distinction between innocent conduct and conduct calculated [*51] [***77] to cause harm. [14] "Moreover, the definition of 'loiter' provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance." *177 Ill. 2d at 451-452, 687 N.E.2d at 60-61.* Furthermore, it concluded that the ordinance was "not reasonably susceptible to a limiting construction which would affirm its validity." [15]

14 "The ordinance defines 'loiter' to mean 'to remain in any one place with no apparent purpose.' Chicago Municipal Code § 8-4-015(c)(1) (added June 17, 1992). People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a job, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer." *177 Ill. 2d at 451-452, 687 N.E.2d at 60-61.*

15 It stated, "Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets." *Id. at 458, 687 N.E.2d at 64.*

[***LEdHR1B] [1B]We granted certiorari, 523 U.S. (1998), and now affirm. Like the Illinois Supreme Court, we conclude that the ordinance enacted by the city of Chicago is unconstitutionally vague.

III

The basic factual predicate for the city's ordinance is not in dispute. As the city argues in its brief, "the very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods." [16] The findings in the ordinance explain that it was motivated by these concerns. We have no doubt [*52] that a law that directly prohibited such intimidating conduct [**1857] would be constitutional, [17] but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.

16 Brief for Petitioner 14.

17 In fact the city already has several laws that serve this purpose. See, *e.g.,* Ill. Comp. Stat. ch. 720 §§ 5/12-6 (1998) (Intimidation); 570/405.2 (Streetgang criminal drug conspiracy); 147/1 *et seq.* (Illinois Streetgang Terrorism Omnibus Pre-

vention Act); 5/25-1 (Mob action). Deputy Superintendent Cooper, the only representative of the police department at the Committee on Police and Fire hearing on the ordinance, testified that, of the kinds of behavior people had discussed at the hearing, "90 percent of those instances are actually criminal offenses where people, in fact, can be arrested." Record, Appendix II to plaintiff's memorandum in opposition to Motion to Dismiss 182 (Transcript of Proceedings, Chicago City Council Committee on Police and Fire, May 18, 1992).

We are confronted at the outset with the city's claim that it was improper for the state courts to conclude that the ordinance is invalid on its face. The city correctly points out that imprecise laws can be attacked on their face under two different doctrines. [18] First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise [***78] of *First Amendment* rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma, 413 U.S. 601, 612-615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)*. Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)*.

18 Brief for Petitioner 17.

While we, like the Illinois courts, conclude that the ordinance is invalid on its face, we do not rely on the overbreadth doctrine. We agree with the city's submission that the law does not have a sufficiently substantial impact on conduct [*53] protected by the *First Amendment* to render it unconstitutional. The ordinance does not prohibit speech. Because the term "loiter" is defined as remaining in one place "with no apparent purpose," it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message. By its terms, the ordinance is inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view. Cf. *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)*; *Gregory v. Chicago, 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969)*. Its impact on the social contact between gang members and others does not impair the *First Amendment* "right of association" that our cases have recognized. See *Dallas v. Stanglin, 490 U.S. 19, 23-25, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989)*.

On the other hand, as the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the *Due Process Clause of the Fourteenth Amendment*. [19] We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. *Williams v. Fears, 179 U.S. 270, 274, 45 L. Ed. 186, 21 S. Ct. 128 (1900)*; see also *Papachristou v. Jacksonville, 405 U.S. 156, 164, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972)*. [20] [*54] Indeed, it is apparent [**1858] that an individual's [***79] decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent v. Dulles, 357 U.S. 116, 126, 2 L. Ed. 2d 1204, 78 S. Ct. 1113 (1958)*, or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765). [21]

19 See Brief for United States as *Amicus Curiae* 23: "We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others." The city appears to agree, at least to the extent that such activities include "social gatherings." Brief for Petitioner 21, n. 13. Both JUSTICE SCALIA, *POST*, at 12-15, and JUSTICE THOMAS, *post*, at 5-9, not only disagree with this proposition, but also incorrectly assume (as the city does not, see Brief for Petitioner 44) that identification of an obvious liberty interest that is impacted by a statute is equivalent to finding a violation of substantive due process. See n. 35, *infra*.

20 *Petitioner cites historical precedent against recognizing what it describes as the "fundamental right to loiter." Brief for Petitioner 12. While antiloitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality. In 16th-century England, for example, the "'Slavery acts'" provided for a 2-year enslavement period for anyone who "'liveth idly and loiteringly, by the space of three days.'" Note, Homelessness in a Modern Urban Setting, 10 Fordham Urb. L. J. 749, 754, n. 17 (1982). In Papachristou* we noted that many American vagrancy laws were patterned on these "Elizabethan poor laws." *405 U.S. at 161-162*. These laws went virtually unchallenged in this country until attorneys became widely available to the indigent following our decision in *Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)*. See Recent Developments,

Constitutional Attacks on Vagrancy Laws, 20 Stan. L. Rev. 782, 783 (1968). In addition, vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery. In 1865, for example, Alabama broadened its vagrancy statute to include "'any runaway, stubborn servant or child'" and "'a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause.'" T. Wilson, Black Codes of the South 76 (1965). The Reconstruction-era vagrancy laws had especially harsh consequences on African-American women and children. L. Kerber, No Constitutional Right to be Ladies: Women and the Obligations of Citizenship 50-69 (1998). Neither this history nor the scholarly compendia in JUSTICE THOMAS' dissent, *post*, at 5-9, persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause.

21 The freewheeling and hypothetical character of JUSTICE SCALIA's discussion of liberty is epitomized by his assumption that citizens of Chicago, who were once "free to drive about the city" at whatever speed they wished, were the ones who decided to limit that freedom by adopting a speed limit. *Post*, at 1. History tells quite a different story.

In 1903, the Illinois Legislature passed, "An Act to regulate the speed of automobiles and other horseless conveyances upon the public streets, roads, and highways of the state of Illinois." That statute, with some exceptions, set a speed limit of 15 miles per hour. See *Christy v. Elliott, 216 Ill. 31, 74 N.E. 1035 (1905)*. In 1900, there were 1,698,575 citizens of Chicago, 1 Twelfth Census of the United States 430 (1900) (Table 6), but only 8,000 cars (both private and commercial) registered in the entire United States. See Ward's Automotive Yearbook 230 (1990). Even though the number of cars in the country had increased to 77,400 by 1905, *ibid*. It seems quite clear that it was pedestrians, rather than drivers, who were primarily responsible for Illinois' decision to impose a speed limit.

[*55] There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. Cf. *Aptheker v. Secretary of State, 378 U.S. 500, 515-517, 12 L. Ed. 2d 992, 84 S. Ct. 1659 (1964)* (right to travel); *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 82-83, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976)* (abortion); *Kolender v. Lawson, 461 U.S. at 358-360*, nn. 3, 9. For it is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement." See *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)*. It is a criminal law that contains no *mens rea* requirement, see *Colautti v. Franklin, 439 U.S. 379, 395, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979)*, and infringes on constitutionally protected rights, see *id. at 391*. When vagueness permeates the text of such a law, it is subject to facial attack. [22]

22 The burden of the first portion of JUSTICE SCALIA's dissent is virtually a facial challenge to the facial challenge doctrine. See *post*, at 2-11. He first lauds the "clarity of our general jurisprudence" in the method for assessing facial challenges and then states that the clear import of our cases is that, in order to mount a successful facial challenge, a plaintiff must "establish that no set of circumstances exists under which the Act would be valid." See *post*, at 7; *United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*. To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, see *id. at 745, n. 3*, the Court nevertheless entertained their facial challenge). Since we, like the Illinois Supreme Court, conclude that vagueness permeates the ordinance, a facial challenge is appropriate.

We need not, however, resolve the viability of *Salerno*'s dictum, because this case comes to us from a state -- not a federal -- court. When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution. See *Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 955, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984)*. When a state court has reached the merits of a constitutional claim, "invoking prudential limitations on [the respondent's] assertion of *jus tertii* would serve no functional purpose." *City of Revere v. Massachusetts Gen. Hospital, 463 U.S.*

239, 243, 77 L. Ed. 2d 605, 103 S. Ct. 2979 (1983) (internal quotation marks omitted).

Whether or not it would be appropriate for federal courts to apply the *Salerno* standard in some cases-a proposition which is doubtful-state courts need not apply prudential notions of standing created by this Court. See *ASARCO Inc. v. Kadish, 490 U.S. 605, 618, 104 L. Ed. 2d 696, 109 S. Ct. 2037 (1989)*. JUSTICE SCALIA's assumption that state courts must apply the restrictive *Salerno* test is incorrect as a matter of law; moreover it contradicts "essential principles of federalism." See Dorf, Facial Challenges to State and Federal Statutes, *46 Stan. L. Rev. 235, 284 (1994)*.

[*56] [**1859]

Vagueness may invalidate a criminal law for either of two independent [***80] reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. See *Kolender v. Lawson, 461 U.S. at 357*. Accordingly, we first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.

IV

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ." *Giaccio v. Pennsylvania, 382 U.S. 399, 402-403, 15 L. Ed. 2d 447, 86 S. Ct. 518 (1966)*. The Illinois Supreme Court recognized that the term "loiter" may have a common and accepted meaning, *177 Ill. 2d at 451, 687 N.E.2d at 61*, but the definition of that term in this ordinance -- "to remain in any one place with no apparent purpose" -- does not. It is difficult to imagine how [*57] any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose? [23]

23 The Solicitor General, while supporting the city's argument that the ordinance is constitutional, appears to recognize that the ordinance cannot be read literally without invoking intractable vagueness concerns. "The purpose simply to stand on a corner cannot be an 'apparent purpose' under the ordinance; if it were, the ordinance would prohibit nothing at all." Brief for United States as *Amicus Curiae* 12-13.

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather [***81] about what loitering is covered by the ordinance and what is not. The Illinois Supreme Court emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm. [24] Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent. [25] [**1860] However, state [*58] courts have uniformly invalidated laws that do not join the term "loitering" with a second specific element of the crime. [26]

24 *177 Ill. 2d at 452, 687 N.E.2d at 61*. One of the trial courts that invalidated the ordinance gave the following illustration: "Suppose a group of gang members were playing basketball in the park, while waiting for a drug delivery. Their apparent purpose is that they are in the park to play ball. The actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the 'basketball players' awaiting a drug delivery would be left alone." *Chicago* v. *Youkhana*, Nos. 93 MCI 293363 et al. (Ill. Cir. Ct., Cook Cty., Sept. 29, 1993), reprinted in App. to Pet. for Cert. 45a.

25 See, *e.g., Tacoma v. Luvene, 118 Wn.2d 826, 827 P.2d 1374 (1992)* (upholding ordinance criminalizing loitering with purpose to engage in drug-related activities); *People v. Superior Court, 46 Cal. 3d 381, 394-395, 758 P.2d 1046, 1052, 250 Cal. Rptr. 515 (1988)* (upholding ordinance criminalizing loitering for the purpose of engaging in or soliciting lewd act).

26 See, *e.g., State v. Richard, 108 Nev. 626, 629, 836 P.2d 622, 624, n. 2 (1992)* (striking down statute that made it unlawful "for any person to loiter or prowl upon the property of another without lawful business with the owner or occupant thereof").

The city's principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer's order to disperse. "Whatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do." [27] We find this response unpersuasive for at least two reasons.

27 Brief for Petitioner 31.

First, the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618 (1939).* Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. [28] If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth v. Birmingham, 382 U.S. 87, 90, 15 L. Ed. 2d 176, 86 S. Ct.* [***82] *211* [*59] *(1965).* [29] Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law. [30]

28 In this way, the ordinance differs from the statute upheld in *Colten v. Kentucky, 407 U.S. 104, 110, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (1972).* There, we found that the illegality of the underlying conduct was clear. "Any person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he could be convicted under . . . Kentucky's statute if he fails to obey an order to move on." *Ibid.*

29 *"Literally read. . . this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration." 382 U.S. 87 at 90.*

30 *As we have noted in a similar context: "If petitioners were held guilty of violating the Georgia statute because they disobeyed the officers, this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute." Wright v. Georgia, 373 U.S. 284, 292, 10 L. Ed. 2d 349, 83 S. Ct. 1240 (1963).*

Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer "shall order all such persons to disperse and remove themselves from the area." App. to Pet. for Cert. 61a. This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of "neighborhood" and "locality." *Connally v. General Constr. Co., 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926).* We remarked in *Connally* that "both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Id. at 395.*

Lack of clarity in the description of the loiterer's duty to obey a dispersal order might not render the ordinance [**1861] unconstitutionally [*60] vague if the definition of the forbidden conduct were clear, but it does buttress our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted. The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese, 92 U.S. 214, 221, 23 L. Ed. 563 (1876).* This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. Cincinnati, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971).*

V

[***LEdHR1C] [1C]The broad sweep of the ordinance also violates "'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson, 461 U.S. at 358.* There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an [***83] order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may -- indeed, she "shall" -- order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *Kolender v. Lawson, 461 U.S. at 359* (internal quotation marks omitted). As we discussed in the context of fair notice, [*61] see *supra, at 12,* the principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose."

[***LEdHR2] [2] [***LEdHR3] [3]As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to determine what activities constitute loitering." *177 Ill. 2d at 457, 687 N.E.2d at 63.* We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. [31] "The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined." *Smiley v. Kansas, 196 U.S. 447, 455, 49 L. Ed. 546, 25 S. Ct. 289 (1905).*

> 31 This critical fact distinguishes this case from *Boos v. Barry, 485 U.S. 312, 329-330, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988).* There, we noted that the text of the relevant statute, read literally, may have been void for vagueness both on notice and on discretionary enforcement grounds. We then found, however, that the Court of Appeals had "provided a narrowing construction that alleviates both of these difficulties." *Ibid.*

Nevertheless, the city disputes the Illinois Supreme Court's interpretation, arguing that the text of the ordinance limits the officer's discretion in three ways. First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose. Second, it does not permit an arrest if individuals obey a dispersal order. Third, no order can issue unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang.

[***LEdHR1D] [1D]Even putting to one side our duty to defer to a state court's construction of the scope of a local enactment, we find each of these limitations insufficient. That the ordinance does not apply to people who are moving -- that is, to activity that would not constitute loitering under any possible definition of the term -- does not even address the question of how much discretion the police enjoy in deciding which stationary persons [*62] to disperse under the ordinance. [32] Similarly, that the [**1862] ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue. The "no apparent purpose" standard for making that decision is inherently subjective because [***84] its application depends on whether some purpose is "apparent" to the officer on the scene.

> 32 *It is possible to read the mandatory language of the ordinance and conclude that it affords the police no* discretion, since it speaks with the mandatory "shall." However, not even the city makes this argument, which flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.

Presumably an officer would have discretion to treat some purposes -- perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening -- as too frivolous to be apparent if he suspected a different ulterior motive. Moreover, an officer conscious of the city council's reasons for enacting the ordinance might well ignore its text and issue a dispersal order, even though an illicit purpose is actually apparent.

It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, [33] or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to non-gang members as well as suspected gang members. [34] It applies to everyone in the city [*63] who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

> 33 JUSTICE THOMAS' dissent overlooks the important distinction between this ordinance and those that authorize the police "to order groups of individuals who threaten the public peace to disperse." See *post,* at 11.
>
> 34 Not all of the respondents in this case, for example, are gang members. The city admits that it was unable to prove that Morales is a gang member but justifies his arrest and conviction by the fact that Morales admitted "that he knew he was with criminal street gang members." Reply Brief for Petitioner 23, n. 14. In fact, 34 of the 66 respondents in this case were charged in a document that only accused them of being in the

presence of a gang member. Tr. of Oral Arg. 34, 58.

[***LEdHR1E] [1E] [***LEdHR4] [4]Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council's findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang's dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs. As the Illinois Supreme Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent. The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.

[***LEdHR1F] [1F]Finally, in its opinion striking down the ordinance, the Illinois Supreme Court refused to accept the general order issued by the police department as a sufficient limitation on the "vast amount of discretion" granted to the police in its enforcement. We agree. See *Smith v. Goguen, 415 U.S. 566, 575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974)*. That the police [***85] have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city [*64] safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.

[**1863] VI

In our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity." [35] *177 Ill. 2d at 459, 687 N.E.2d at 64*. We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. "We are mindful that the preservation of liberty depends in part on the maintenance of social order." *Houston v. Hill, 482 U.S. 451, 471-472, 96 L. Ed. 2d 398, 107 S. Ct. 2502 (1987)*. However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

35 This conclusion makes it unnecessary to reach the question whether the Illinois Supreme Court correctly decided that ordinance is invalid as a deprivation of substantive due process. For this reason, JUSTICE THOMAS, see *post*, at 5, and JUSTICE SCALIA, see *post*, at 13, are mistaken when they asserts that our decision must be analyzed under the framework for substantive due process set out in *Washington v. Glucksberg, 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997)*.

Accordingly, the judgment of the Supreme Court of Illinois is

Affirmed.

CONCUR BY: O'CONNOR; KENNEDY; BREYER

CONCUR

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

I agree with the Court that Chicago's Gang Congregation Ordinance, Chicago Municipal Code § 8-4-015 (1992) (gang loitering ordinance or ordinance) is unconstitutionally vague. A penal law is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" or fails to [*65] establish guidelines to prevent "arbitrary and discriminatory enforcement" of the law. *Kolender v. Lawson, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)*. Of these, "the more important aspect of vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id. at 358* (quoting *Smith v. Goguen, 415 U.S. 566, 574-575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974)*). I share JUSTICE THOMAS' concern about the consequences of gang violence, and I agree that some degree of police discretion is necessary to allow the police "to perform their peacekeeping responsibilities satisfactorily." See *post*, at 12 (dissenting opinion). A criminal law, however, must not permit policemen, prosecutors, and juries to conduct "'a standardless sweep . . . to pursue their personal predilections.'" *Kolender v. Lawson, supra, at 358* (quoting *Smith v. Goguen, supra, at 575*).

The ordinance at issue provides:

"Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public [***86] place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any per-

son who does not promptly obey such an order is in violation of this section." App. to Pet. for Cert. 61a.

To "loiter," in turn, is defined in the ordinance as "to remain in any one place with no apparent purpose." *Ibid.* The Illinois Supreme Court declined to adopt a limiting construction of the ordinance and concluded that the ordinance vested "*absolute* discretion to police officers." *177 Ill. 2d 440, 457, 687 N.E.2d 53, 63, 227 Ill. Dec. 130 (1997)* (emphasis added). This Court is bound by the Illinois Supreme Court's construction of the ordinance. See *Terminiello v. Chicago, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949).*

As it has been construed by the Illinois court, Chicago's gang loitering ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement [*66] officers. In particular, it fails to provide police with any standard by which they can judge whether an individual has an "*apparent* purpose." Indeed, because any person standing on the street has a general "purpose" -- even if it is simply to stand -- the ordinance permits police officers to choose which purposes are *permissible*. Under this [**1864] construction the police do not have to decide that an individual is "threatening the public peace" to issue a dispersal order. See *post,* at 11 (THOMAS, J., dissenting). Any police officer in Chicago is free, under the Illinois Supreme Court's construction of the ordinance, to order at his whim any person standing in a public place with a suspected gang member to disperse. Further, as construed by the Illinois court, the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk or in any park, coffee shop, bar, or "other location open to the public, whether publicly or privately owned." Chicago Municipal Code § 8-4-015(c)(5) (1992).

To be sure, there is no violation of the ordinance unless a person fails to obey promptly the order to disperse. But, a police officer cannot issue a dispersal order until he decides that a person is remaining in one place "with no apparent purpose," and the ordinance provides no guidance to the officer on how to make this antecedent decision. Moreover, the requirement that police issue dispersal orders only when they "reasonably believe" that a group of loiterers includes a gang member fails to cure the ordinance's vague aspects. If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued. Cf. *ante,* at 18-19. But, the Illinois Supreme Court did not construe the ordinance to be so limited. See *177 Ill. 2d at 453-454, 687 N.E.2d at 62.*

This vagueness consideration alone provides a sufficient ground for affirming the Illinois court's decision, and I agree [*67] with Part V of the Court's opinion, which discusses this consideration. See *ante*, at 18 ("That the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue"); *ante,* at 18-19 [***87] ("It is true . . . that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members"). Accordingly, there is no need to consider the other issues briefed by the parties and addressed by the plurality. I express no opinion about them.

It is important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding. As the ordinance comes to this Court, it is unconstitutionally vague. Nevertheless, there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose," see *id. at 18,* from laws that target only gang members, see *ibid.* and from laws that incorporate limits on the area and manner in which the laws may be enforced, see *ante*, at 19. In addition, the ordinance here is unlike a law that "directly prohibits" the "'presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways,'" that "'intimidates residents.'" *Ante*, at 7 (quoting Brief for Petitioner 14). Indeed, as the plurality notes, the city of Chicago has several laws that do exactly this. See *ante*, at 7-8, n.17. Chicago has even enacted a provision that "enables police officers to fulfill . . . their traditional functions," including "preserving the public peace." See *post*, at 10 (THOMAS, J., dissenting). Specifically, [*68] Chicago's general disorderly conduct provision allows the police to arrest those who knowingly "provoke, make or aid in making a breach of peace." See Chicago Municipal Code § 8-4-010 (1992).

In my view, the gang loitering ordinance could have been construed more narrowly. The term "loiter" might possibly be construed in a more limited fashion to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal [**1865] activities." Such a definition would be consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court. See

App. to Pet. for Cert. 60a-61a. As noted above, so would limitations that restricted the ordinance's criminal penalties to gang members or that more carefully delineated the circumstances in which those penalties would apply to nongang members.

The Illinois Supreme Court did not choose to give a limiting construction to Chicago's ordinance. To the extent it relied on our precedents, particularly *Papachristou v. Jacksonville, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972)*, as *requiring* it to hold the ordinance vague in all of its applications because it was intentionally drafted in a vague manner, the Illinois court misapplied our precedents. See *177 Ill. 2d at 458-459, 687 N.E.2d at 64.* This Court has never [***88] held that the intent of the drafters determines whether a law is vague. Nevertheless, we cannot impose a limiting construction that a state supreme court has declined to adopt. See *Kolender, 461 U.S. at 355-356, n. 4* (noting that the Court has held that "'for the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation we must take the statute as though it read precisely as the highest court of the State has interpreted it'" (citations and internal quotation marks omitted)); *New York* [*69] *v. Ferber, 458 U.S. 747, 769, n. 24, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)* (noting that where the Court is "dealing with a state statute on direct review of a state-court decision that has construed the statute[,] such a construction is binding on us"). Accordingly, I join Parts I, II, and V of the Court's opinion and concur in the judgment.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join Parts I, II, and V of JUSTICE STEVENS' opinion.

I also share many of the concerns he expresses in Part IV with respect to the sufficiency of notice under the ordinance. As interpreted by the Illinois Supreme Court, the Chicago ordinance would reach a broad range of innocent conduct. For this reason it is not necessarily saved by the requirement that the citizen must disobey a police order to disperse before there is a violation.

We have not often examined these types of orders. Cf. *Shuttlesworth v. Birmingham, 382 U.S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211 (1965).* It can be assumed, however, that some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given. Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official. It does not follow, however, that any unexplained police order must be obeyed without notice of the lawfulness of the order. The predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance. A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a dispersal order based on the officer's own knowledge of the identity or affiliations of other persons with whom the citizen is congregating; [*70] nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose.

JUSTICE BREYER, concurring in part and concurring in the judgment.

The ordinance before us creates more than a "*minor* limitation upon the free state of nature." *Post*, at 2 (SCALIA, J., dissenting) (emphasis added). The law authorizes a police officer to order any person to remove himself from any "location open to the public, whether publicly or privately owned," Chicago Municipal Code § 8-4-015(c)(5) (1992). *i.e.*, any sidewalk, front stoop, public park, public square, lakeside promenade, hotel, restaurant, bowling alley, bar, barbershop, sports arena, shopping mall, etc., but with two, and only two, limitations: First, that person must be accompanied by (or must himself be) [***89] someone police reasonably believe is a gang member. Second, that person [**1866] must have remained in that public place "with no apparent purpose." § 8-4-015(c)(1).

The first limitation cannot save the ordinance. Though it limits the number of persons subject to the law, it leaves many individuals, gang members and nongang members alike, subject to its strictures. Nor does it limit in any way the range of conduct that police may prohibit. The second limitation is, as JUSTICE STEVENS, *ante* at 18, and JUSTICE O'CONNOR, *ANTE* at 2, point out, not a limitation at all. Since one always has some apparent purpose, the so-called limitation invites, in fact requires, the policeman to interpret the words "no apparent purpose" as meaning "no apparent purpose except for . . . ." And it is in the ordinance's delegation to the policeman of open-ended discretion to fill in that blank that the problem lies. To grant to a policeman virtually standardless discretion to close off major portions of the city to an innocent person is, in my view, to create a major, not a "minor," "limitation upon the free state of nature."

[*71] Nor does it violate "our rules governing facial challenges," *post*, at 2 (SCALIA, J., dissenting), to forbid the city to apply the unconstitutional ordinance in this case. The reason *why* the ordinance is invalid explains how that is so. As I have said, I believe the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances. And I see

no way to distinguish in the ordinance's terms between one application of that discretion and another. The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications. The city of Chicago may be able validly to apply some *other* law to the defendants in light of their conduct. But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than could it apply an (imaginary) statute that said, "It is a crime to do wrong," even to the worst of murderers. See *Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618 (1939)* ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it").

JUSTICE SCALIA's examples, *post*, at 10-11, reach a different conclusion because they assume a different basis for the law's constitutional invalidity. A statute, for example, might not provide fair warning to many, but an individual defendant might still have been aware that it prohibited the conduct in which he engaged. Cf., *e.g., Parker v. Levy, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)* ("One who has received fair warning of the criminality of his own conduct from the statute in question is [not] entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. [*72] One to whose conduct a statute clearly applies may not successfully challenge it for vagueness"). But I believe this ordinance is [***90] unconstitutional, not because it provides insufficient notice, but because it does not provide "sufficient minimal standards to guide law enforcement officers." See *ante*, at 2 (O'CONNOR, J., concurring in part and concurring in judgment).

I concede that this case is unlike those *First Amendment* "overbreadth" cases in which this Court has permitted a facial challenge. In an overbreadth case, a defendant whose conduct clearly falls within the law and may be constitutionally prohibited can nonetheless have the law declared facially invalid to protect the rights of others (whose protected speech might otherwise be chilled). In the present case, the right that the defendants assert, the right to be free from the officer's exercise of unchecked discretion, is more clearly their own.

This case resembles *Coates v. Cincinnati, 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971)*, where this Court declared facially unconstitutional on, among other grounds, the due process standard of vagueness an ordinance that prohibited persons assembled [**1867] on a sidewalk from "conducting themselves in a manner annoying to persons passing by." The Court explained:

"It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. . . . It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." *Id. at 614* (citation omitted).

[*73] The ordinance in *Coates* could not constitutionally be applied whether or not the conduct of the particular defendants was indisputably "annoying" or of a sort that a different, more specific ordinance could constitutionally prohibit. Similarly, here the city might have enacted a different ordinance, or the Illinois Supreme Court might have interpreted this ordinance differently. And the Constitution might well have permitted the city to apply that different ordinance (or this ordinance as interpreted differently) to circumstances like those present here. See *ante*, at 4 (O'CONNOR, J., concurring in part and concurring in judgment). But *this* ordinance, as I have said, cannot be constitutionally applied to anyone.

DISSENT BY: SCALIA; THOMAS

DISSENT

JUSTICE SCALIA, dissenting.

The citizens of Chicago were once free to drive about the city at whatever speed they wished. At some point Chicagoans (or perhaps Illinoisans) decided this would not do, and imposed prophylactic speed limits designed to assure safe operation by the average (or perhaps even subaverage) driver with the average (or perhaps even subaverage) vehicle. This infringed upon the "freedom" of all citizens, but was not unconstitutional.

Similarly, the citizens of Chicago were once free to stand around and [***91] gawk at the scene of an accident. At some point Chicagoans discovered that this obstructed traffic and caused more accidents. They did not make the practice unlawful, but they did authorize police officers to order the crowd to disperse, and imposed penalties for refusal to obey such an order. Again, this prophylactic measure infringed upon the "freedom" of all citizens, but was not unconstitutional.

Until the ordinance that is before us today was adopted, the citizens of Chicago were free to stand about in public places with no apparent purpose -- to engage, that is, in conduct that appeared to be loitering. In recent years, however, the city has been afflicted with criminal street gangs. As reflected in the record before us, these gangs congregated [*74] in public places to deal in drugs, and to terrorize the neighborhoods by demonstrating control over their "turf." Many residents of the inner city felt that they were prisoners in their own homes. Once again, Chicagoans decided that to eliminate the problem it was worth restricting some of the freedom that they once enjoyed. The means they took was similar to the second, and more mild, example given above rather than the first: Loitering was not made unlawful, but when a group of people occupied a public place without an apparent purpose and in the company of a known gang member, police officers were authorized to order them to disperse, and the failure to obey such an order was made unlawful. See Chicago Municipal Code § 8-4-015 (1992). The minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets.

The majority today invalidates this perfectly reasonable measure by ignoring our rules governing facial challenges, by elevating loitering to a constitutionally guaranteed right, and by discerning vagueness where, according to our usual standards, none exists.

I

Respondents' consolidated appeal presents a facial challenge to the Chicago Ordinance on vagueness grounds. When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications, [**1868] and not just in its particular application to the party in suit. To tell the truth, it is highly questionable whether federal courts have any business making such a declaration. The rationale for our power to review federal legislation for constitutionality, expressed in *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)*, was that we *had* to do so in order to decide the case before us. But that rationale only extends so far as to require us to determine that the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case. [*75]

That limitation was fully grasped by Tocqueville, in his famous chapter on the power of the judiciary in American society:

"The second characteristic of judicial power is, that it pronounces on special cases, and not upon general principles. If a judge, in deciding a particular point, destroys a general principle by passing a judgment which tends to reject all the inferences from that principle, and consequently to annul it, he remains within the ordinary limits of his functions. But if he directly attacks a general principle [***92] without having a particular case in view, he leaves the circle in which all nations have agreed to confine his authority; he assumes a more important, and perhaps a more useful influence, than that of the magistrate; but he ceases to represent the judicial power.

. . . . .

"Whenever a law which the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule . . . . But as soon as a judge has refused to apply any given law in a case, that law immediately loses a portion of its moral force. Those to whom it is prejudicial learn that means exist of overcoming its authority; and similar suits are multiplied, until it becomes powerless. . . . The political power which the Americans have entrusted to their courts of justice is therefore immense; but the evils of this power are considerably diminished by the impossibility of attacking the laws except through the courts of justice. . . . When a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice; his decision bears upon the interest of an individual, and the law is slighted only incidentally. Moreover, although it is censured, it is not abolished; its moral force may be diminished, but its authority is not taken away; and its final destruction can [*76] be accomplished only by the reiterated attacks of judicial functionaries." Democracy in America 73, 75-76 (R. Heffner ed. 1956).

As Justice Sutherland described our system in his opinion for a unanimous Court in *Massachusetts v. Mellon, 262 U.S. 447, 488, 67 L. Ed. 1078, 43 S. Ct. 597 (1923)*:

"We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. . . . If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

And as Justice Brennan described our system in his opinion for a unanimous Court in *United States v. Raines, 362 U.S. 17, 21-22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)*:

"The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies before them. . . . This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to [**1869] anticipate a question [***93] of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of [*77] constitutional law broader than is required by the precise facts to which it is to be applied'. . . . Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."

It seems to me fundamentally incompatible with this system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion -- which a federal court should never issue at all, see *Hayburn's Case*, 2 Dall. 409 (1792), and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non*advisory opinions, see, *e.g., Ashwander v. TVA, 297 U.S. 288, 347, 80 L. Ed. 688, 56 S. Ct. 466 (1936)* (Brandeis, J., concurring). I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?

I must acknowledge, however, that for some of the present century we have done just this. But until recently, at least, we have -- except in free-speech cases subject to the doctrine of overbreadth, see, *e.g., New York v. Ferber, 458 U.S. 747, 769-773, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)* -- *required* the facial challenge to *be* a go-for-broke proposition. That is to say, before declaring a statute to be void in all its applications (something we should not be doing in the first place), we have at least imposed upon the litigant the eminently reasonable requirement that he establish [*78] that the statute was *unconstitutional* in all its applications. (I say that is an eminently reasonable requirement, not only because we should not be holding a statute void in all its applications unless it is unconstitutional in all its applications, but also because *unless* it is unconstitutional in all its applications we do not even know, without conducting an as-applied analysis, whether it is void with regard to the very litigant *before* us -- whose case, after all, was the occasion for undertaking this inquiry in the first place. [1])

1 In other words, a facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as-applied challenge. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)* ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law"); *Parker v. Levy, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)* ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness").

The plurality asserts that in *United States v. Salerno, 481 U.S. 739, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*, which I discuss in text immediately following this footnote, the Court "entertained" a facial challenge even though "the defendants . . . did not claim that the statute was unconstitutional as applied to them." *Ante*, at 11, n. 22. That is not so. The Court made it absolutely clear in *Salerno* that a facial challenge requires the assertion that "*no set of circumstances exists* under which the Act would be valid," *481 U.S. at 745* (emphasis added). The footnoted statement upon which the plurality relies ("Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case," *id. at 745, n. 3*) was obviously meant to convey the fact that the defendants were not making, *in addition to their facial challenge*, an alternative as-applied challenge -- *i.e.*, asserting that *even if* the statute was not unconstitutional in *all* its applications it was *at least* unconstitutional in its particular application to them.

As we said in *United States v. Salerno,* [***94] *481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*: [**1870]

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances* [*79] *exists under which the Act would be*

valid. The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the *First Amendment*." (Emphasis added.) [2]

2 *Salerno*, a criminal case, repudiated the Court's statement in *Kolender v. Lawson, 461 U.S. 352, 359, n. 8, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)*, to the effect that a facial challenge to a criminal statute could succeed "even when [the statute] could conceivably have had some valid application." *Kolender* seems to have confused the standard for *First Amendment* overbreadth challenges with the standard governing facial challenges on all other grounds. See *ibid.* (citing the Court's articulation of the standard for *First Amendment overbreadth* challenges from *Hoffman Estates, supra, at 494*). As *Salerno* noted, *481 U.S. at 745*, the overbreadth doctrine is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression. See, *e.g., Broadrick v. Oklahoma, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)*.

This proposition did not originate with *Salerno*, but had been expressed in a line of prior opinions. See, *e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984)* (opinion for the Court by STEVENS, J.) (statute not implicating *First Amendment* rights is invalid on its face if "it is unconstitutional in every conceivable application"); *Schall v. Martin, 467 U.S. 253, 269, n. 18, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984)*; *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-495, 497, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)*; *United States v. National Dairy Products Corp., 372 U.S. 29, 31-32, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963)*; *Raines, supra, at 21*. And the proposition has been reaffirmed in many cases and opinions since. See, *e.g., Anderson v. Edwards, 514 U.S. 143, 155-156, n. 6, 131 L. Ed. 2d 178, 115 S. Ct. 1291 (1995)* (unanimous Court); *Babbitt v. Sweet Home Chapter of Communities for Great Oregon, 515 U.S. 687, 699, 132 L. Ed. 2d 597, 115 S. Ct. 2407 (1995)* (opinion for the Court by STEVENS, J.) (facial challenge asserts that a challenged statute or regulation is invalid "in every circumstance"); *Reno v. Flores, 507 U.S. 292, 301, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993)*; *Rust v. Sullivan,* [*80] *500 U.S. 173, 183, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991)*; *Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 514, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990)* (opinion of KENNEDY, J.); *Webster v. Reproductive Health Servs.,* [***95] *492 U.S. 490, 523-524, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989)* (O'CONNOR, J., concurring in part and concurring in judgment); *New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 11-12, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988)*. [3] Unsurprisingly, given the clarity of our general jurisprudence on this [**1871] point, the Federal Courts of Appeals *all* apply the *Salerno* standard in adjudicating facial challenges. [4]

3 The plurality asserts that the *Salerno* standard for facial challenge "has never been the decisive factor in any decision of this Court." It means by that only this: in rejecting a facial challenge, the Court has never contented itself with identifying *only one* situation in which the challenged statute would be constitutional, but has mentioned several. But that is not at all remarkable, and casts no doubt upon the validity of the principle that *Salerno* and these many other cases enunciated. It is difficult to conceive of a statute that would be constitutional in only a single application -- and hard to resist mentioning more than one.

The plurality contends that it *does not matter* whether the *Salerno* standard is federal law, since facial challenge is a species of third-party standing, and federal limitations upon third-party standing do not apply in an appeal from a state decision which takes a broader view, as the Illinois Supreme Court's opinion did here. *Ante*, at 11, n. 22. This is quite wrong. Disagreement over the *Salerno* rule is not a disagreement over the "standing" question of whether the person challenging the statute can *raise* the rights of third parties: under both *Salerno* and the plurality's rule he *can*. The disagreement relates to *how many* third-party rights he must *prove to be infringed* by the statute before he can *win*: *Salerno* says "all" (in addition to his own rights), the plurality says "many." That is not a question of standing but of substantive law. The notion that, if *Salerno* is the federal rule (a federal statute is not totally invalid unless it is invalid in all its applications), it can be *altered* by a state court (a federal statute is totally invalid if it is invalid in *many* of its applications), and that that alteration must be accepted by the Supreme Court of the United States is, to put it as gently as possible, remarkable.

4 See, *e.g., Abdullah v. Commissioner of Ins. of Commonwealth of Mass., 84 F.3d 18, 20 (CA1 1996)*; *Deshawn E. v. Safir, 156 F.3d 340, 347 (CA2 1998)*; *Artway v. Attorney Gen. of State of N. J., 81 F.3d 1235, 1252, n. 13 (CA3 1996)*; *Manning v. Hunt, 119 F.3d 254, 268-269 (CA4 1997)*; *Causeway Medical Suite v. Ieyoub, 109 F.3d 1096, 1104* (CA5), cert. denied, *522 U.S. 943, 139 L. Ed. 2d 278, 118 S. Ct. 357 (1997)*;

Aronson v. City of Akron, 116 F.3d 804, 809 (CA6 1997); *Government Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267, 1283 (CA7 1992)*, cert. denied, *506 U.S. 1053, 122 L. Ed. 2d 131, 113 S. Ct. 977 (1993)*; *Woodis v. Westark Community College, 160 F.3d 435, 438-439 (CA8 1998)*; *Roulette v. Seattle, 97 F.3d 300, 306 (CA9 1996)*; *Public Lands Council v. Babbitt, 167 F.3d 1287, 1293 (CA10 1999)*; *Dimmitt v. Clearwater, 985 F.2d 1565, 1570-1571 (CA11 1993)*; *Time Warner Entertainment Co. v. FCC, 320 U.S. App. D.C. 294, 93 F.3d 957, 972 (CADC 1996)*.

[*81] I am aware, of course, that in some recent facial-challenge cases the Court has, without any attempt at explanation, created entirely irrational exceptions to the "unconstitutional in every conceivable application" rule, when the statutes at issue concerned hot-button social issues on which "informed opinion" was zealously united. See *Romer v. Evans, 517 U.S. 620, 643, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996)* (SCALIA, J., dissenting) (homosexual rights); *Planned Parenthood of Southeastern Pa.* v. *Casey*,

[***H] R1B *505 U.S. 833, 895, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)* (abortion rights). But the present case does not even lend itself to such a "political correctness" exception -- which, though illogical, is at least predictable. It is not *a la mode* to favor gang members and associated loiterers over the beleaguered law-abiding residents of the inner city.

When our normal criteria for facial challenges are applied, it is clear that the Justices in the majority have transposed the burden of proof. Instead of requiring the respondents, who are challenging the Ordinance, to show that it is invalid in all its applications, they have required the petitioner to show that it is valid in all its applications. Both the plurality [***96] opinion and the concurrences display a lively imagination, creating hypothetical situations in which the law's application would (in their view) be ambiguous. But that creative role has been usurped from the petitioner, who can defeat the respondents' facial challenge by conjuring up *a single valid application* of the law. My contribution would go something like this [5] : Tony, a member of the Jets criminal street gang, is standing [*82] alongside and chatting with fellow gang members while staking out their turf at Promontory Point on the South Side of Chicago; the group is flashing gang signs and displaying their distinctive tattoos to passersby. Officer Krupke, applying the Ordinance at issue here, orders the group to disperse. After some speculative discussion (probably irrelevant here) over whether the Jets are depraved because they are deprived, Tony and the other gang members break off further conversation with the statement -- not entirely coherent, but evidently intended to be rude -- "Gee, Officer Krupke, krup you." A tense standoff ensues until Officer Krupke arrests the group for failing to obey his dispersal order. Even assuming (as the Justices in the majority do, but I do not) that a law requiring obedience to a dispersal order is impermissibly vague unless it is clear to the objects of the order, before its issuance, that their conduct justifies it, I find it hard to believe that the Jets would not have known they had it coming. That should settle the matter of respondents' facial challenge to the Ordinance's vagueness.

5 With apologies for taking creative license with the work of Messrs. Bernstein, Sondheim, and Laurents. West Side Story, copyright 1959.

Of course respondents would still be able to claim that the Ordinance was vague as applied to them. But the ultimate demonstration of the inappropriateness of the Court's holding of *facial* invalidity is the fact that it is doubtful whether some of these respondents could even sustain an *as-applied* challenge on the basis of the majority's own criteria. For instance, respondent Jose Renteria -- who admitted that he was a member of the Satan Disciples gang -- was observed by the arresting officer loitering on a street corner with other gang members. The officer issued a dispersal order, but when she returned to the same corner 15 to [**1872] 20 minutes later, Renteria was still there with his friends, whereupon he was arrested. In another example, respondent Daniel Washington and several others -- who admitted they were members of the Vice Lords gang -- were observed by the arresting officer loitering in the street, yelling at passing vehicles, stopping traffic, and preventing pedestrians from using [*83] the sidewalks. The arresting officer issued a dispersal order, issued *another* dispersal order later when the group did not move, and finally arrested the group when they were found loitering in the same place still later. Finally, respondent Gregorio Gutierrez -- who had previously admitted to the arresting officer his membership in the Latin Kings gang -- was observed loitering with two other men. The officer issued a dispersal order, drove around the block, and arrested the men after finding them in the same place upon his return. See Brief for Petitioner 7, n. 5; Brief for United States as *Amicus Curiae* 16, n. 11. Even on the majority's assumption that to avoid vagueness it must be clear to the object of the dispersal order *ex ante* that his conduct is covered by the Ordinance, it seems most improbable [***97] that any of these as-applied challenges would be sustained. Much less is it possible to say that the Ordinance is invalid in *all* its applications.

II

The plurality's explanation for its departure from the usual rule governing facial challenges is seemingly contained in the following statement: "[This] is a criminal law that contains no *mens rea* requirement . . . *and* infringes on constitutionally protected rights . . . . When vagueness permeates the text of *such* a law, it is subject to facial attack." *Ante*, at 11 (emphasis added). The proposition is set forth with such assurance that one might suppose that it repeats some well-accepted formula in our jurisprudence: (Criminal law without *mens rea* requirement) + (infringement of constitutionally protected right) + (vagueness) = (entitlement to facial invalidation). There is no such formula; the plurality has made it up for this case, as the absence of any citation demonstrates.

But no matter. None of the three factors that the plurality relies upon exists anyway. I turn first to the support for the proposition that there is a constitutionally protected right to loiter -- or, as the plurality more favorably describes [*84] it, for a person to "remain in a public place of his choice." *Ibid.* The plurality thinks much of this Fundamental Freedom to Loiter, which it contrasts with such lesser, constitutionally *un*protected, activities as doing (ugh!) *business*: "This is not an ordinance that simply regulates business behavior and contains a scienter requirement. . . . It is a criminal law that contains no *mens rea* requirement . . . and infringes on constitutionally protected rights." *Ibid.* (internal quotation marks omitted). (Poor Alexander Hamilton, who has seen his "commercial republic" devolve, in the eyes of the plurality, at least, into an "indolent republic," see The Federalist No. 6, p. 56; No. 11, pp. 84-91 (C. Rossiter ed. 1961).)

Of course every activity, even scratching one's head, can be called a "constitutional right" if one means by that term nothing more than the fact that the activity is covered (as all are) by the *Equal Protection Clause*, so that those who engage in it cannot be singled out without "rational basis." See *FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)*. But using the term in that sense utterly impoverishes our constitutional discourse. We would then need a *new* term for those activities -- such as political speech or religious worship -- that cannot be forbidden even *with* rational basis.

The plurality tosses around the term "constitutional right" in this renegade sense, because there is not the slightest evidence for the existence of a genuine constitutional right to loiter. JUSTICE THOMAS recounts the vast historical tradition of criminalizing the activity. *Post*, at 5-9. It is simply not maintainable that the right to loiter would have been regarded as an essential attribute of liberty at the time of the framing or at the time of adoption of the *Fourteenth Amendment*. For the plurality, however, the historical practices of our people are nothing more than a speed bump on the road to the "right" result. Its opinion [**1873] blithely proclaims: "Neither this history nor the scholarly [*85] compendia in JUSTICE THOMAS' dissent, [***98] *post*, at 5-9, persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause." *Ante*, at 10, n. 20. The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the *Bill of Rights* (usually under the rubric of so-called "substantive due process") is in my view judicial usurpation. But we have, recently at least, sought to limit the damage by tethering the courts' "right-making" power to an objective criterion. In *Washington v. Glucksberg, 521 U.S. 702, 720-721, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997)*, we explained our "established method" of substantive due process analysis: carefully and narrowly describing the asserted right, and then examining whether that right is manifested in "our Nation's history, legal traditions, and practices." See also *Collins v. Harker Heights, 503 U.S. 115, 125-126, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992)*; *Michael H. v. Gerald D., 491 U.S. 110, 122-123, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989)*; *Moore v. East Cleveland, 431 U.S. 494, 502-503, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977)*. The plurality opinion not only ignores this necessary limitation, but it leaps far beyond any substantive-due-process atrocity we have ever committed, by actually placing the burden of proof upon the defendant to establish that loitering is *not* a "fundamental liberty." It never does marshal any support *for* the proposition that loitering *is* a constitutional right, contenting itself with a (transparently inadequate) explanation of why the historical record of laws banning loitering does not positively *contradict* that proposition, [6] and the (transparently erroneous) assertion that the City of Chicago appears to have conceded the [*86] point. [7] It is enough for the members of the plurality that "history . . . [fails to] persuade us that the right to engage in loitering that is entirely harmless in both purpose and effect is *not* a part of the liberty protected by the Due Process Clause," *ante*, at 10, n. 20 (emphasis added); they apparently think it quite unnecessary for anything to persuade them that it *is*. [8]

6 The plurality's explanation for ignoring these laws is that many of them carried severe penalties and, during the Reconstruction era, they had "harsh consequences on African-American women and children." *Ante*, at 9-10, n. 20. Those severe penalties and those harsh consequences are certainly regrettable, but they in no way lessen (indeed, the harshness of penalty tends to increase) the capacity of these laws to *prove* that

loitering was never regarded as a fundamental liberty.

7 *Ante*, at 9, n. 19. The plurality bases its assertion of apparent concession upon a footnote in Part I of petitioner's brief which reads: "Of course, laws regulating social gatherings affect a liberty interest, and thus are subject to review under the rubric of substantive due process . . . . We address that doctrine in Part II below." Brief for Petitioner 21-22, n. 14. If a careless reader were inclined to confuse the term "social gatherings" in this passage with "loitering," his confusion would be eliminated by pursuing the reference to Part II of the brief, which says, in its introductory paragraph: "As we explain below, substantive due process does not support the court's novel holding that the Constitution secures the right to stand still on the public way even when one is not engaged in speech, assembly, or other conduct that enjoys affirmative constitutional protection." *Id. at 39.*

8 The plurality says, *ante*, at 20, n. 35, that since it decides the case on the basis of *procedural* due process rather than *substantive* due process, I am mistaken in analyzing its opinion "under the framework for substantive due process set out in *Washington* v. *Glucksberg.*" *Ibid.* But I am not analyzing it under that framework. I am simply assuming that when the plurality says (as an essential part of its reasoning) that "the right to loiter for innocent purposes is . . . a part of the liberty protected by the Due Process Clause" it does not believe that the same word ("liberty") means one thing for purposes of substantive due process and something else for purposes of procedural due process. There is no authority for that startling proposition. See *Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572-575, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)* (rejecting procedural-due-process claim for lack of "liberty" interest, and citing substantive-due-process cases).

The plurality's opinion seeks to have it both ways, invoking the *Fourteenth Amendment's* august protection of "liberty" in defining the standard of certainty that it sets, but then, in identifying the conduct protected by that high standard, ignoring our extensive case-law defining "liberty," and substituting, instead, all "harmless and innocent" conduct, *ante*, at 14.

It would be unfair, however, to criticize the plurality's failed attempt [***99] to establish that [**1874] loitering is a constitutionally [*87] protected right while saying nothing of the concurrences. The plurality at least makes an attempt. The concurrences, on the other hand, make no pretense at attaching their broad "vagueness invalidates" rule to a liberty interest. As far as appears from JUSTICE O'CONNOR's and JUSTICE BREYER's opinions, *no* police officer may issue *any* order, affecting *any* insignificant sort of citizen conduct (except, perhaps, an order addressed to the unprotected class of "gang members") unless the standards for the issuance of that order are precise. No modern urban society -- and probably none since London got big enough to have sewers -- could function under such a rule. There are innumerable reasons why it may be important for a constable to tell a pedestrian to "move on" -- and even if it were possible to list in an ordinance all of the reasons that are known, many are simply unpredictable. Hence the (entirely reasonable) Rule of the City of New York which reads: "No person shall fail, neglect or refuse to comply with the lawful direction or command of any Police Officer, Urban Park Ranger, Parks Enforcement Patrol Officer or other [Parks and Recreation] Department employee, indicated by gesture or otherwise." 56 RCNY § 1-03(c)(1) (1996). It is one thing to uphold an "as applied" challenge when a pedestrian disobeys such an order that is unreasonable -- or even when a pedestrian asserting some true "liberty" interest (holding a political rally, for instance) disobeys such an order that is reasonable *but unexplained.* But to say that such a general ordinance permitting "lawful orders" is void *in all its applications* demands more than a safe and orderly society can reasonably deliver.

JUSTICE KENNEDY apparently recognizes this, since he acknowledges that "some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given," including, for example, an order "telling a pedestrian not to enter a building" when the reason is "to avoid impeding a rescue team." *Ante*, at 1. [*88] But his only explanation of why the present interference with the "right to loiter" does not fall within that permitted scope of action is as follows: "The predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance." *Ibid.* I have not the slightest idea what this means. But I *do* understand that the follow-up explanatory sentence, showing how this principle invalidates the present ordinance, applies equally to the rescue-team example [***100] that JUSTICE KENNEDY thinks is constitutional -- as is demonstrated by substituting for references to the facts of the present case (shown in italics) references to his rescue-team hypothetical (shown in brackets): "A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a *dispersal order* [order not to enter a building] based on the officer's own knowledge of *the identity or affiliations of other persons with whom the citizen is congregating* [what is

going on in the building]; nor may the citizen be able to assess what an officer might conceive to be *the citizen's lack of an apparent purpose* [the impeding of a rescue team]." *Ibid.*

III

I turn next to that element of the plurality's facial-challenge formula which consists of the proposition that this criminal ordinance contains no *mens rea* requirement. The first step in analyzing this proposition is to determine what the *actus reus*, to which that *mens rea* is supposed to be attached, consists of. The majority believes that loitering forms part of (indeed, the essence of) the offense, and must be proved if conviction is to be obtained. See *ante*, at 2, 6, 9-13, 14-15, 16-18 (plurality and majority opinions); *ante*, at 2-3, 4 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 1-2 (KENNEDY, J., concurring in part and concurring in judgment); *ante*, at 3-4 (BREYER, J., concurring in part and concurring in judgment). That is not what the Ordinance provides. The [*89] only part of the Ordinance that refers to loitering is the portion that addresses, not the punishable conduct of the defendant, but what the police officer must observe before he can issue an order to disperse; and what he must observe is carefully defined in terms of what [**1875] the defendant *appears* to be doing, not in terms of what the defendant is *actually* doing. The Ordinance does not require that the defendant have been loitering (*i.e.*, have been remaining in one place with no purpose), but rather that the police officer have observed him remaining in one place without any *apparent* purpose. Someone who in fact *has* a genuine purpose for remaining where he is (waiting for a friend, for example, or waiting to hold up a bank) *can* be ordered to move on (assuming the other conditions of the Ordinance are met), so long as his remaining has no *apparent* purpose. It is likely, to be sure, that the Ordinance will come down most heavily upon those who are *actually* loitering (those who *really* have no purpose in remaining where they are); but that activity is not a condition for issuance of the dispersal order.

The *only* act of a defendant that is made punishable by the Ordinance -- or, indeed, that is even mentioned by the Ordinance -- is his failure to "promptly obey" an order to disperse. The question, then, is whether that *actus reus* must be accompanied by any wrongful intent -- and of course it must. As the Court itself describes the requirement, "a person must *disobey* the officer's order." *Ante*, at 3 (emphasis added). No one thinks a defendant could be successfully prosecuted under the Ordinance if he did not hear the order to disperse, or if he suffered a paralysis that rendered his compliance impossible. The willful failure [***101] to obey a police order is wrongful intent enough.

IV

Finally, I address the last of the three factors in the plurality's facial-challenge formula: the proposition that the Ordinance is vague. It is not. Even under the ersatz overbreadth [*90] standard applied in *Kolender v. Lawson, 461 U.S. 352, 358 n. 8, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)*, which allows facial challenges if a law reaches "a substantial amount of constitutionally protected conduct," respondents' claim fails because the Ordinance would not be vague in most or even a substantial number of applications. A law is unconstitutionally vague if its lack of definitive standards either (1) fails to apprise persons of ordinary intelligence of the prohibited conduct, or (2) encourages arbitrary and discriminatory enforcement. See, *e.g., Grayned v. City of Rockford, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).*

The plurality relies primarily upon the first of these aspects. Since, it reasons, "the loitering is the conduct that the ordinance is designed to prohibit," and "an officer may issue an order only after prohibited conduct has already occurred," *ante*, at 14, 15, the order to disperse cannot itself serve "to apprise persons of ordinary intelligence of the prohibited conduct." What counts for purposes of vagueness analysis, however, is not what the Ordinance is "designed to prohibit," but what it actually subjects to criminal penalty. As discussed earlier, that consists of nothing but the refusal to obey a dispersal order, as to which there is no doubt of adequate notice of the prohibited conduct. The plurality's suggestion that even the dispersal order *itself* is unconstitutionally vague, because it does not specify *how far to disperse (!)*, see *ante*, at 15, scarcely requires a response. [9] If it were true, it would render unconstitutional for vagueness many of the Presidential proclamations issued under that provision of the United States Code which requires the President, [*91] before using the militia or the Armed Forces for law enforcement, to issue a proclamation ordering the insurgents to disperse. See *10 U.S.C. § 334.* President Eisenhower's proclamation relating to the obstruction of court-ordered enrollment of black students in public schools at Little Rock, Arkansas, read as follows: "I . . . command all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith." Presidential [**1876] Proclamation No. 3204, 3 CFR 132 (1954-1958 Comp.). See also Presidential Proclamation No. 3645, 3 CFR 103 (1964-1965 Comp.) (ordering those obstructing the civil rights march from Selma to Montgomery, Alabama, to "disperse . . . forthwith"). See also *Boos v. Barry, 485 U.S. 312, 331, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988)* (rejecting overbreadth/vagueness challenge to a law allowing police officers to order congregations near foreign embassies to disperse); *Cox v. Louisiana, 379 U.S. 536, 551,*

[***102] *13 L. Ed. 2d 471, 85 S. Ct. 453 (1965)* (rejecting vagueness challenge to the dispersal-order prong of a breach-of-the-peace statute and describing that prong as "narrow and specific").

9 I call it a "suggestion" because the plurality says only that the terms of the dispersal order "compound the inadequacy of the notice," and acknowledges that they "might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear." *Ante*, at 15, 16. This notion that a prescription ("Disperse!") which is itself not unconstitutionally vague can somehow contribute to the unconstitutional vagueness of the entire scheme is full of mystery -- suspending, as it does, the metaphysical principle that nothing can confer what it does not possess (*nemo dat qui non habet*).

For its determination of unconstitutional vagueness, the Court relies secondarily -- and JUSTICE O'CONNOR's and JUSTICE BREYER's concurrences exclu-

cause requirement explicit. [10] Under the Order, officers must have probable cause to believe that an individual is a member of a criminal street gang, to be substantiated by the officer's "experience and knowledge of the alleged offenders" and by "specific, documented and reliable information" such as reliable witness testimony or an individual's admission of gang membership or display of distinctive colors, tattoos, signs, or other markings worn by members of particular criminal street gangs. App. to Pet. for Cert. 67a-69a, 71a-72a.

10 "Administrative interpretation and implementation of a regulation are . . . highly relevant to our [vagueness] analysis, for 'in evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court *or enforcement agency* has proffered.'" *Ward v. Rock Against Racism, 491 U.S. 781, 795-796, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989)* (emphasis added) (quoting *Hoffman Estates, 455 U.S. at 494, n. 5*). See also *Hoffman Estates, 455 U.S. at 504* (administrative regula-

> purpose' as meaning 'no apparent purpose except for . . . .'" *Ante*, at 1-2. It is simply not true that "one always has some apparent purpose" -- and especially not true that one always has some apparent purpose in remaining at rest, for the simple reason that one often (indeed, perhaps usually) has no *actual* purpose in remaining at rest. Remaining at rest will be a person's normal state, unless he has a purpose which causes him to move. That is why one frequently reads of a person's "wandering aimlessly" (which is worthy of note) but not of a person's "sitting aimlessly" (which is not remarkable at all). And that is why a synonym for "purpose" is "motive": that which causes one *to move*.

The Court's attempt to demonstrate the vagueness of the Ordinance produces the following peculiar statement: "The 'no apparent purpose' standard for making [the decision to [*94] issue an order to disperse] is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." *Ante*, at 18. In the Court's view, a person's lack of any purpose in staying in one location is presumably an *objective* factor, and what the Ordinance requires as a condition of an order to disperse -- the absence of any *apparent* purpose -- is a *subjective* factor. This side of the looking glass, just the opposite is true.

Elsewhere, of course, the Court acknowledges the clear, objective commands of the Ordinance, and indeed relies upon them to paint it as unfair:

"By its very terms, the ordinance encompasses a great deal of harmless behavior. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may -- indeed, she 'shall' -- order [***104] them to disperse." *Ante*, at 16.

Quite so. And the fact that this clear instruction to the officers "encompasses a great deal of harmless behavior" would be invalidating if that harmless behavior were constitutionally protected against abridgment, such as speech or the practice of religion. Remaining in one place is *not* so protected, and so (as already discussed) it is up to the citizens of Chicago -- not us -- to decide whether the trade-off is worth it.

The Court also asserts -- in apparent contradiction to the passage just quoted -- that the "apparent purpose" test is too elastic because it presumably allows police officers to treat *de minimis* "violations" as not warranting enforcement. [12] See *ante*, at 18-19. But such discretion -- and, for that matter, the potential for ultra vires action -- is no different with regard to the enforcement of this clear ordinance than it is with regard to the enforcement of all laws in our criminal-justice system. Police officers (and prosecutors, see *Bordenkircher v. Hayes, 434 U.S. 357, 364, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978)*), have broad discretion over what laws to enforce and when. As we said in *Whren v. United States, 517 U.S. 806, 818, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996)*, "we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."

> 12 The Court also speculates that a police officer may exercise his discretion to *enforce* the Ordinance and *direct* dispersal when (in the Court's view) the Ordinance is inapplicable -- viz., where there *is* an apparent purpose, but it is an unlawful one. See *ante*, at 18. No one in his right mind would read the phrase "without any apparent purpose" to mean anything other than "without any apparent lawful purpose." The implication that acts referred to approvingly in statutory language are "lawful" acts is routine. The Court asserts that the Illinois Supreme Court has forced it into this interpretive inanity because, since it "has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says . . . ." *Ante*, at 19. But the Illinois Supreme Court did not mention this particular interpretive issue, which has nothing to do with giving the Ordinance a "limiting" interpretation, and everything to do with giving it its ordinary legal meaning.

[*95] [**1878] JUSTICE BREYER's concurrence tries to perform the impossible feat of affirming our unquestioned rule that a criminal statute that is so vague as to give constitutionally inadequate notice to *some* violators may nonetheless be enforced against those whose conduct is clearly covered, see *ante*, at 3, citing *Parker v. Levy, 417 U.S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)*, while at the same time asserting that a statute which "delegates too much discretion to a police officer" is invalid in *all* its applications, even where the officer uses his discretion "wisely," *ante*, at 2. But the vagueness that causes notice to be inadequate is the very same vagueness that causes "too much discretion" to be lodged in the enforcing officer. Put another way: A law that gives the policeman clear guidance in all cases gives

the public clear guidance in all cases as well. Thus, what JUSTICE BREYER gives with one hand, he takes away with the other. In his view, vague statutes that nonetheless give adequate notice to *some* violators are not unenforceable against those violators because of inadequate notice, but *are* unenforceable against them "because [***105] the policeman enjoys too much discretion in *every* case," *ibid.* This is simply contrary to our case-law, including *Parker v. Levy, supra.* [13]

13 The opinion that JUSTICE BREYER relies on, *Coates v. Cincinnati, 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971)*, discussed *ante*, at 3-4, did not say that the ordinance there at issue gave adequate notice but did not provide adequate standards for the police. It invalidated that ordinance *on both inadequate-notice and inadequate-enforcement-standard grounds*, because *First Amendment* rights were implicated. It is common ground, however, that the present case does not implicate the *First Amendment*, see *ante*, at 8-9 (plurality opinion); *ante*, at 3 (BREYER, J., concurring in part and concurring in judgment).

[*96] V

The plurality points out that Chicago already has several laws that reach the intimidating and unlawful gang-related conduct the Ordinance was directed at. See *ante*, at 7-8, n. 17. The problem, of course, well recognized by Chicago's City Council, is that the gang members cease their intimidating and unlawful behavior under the watchful eye of police officers, but return to it as soon as the police drive away. The only solution, the council concluded, was to clear the streets of congregations of gangs, their drug customers, and their associates.

JUSTICE O'CONNOR's concurrence proffers the same empty solace of existing laws useless for the purpose at hand, see *ante*, at 3-4, but seeks to be helpful by suggesting some measures *similar* to this ordinance that *would* be constitutional. It says that Chicago could, for example, enact a law that "directly prohibits the presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways, that intimidates residents." *Ibid.* (internal quotation marks omitted). (If the majority considers the present ordinance too vague, it would be fun to see what it makes of "a large collection of obviously brazen, insistent, and lawless gang members.") This prescription of the concurrence is largely a quotation from the plurality -- which itself answers the concurrence's suggestion that such a law would be helpful by pointing out that the city already "has several laws that serve this purpose." *Ante*, at 7-8, n. 17 (plurality opinion) (citing extant laws against "intimidation," "streetgang criminal drug conspiracy," and "mob action"). The problem, again, is that the intimidation and lawlessness do not occur when the police are in sight.

[*97] JUSTICE O'CONNOR's concurrence also proffers another cure: "If the ordinance applied only to persons reasonably believed to be gang members, this requirement might [**1879] have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued." *Ante*, at 3 (the Court agrees that this might be a cure, see *ante*, at 18-19). But the Ordinance already specifies to whom the order can be issued: persons remaining in one place with no apparent purpose in the company of a gang member. And if "remaining in one place with no apparent purpose" is so vague as to give the police unbridled discretion in controlling the conduct of non-gang-members, it surpasses understanding how it ceases to be so vague when applied to gang members *alone*. [***106] Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.

* * *

The fact is that the present ordinance is entirely clear in its application, cannot be violated except with full knowledge and intent, and vests no more discretion in the police than innumerable other measures authorizing police orders to preserve the public peace and safety. As suggested by their tortured analyses, and by their suggested solutions that bear no relation to the identified constitutional problem, the majority's real quarrel with the Chicago Ordinance is simply that it permits (or indeed requires) too much harmless conduct by innocent citizens to be proscribed. As JUSTICE O'CONNOR's concurrence says with disapprobation, "the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk or in any park, coffee shop, bar, or other location open to the public." *Ante*, at 2-3 (internal quotation marks omitted).

But in our democratic system, how much harmless conduct to proscribe is not a judgment to be made by the courts. So long as constitutionally guaranteed rights are not affected, [*98] and so long as the proscription has a rational basis, *all sorts* of perfectly harmless activity by millions of perfectly innocent people can be forbidden -- riding a motorcycle without a safety helmet, for example, starting a campfire in a national forest, or selling a safe and effective drug not yet approved by the FDA. All of these acts are entirely innocent and harmless in themselves, but because of the *risk* of harm that they entail, the freedom to engage in them has been abridged. The citizens of Chicago have decided that depriving themselves of the freedom to "hang out" with a gang member is necessary to eliminate pervasive gang crime and inti-

midation -- and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.

I dissent from the judgment of the Court.

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

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. The ordinance is not vague. "Any fool would know that a particular category of conduct would be within [its] reach." *Kolender v. Lawson, 461 U.S. 352, 370, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)* (White, J., dissenting). Nor does it violate the Due Process Clause. The asserted "freedom to loiter for innocent purposes," *ante*, at 9, is in no way "'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksberg, 521 U.S. 702, 721, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997)* (citation omitted). I dissent.

I

The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs [***107] have "virtually [*99] overtaken certain neighborhoods, contributing to the economic and social decline of [**1880] these areas and causing fear and lifestyle changes among law-abiding residents." U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Assistance, Monograph: Urban Street Gang Enforcement 3 (1997). Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes. See U.S. Dept. of Justice, Attorney General's Report to the President, Coordinated Approach to the Challenge of Gang Violence: A Progress Report 1 (Apr. 1996) ("From the small business owner who is literally crippled because he refuses to pay 'protection' money to the neighborhood gang, to the families who are hostages within their homes, living in neighborhoods ruled by predatory drug trafficking gangs, the harmful impact of gang violence . . . is both physically and psychologically debilitating").

The city of Chicago has suffered the devastation wrought by this national tragedy. Last year, in an effort to curb plummeting attendance, the Chicago Public Schools hired dozens of adults to escort children to school. The youngsters had become too terrified of gang violence to leave their homes alone. Martinez, Parents Paid to Walk Line Between Gangs and School, Chicago Tribune, Jan. 21, 1998, p. 1. The children's fears were not unfounded. In 1996, the Chicago Police Department estimated that there were 132 criminal street gangs in the city. Illinois Criminal Justice Information Authority, Research Bulletin: Street Gangs and Crime 4 (Sept. 1996). Between 1987 and 1994, these gangs were involved in 63,141 criminal incidents, including 21,689 nonlethal violent crimes and 894 homicides. *Id. at 4-5.* [1] Many [*100] of these criminal incidents and homicides result from gang "turf battles," which take place on the public streets and place innocent residents in grave danger. See U.S. Dept. of Justice, Office of Justice Programs National Institute of Justice, Research in brief, C. Block & R. Block, Street Gang Crime in Chicago, 1 (Dec. 1993); U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Journal, J. Howell, Youth Gang Drug Trafficking and Homicide: Policy and Program Implications, (Dec. 1997); see also Testimony of Steven R. Wiley, Chief, Violent Crimes and Major Offenders Section, FBI, Hearing on S. 54 before the Senate Committee on the Judiciary, 105th Cong., 1st Sess., 13 (1997) ("While street gangs may specialize in entrepreneurial activities like drug-dealing, their gang-related lethal violence is more likely to grow out of turf conflicts").

1 In 1996 alone, gangs were involved in 225 homicides, which was 28 percent of the total homicides committed in the city. Chicago Police Department, Gang and Narcotic Related Violent Crime, City of Chicago: 1993-1997 (June 1998). Nationwide, law enforcement officials estimate that as many as 31,000 street gangs, with 846,000 members, exist. U.S. Dept. of Justice, Office of Justice Programs, Highlights of the 1996 National Youth Gang Survey (OJJDP Fact Sheet, No. 86, Nov. 1998).

Before enacting its ordinance, the Chicago City Council held extensive hearings on the problems of gang loitering. Concerned citizens appeared to testify poignantly as to how gangs disrupt their daily lives. Ordinary citizens like Ms. D'Ivory Gordon explained that she struggled just to walk to work:

[***108] "When I walk out my door, these guys are out there . . . .

"They watch you . . . . They know where you live. They know what time you leave, what time you come home. I am afraid of them. I have even come to the point now that I carry a meat cleaver to work with me . . . .

". . . I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them." Transcript

of Proceedings before the City Council of [*101] Chicago, Committee on Police and Fire 66-67 (May 15, 1997) (hereinafter Transcript).

Eighty-eight-year-old Susan Mary Jackson echoed her sentiments, testifying, "We used to have a nice neighborhood. We don't have it anymore . . . . I am scared to go out in the daytime . . . . you can't pass because they are standing. I am afraid to go to the store. I don't go to the store because I am afraid. At my age if they look at me real hard, I be ready to holler." *Id. at 93-95*. Another long-time resident testified:

[**1881] "I have never had the terror that I feel everyday when I walk down the streets of Chicago . . . . . I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, well, do I go out today. Do I put my ax in my briefcase. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that." *Id. at 124-125*.

Following these hearings, the council found that "criminal street gangs establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas." App. to Pet. for Cert. 60a-61a. It further found that the mere presence of gang members "intimidates many law abiding citizens" and "creates a justifiable fear for the safety of persons and property in the area." *Ibid.* It is the product of this democratic process -- the council's attempt to address these social ills -- that we are asked to pass judgment upon today.

II

As part of its ongoing effort to curb the deleterious effects of criminal street gangs, the citizens of Chicago sensibly decided to return to basics. The ordinance does nothing more than confirm the well-established principle that the police [*102] have the duty and the power to maintain the public peace, and, when necessary, to disperse groups of individuals who threaten it. The plurality, however, concludes that the city's commonsense effort to combat gang loitering fails constitutional scrutiny for two separate reasons -- because it infringes upon gang members' constitutional right to "loiter for innocent purposes," *ante*, at 9, and because it is vague on its face, *ante*, at 11. A majority of the Court endorses the latter conclusion. I respectfully disagree.

A

We recently reconfirmed that "our Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause." *Glucksberg, 521 U.S. at 721* (quoting *Moore v. East Cleveland, 431 U.S. 494, 503, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977)* (plurality [***109] opinion)). Only laws that infringe "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'" offend the Due Process Clause. *Glucksberg, supra, at 720-721.*

The plurality asserts that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the *Due Process Clause of the Fourteenth Amendment*." *Ante*, at 9. Yet it acknowledges -- as it must -- that "anti-loitering ordinances have long existed in this country." *Ante*, at 9, n. 20; see also *177 Ill. 2d 440, 450, 687 N.E.2d 53, 60, 227 Ill. Dec. 130 (1997)* (case below). ("Loitering and vagrancy statutes have been utilized throughout American history in an attempt to prevent crime by removing 'undesirable persons' from public before they have the opportunity to engage in criminal activity"). In derogation of the framework we articulated only two Terms ago in *Glucksberg*, the plurality asserts that this history fails to "persuade us that the right to engage in loitering that is entirely harmless . . . is not a part of the liberty protected by the due process clause." *Ante*, at 10, [*103] n. 20. Apparently, the plurality believes it sufficient to rest on the proposition that antiloitering laws represent an anachronistic throwback to an earlier, less sophisticated, era. For example, it expresses concern that some antivagrancy laws carried the penalty of slavery. *Ibid.* But this fact is irrelevant to our analysis of whether there is a constitutional right to loiter for innocent purposes. This case does not involve an antiloitering law carrying the penalty of slavery. The law at issue in this case criminalizes the failure to disobey a police officer's order to disperse and imposes modest penalties, such as a fine of up to $ 500 and a prison sentence of up to six months.

The plurality's sweeping conclusion that this ordinance infringes upon a liberty interest protected by the *Fourteenth Amendment's Due Process Clause* withers when exposed to the relevant history: Laws prohibiting loitering and vagrancy have been a fixture of Anglo-American law at least since the time of the Norman Conquest. See generally [**1882] C. Ribton-Turner, A History of Vagrants and Vagrancy and Beggars and Begging (reprint 1972) (discussing history of English vagrancy laws); see also *Papachristou v. Jacksonville, 405 U.S. 156, 161-162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972)* (recounting history of vagrancy laws). The American colonists enacted laws modeled upon the English vagrancy laws, and at the time of the founding, state and local governments customarily criminalized loitering and other forms of vagrancy. [2] Vagrancy laws [*104] were common in the decades preceding the ratification of the [***110] *Fourteenth Amendment*, [3] and remained on the books long after. [4]

2 See, *e.g.*, Act for the Restraint of idle and disorderly Persons (1784) (reprinted in 2 The First Laws of the State of North Carolina 508-509 (J. Cushing comp. 1984)); Act for restraining, correcting, supressing and punishing Rogues, Vagabonds, common Beggars, and other lewd, idle, dissolute, profane and disorderly Persons; and for setting them to work (reprinted in The First Laws of the State of Connecticut 206-210 (J. Cushing comp. 1982)); Act for suppressing and punishing of Rogues, Vagabonds, common Beggars and other idle, disorderly and lewd persons (1788) (reprinted in The First Laws of the Commonwealth of Massachusetts 347-349 (J. Cushing comp. 1981)); Act for better securing the payment of levies and restraint of vagrants, and for making provisions for the poor (1776) (reprinted in The First Laws of the State of Virginia 44-45 (J. Cushing comp. 1982)); Act for the better ordering of the Police of the Town of Providence, of the Work-House in said Town (1796) (reprinted in 2 The First Laws of the State of Rhode Island 362-367 (J. Cushing comp. 1983)); Act for the Promotion of Industry, and for the Suppression of Vagrants and Other Idle and Disorderly Persons (1787) (reprinted in The First Laws of the State of South Carolina, Part 2, 431-433 (J. Cushing comp. 1981)); An act for the punishment of vagabond and other idle and disorderly persons (1764) (reprinted in The First Laws of the State of Georgia 431-433 (J. Cushing comp. 1981)); Laws of the Colony of New York 4, ch. 1021 (1756); 1 Laws of the Commonwealth of Pennsylvania, ch. DLV (1767) (An Act to prevent the mischiefs arising from the increase of vagabonds, and other idle and disorderly persons, within this province); Laws of the State of Vermont, § 10 (1797).

3 See, *e.g.*, Kan. Stat. ch. 161, § 1 (1855); Ky. Rev. Stat., ch. CIV, § 1 (1852); Pa. Laws, ch. 664 § V (1853); N. Y. Rev. Stat., ch. XX, § 1 (1859); Ill. Stat., ch. 30, § CXXXVIII (1857). During the 19th century, this Court acknowledged the States' power to criminalize vagrancy on several occasions. See *Mayor of New York* v. *Miln*, 11 Peters 102, 148 (1837); *Smith v. Turner, 48 U.S. 283, 12 L. Ed. 702, 7 How. 283, 425 (1849)* (opinion of Wayne, J.); *Prigg* v. *Pennsylvania*, 16 Peters 539, 625 (1842).

4 See generally C. Tiedeman, Limitations of Police Power in the United States 116-117 (1886) ("The vagrant has been very appropriately described as the chrysalis of every species of criminal. A wanderer through the land, without home ties, idle, and without apparent means of support, what but criminality is to be expected from such a person? If vagrancy could be successfully combated . . . the infractions of the law would be reduced to a surprisingly small number; and it is not to be wondered at that an effort is so generally made to suppress vagrancy"). See also R. I. Gen. Stat., ch. 232, § 24 (1872); Ill. Rev. Stat., ch. 38, § 270 (1874); Conn. Gen. Stat., ch. 3, § 7 (1875); N. H. Gen. Laws, ch. 269, § 17 (1878); *Cal. Penal Code § 647* (1885); Ohio Rev. Stat., Tit. 1, ch. 8, §§ 6994, 6995 (1886); Colo. Rev. Stat. ch. 36, § 1362 (1891); Del. Rev. Stat., ch. 92, Vol. 12, p. 962 (1861); Ky. Stat., ch. 132, § 4758 (1894); Ill. Rev. Stat., ch. 38, § 270 (1895); Ala. Code, ch. 199 § 5628 (1897); Ariz. Rev. Stat., Tit. 17, § 599 (1901); N. Y. Crim. Code § 887 (1902); Pa. Stat. §§ 21409, 21410 (1920); Ky. Stat. § 4758-1 (1922); Ala. Code, ch. 244, § 5571 (1923); Kan. Rev. Stat. § 21-2402 (1923); Ill. Stat. Ann., 606 (1924); Ariz. Rev. Stat., ch. 111, § 4868 (1928); Cal. Penal Code, Pt. 1, Tit. 15, ch. 2, *§ 647* (1929); Pa. Stat. Ann., Tit. 18, § 2032 (Purdon 1945); Kan. Gen. Stat. Ann. *§ 21-2409* (1949); N. Y. Crim. Code § 887 (1952); Colo. Rev. Stat. Ann. § 40-8-20 (1954); *Cal. Penal Code § 647* (1953); 1 Ill. Rev. Stat., ch. 38, § 578 (1953); *Ky. Rev. Stat. § 436.520* 1953); 5 Ala. Code, Tit. 14, § 437 (1959); Pa. Stat. Ann., Tit. 18, § 2032 (Purdon 1963); *Kan. Stat. Ann. § 21-2409* (1964).

[*105] Tellingly, the plurality cites only three cases in support of the asserted right to "loiter for innocent purposes." See *ante*, at 9-10. Of those, only one -- decided more than 100 years after the ratification of the *Fourteenth Amendment* -- actually addressed the validity of a vagrancy ordinance. That case, *Papachristou, supra*, contains some dicta that can be read to support the fundamental right that the plurality asserts. [5] [**1883] However, the Court in *Papachristou* did not undertake the now-accepted analysis applied in substantive due process cases -- it did not look to tradition to [***111] define the rights protected by the Due Process Clause. In any event, a careful reading of the opinion reveals that the Court never said anything about a constitutional right. The Court's holding was that the antiquarian language employed in the vagrancy ordinance at issue was unconstitutionally vague. See *Papachristou, supra, 405 U.S. at 162-163*. Even assuming, then, that *Papachristou* was correctly decided as an original matter -- a doubtful proposition [*106] -- it does not compel the conclusion that the Constitution protects the right to loiter for innocent purposes. The plurality's contrary assertion calls to mind the warning that "the Judiciary, including this Court, is the most vulnerable and comes nearest to illegi-

timacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution . . . . [We] should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare." *Moore, 431 U.S. at 544* (White, J., dissenting). When "the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Ibid.*

5 The other cases upon which the plurality relies concern the entirely distinct right to interstate and international travel. See *Williams v. Fears, 179 U.S. 270, 274-275, 45 L. Ed. 186, 21 S. Ct. 128 (1900)*; *Kent v. Dulles, 357 U.S. 116, 2 L. Ed. 2d 1204, 78 S. Ct. 1113 (1958)*. The plurality claims that dicta in those cases articulating a right of free movement, see *Williams, supra, at 274*; *Kent, supra, at 125*, also supports an individual's right to "remain in a public place of his choice." Ironically, *Williams* rejected the argument that a tax on persons engaged in the business of importing out-of-state labor impeded the freedom of transit, so the precise holding in that case does not support, but undermines, the plurality's view. Similarly, the precise holding in *Kent* did not bear on a constitutional right to travel; instead, the Court held only that Congress had not authorized the Secretary of State to deny certain passports. Furthermore, the plurality's approach distorts the principle articulated in those cases, stretching it to a level of generality that permits the Court to disregard the relevant historical evidence that should guide the analysis. *Michael H. v. Gerald D., 491 U.S. 110, 127, n. 6, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989)* (plurality opinion).

B

The Court concludes that the ordinance is also unconstitutionally vague because it fails to provide adequate standards to guide police discretion and because, in the plurality's view, it does not give residents adequate notice of how to conform their conduct to the confines of the law. I disagree on both counts.

1

At the outset, it is important to note that the ordinance does not criminalize loitering per se. Rather, it penalizes loiterers' failure to obey a police officer's order to move along. A majority of the Court believes that this scheme vests too much discretion in police officers. Nothing could be further from the truth. Far from according officers too much discretion, the ordinance merely enables police officers to fulfill one of their traditional functions. Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats -- importantly, they have long been vested with the responsibility for preserving the public peace. See, *e.g.*, O. Allen, Duties and Liabilities of Sheriffs [*107] 59 (1845) ("As the principal conservator of the peace in his county, and as the calm but irresistible minister of the law, the duty of the Sheriff is no less important than his authority is great"); E. Freund, Police Power § 86, p. 87 (1904) ("The criminal law deals with offenses after they have been committed, the police power aims to prevent them. The activity of the police for the prevention of crime is partly such as needs no special legal authority"). Nor is the idea that the police are also *peace officers* simply a quaint anachronism. In most American jurisdictions, police officers continue to be obligated, by law, to maintain the public peace. [6]

6 See, *e.g.*, *Ark. Code Ann. § 12-8-106(b)* (Supp. 1997) ("The Department of Arkansas State Police shall be conservators of the peace"); Del. Code Ann. Tit. IX, § 1902 (1989) ("All police appointed under this section shall see that the peace and good order of the State . . . be duly kept"); Ill. Comp. Stat. Ann. ch. 65, § 5 11-1-2(a) (Supp. 1998) ("Police officers in municipalities shall be conservators of the peace"); *La. Rev. Stat. Ann. § 40:1379* ("(West) Police employees . . . shall . . . keep the peace and good order"); *Mo. Rev. Stat. § 85.561* (1998) ("Members of the police department shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city"); *N. H. Rev. Stat. Ann. § 105:3* (1990) ("All police officers are, by virtue of their appointment, constables and conservators of the peace"); *Ore. Rev. Stat. § 181.110* (1997) ("Police to preserve the peace, to enforce the law and to prevent and detect crime"); 351 Pa. Code Art. V, ch. 2, § 5.5-200 ("The Police Department . . . shall preserve the public peace, prevent and detect crime, police the streets and highways and enforce traffic statutes, ordinances and regulations relating thereto"); Texas Code Crim. Proc. Ann., Art. § 2.13 (Vernon 1977) ("It is the duty of every peace officer to preserve the peace within his jurisdiction"); *Vt. Stat. Ann., Tit. 24, § 299* (1992) ("A sheriff shall preserve the peace, and suppress, with force and strong hand, if necessary, unlawful disorder"); *Va. Code Ann. § 15.2-1704(A)* (Supp. 1998) ("The police force . . . is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of

state and local laws, regulations, and ordinances").

[**1884] In their role as peace officers, the [***112] police long have had the authority and the duty to order groups of individuals who threaten the public peace to disperse. For example, the 1887 Police Manual for the City of New York provided:

[*108] "It is hereby made the duty of the Police Force at all times of day and night, and the members of such Force are hereby thereunto empowered, to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, *disperse unlawful or dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places.*" Manual Containing the Rules and Regulations of the Police Department of the City of New York, Rule 414 (emphasis added).

See also J. Crocker, Duties of Sheriffs, Coroners and Constables § 48, p. 33 (2d ed. rev. 1871) ("Sheriffs are, *ex officio*, conservators of the peace within their respective counties, and it is their duty, as well as that of all constables, coroners, marshals and other peace officers, to prevent every breach of the peace, and to *suppress every unlawful assembly*, affray or riot which may happen in their presence") (emphasis added). The authority to issue dispersal orders continues to play a commonplace and crucial role in police operations, particularly in urban areas. [7] Even the ABA Standards for [*109] Criminal Justice recognize that "in day-to-day police experience there are innumerable situations in which police are called upon to order people not to block the sidewalk, not to congregate in a given [***113] place, and not to 'loiter' . . . . The police may suspect the loiterer of considering engaging in some form of undesirable conduct that can be at least temporarily frustrated by ordering him or her to 'move on.'" Standard 1-3.4(d), p. 1.88, and comments (2d ed. 1980, Supp. 1986). [8]

7 For example, the following statutes provide a criminal penalty for the failure to obey a dispersal order: *Ala. Code § 13A-11-6* (1994); *Ariz. Rev. Stat. Ann. § 13-2902(A)(2)* (1989); *Ark. Code Ann. § 5-71-207(a)(6)* (1993); *Cal. Penal Code Ann. § 727* (West 1985); *Colo. Rev. Stat. Ann. § 18-9-107(b)* (1997); *Del. Code Ann., Tit. 11, § 1321* (1995); *Ga. Code Ann. § 16-11-36* (1996); Guam Code Ann., Tit. 9, § 61.10(b) (1996); *Haw. Rev. Stat. Ann. § 711-1102* (Michie 1994); *Idaho Code § 18-6410* (1997); Ill. Comp. Stat. Ann., ch. 720 § 5/25-1(e) (West 1993); *Ky. Rev. Stat. Ann. §§ 525.060, 525.160* (Baldwin 1990); Me. Rev. Stat. Ann., Tit. 17A, § 502 (1983 *Mass. Ann., Laws, ch. 269, § 2* (1992); *Mich. Comp. Laws § 750.523* (1991); *Minn. Stat. Ann. § 609.715* (West 1987); *Miss. Code Ann. § 97-35-7(1)* (1994); *Mo. Ann. Stat. § 574.060* (Vernon 1995); *Mont. Code Ann. § 45-8-102* (1997); *Nev. Rev. Stat. Ann. § 203.020* (Michie 1997); *N. H. Rev. Stat. Ann. §§ 644:1, 644:2(II)(e)* (1996); N. J. Stat. Ann. § 2C: 33-1(b) (West 1995); *N. Y. Penal Law § 240.20(6)* (McKinney 1989); *N. C. Gen. Stat. § 14-288.5(a)* (1999); *N. D. Cent. Code § 12.1-25-04* (1997); *Ohio Rev. Code Ann. § 2917.13(A)(2)* (Baldwin 1997); *Okla. Stat. Ann. Tit. 21, § 1316* (West 1983); *Ore. Rev. Stat. § 166.025(1)(e)* (1997); *18 Pa. Cons. Stat. Ann. § 5502* (1983); R. I. Gen. Laws § 11-38-2 (1994); *S. C. Code Ann. § 16-7-10(a)* (1985); *S. D. Codified Laws § 22-10-11* (1998); *Tenn. Code Ann. § 39-17-305(2)* (1997); *Tex. Penal Code Ann. § 42.03(a)(2)* (Vernon 1994); *Utah Code Ann. § 76-9-104* (1995) *V. I. Code Ann. Tit. 5, § 4022* (1997); *Vt. Stat. Ann., Tit. 13, § 901* (1998); *Va. Code Ann. § 18.2-407* (Michie 1996); *Wash. Rev. Code Ann. § 9A.84.020* (West 1988); *W. Va. Code § 61-6-1* (1997); *Wis. Stat. Ann. § 947.06(3)* (West 1982).

8 See also *Ind. Code Ann. § 36-8-3-10(a)* (1997) ("The police department shall, within the city: (1) preserve peace; (2) prevent offenses; (3) detect and arrest criminals; (4) suppress riots, mobs, and insurrections; (5) disperse unlawful and dangerous assemblages and assemblages that obstruct the free passage of public streets, sidewalks, parks, and places . . . "); *Okla. Stat. Ann., Tit. 19, § 516* (1988) ("It shall be the duty of the sheriff . . . to keep and preserve the peace of the their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections . . . ").

[**1885] In order to perform their peace-keeping responsibilities satisfactorily, the police inevitably must exercise discretion. Indeed, by empowering them to act as peace officers, the law assumes that the police will exercise that discretion responsibly and with sound judgment. That is not to say that the law should not provide objective guidelines for the police, but simply that it cannot rigidly constrain their every action. By directing a police officer not to issue a dispersal order unless he "observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place," App. to Pet. for Cert. 61a. Chicago's ordinance strikes an appropriate balance between those two extremes. Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as "probable cause" [*110] and "reasonable suspicion," so we must trust them to determine whether a group of loiterers contains individuals (in

this case members of criminal street gangs) whom the city has determined threaten the public peace. See *Ornelas v. United States, 517 U.S. 690, 695, 700, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996)* ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . . Our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists") (citations and internal quotation marks omitted). In sum, the Court's conclusion that the ordinance is impermissibly vague because it "'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat,'" *ante,* at 15, cannot be reconciled with common sense, longstanding police practice, or this Court's *Fourth Amendment* jurisprudence.

The illogic of the Court's position becomes apparent when JUSTICE STEVENS opines that the ordinance's dispersal provision "would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members." *Ante,* at 18-19. See also *ante,* at 4 (O'CONNOR, J., concurring in part and concurring in judgment) (endorsing Court's proposal). With respect, if the Court believes that the ordinance is vague as written, this suggestion [***114] would not cure the vagueness problem. First, although the Court has suggested that a scienter requirement may mitigate a vagueness problem "with respect to the adequacy of notice to the complainant that his conduct is proscribed," *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)* (footnote omitted), the alternative proposal does not incorporate a scienter requirement. If the statute's prohibition were limited [*111] to loitering with "an apparently harmful purpose" [illegible] conduct would continue

ty's proposed law, an officer would be required to make such a determination multiple times.

In concluding that the ordinance adequately channels police discretion, I do not suggest that a police officer enforcing the Gang Congregation Ordinance will never make a mistake. Nor do I overlook the *possibility* that a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way. But our decisions should [**1886] not turn on the proposition that such an event will be anything but rare. Instances of arbitrary or discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge on vagueness grounds. See *United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)* ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid"). [*112]

2

The plurality's conclusion that the ordinance "fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted," *ante,* at 16, is similarly untenable. There is nothing "vague" about an order to disperse. [9] While "we can never expect mathematical certainty from our language," *Grayned v. City of Rockford, 408 U.S. 104, 110, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)*, it is safe to assume that [***115] the vast majority of people who are ordered by the police to "disperse and remove themselves from the area" will have little difficulty understanding how to comply. App. to Pet. for Cert. 61a.

9 The plurality suggests, *ante*, at 15, that dispersal orders are, by their nature, vague. The plurality purports to distinguish its sweeping con-

L. Ed. 2d 214, 91 S. Ct. 1686 (1971). I subscribe to the view of retired Justice White -- "If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face." *Kolender, 461 U.S. at 370-371* (dissenting opinion). This is certainly such a case. As the Illinois Supreme Court recognized, "persons of ordinary intelligence may maintain a common and accepted [*113] meaning of the word 'loiter.'" *Morales*, 177 Ill. 2d at 451, 687 N.E.2d at 61.

JUSTICE STEVENS' contrary conclusion is predicated primarily on the erroneous assumption that the ordinance proscribes large amounts of constitutionally protected and/or innocent conduct. See *ante*, at 11, 13, 16-17. As already explained, *supra, at 5-9*, the ordinance does not proscribe constitutionally protected conduct -- there is no fundamental right to loiter. It is also anomalous to characterize loitering as "innocent" conduct when it has been disfavored throughout American history. When a category of conduct has been consistently criminalized, it can hardly be considered "innocent." Similarly, when a term has long been used to describe criminal conduct, the need to subject it to the "more stringent vagueness test" suggested in *Hoffman Estates, supra, at 499*, dissipates, for there is no risk of a trap for the unwary. The term "loiter" is no different from terms such as "fraud," "bribery," and "perjury." We expect people of ordinary intelligence to grasp the meaning of such legal terms despite the fact that they are arguably imprecise. [10]

> 10 For example, a 1764 Georgia law declared that "all able bodied persons . . . who shall be found loitering . . . all other idle vagrants, or disorderly persons wandering abroad without betaking themselves to some lawful employer or honest labor, shall be deemed and adjudged vagabonds," and required the apprehension of "any such vagabond . . . found within any county in this State, wandering, strolling, loitering about." (reprinted in The First Laws of the State of Georgia, Part 1, 376-377 (J. Cushing comp. 1981)). See also, *e.g.*, Digest of the Laws of Pennsylvania 829 (F. Brightly ed., 8th ed. 1853) ("The following described persons shall be liable to the penalties imposed by law upon vagrants . . . . All persons who shall . . . be found loitering"); Ky. Rev. Stat., ch. CIV, § 1, p. 69 (1852) ("If any able bodied person be found loitering or rambling about, . . . he shall be taken and adjudged to be a vagrant, and guilty of a high misdemeanor").

[**1887] The plurality also concludes that the definition of the term loiter -- "to remain in any one place with no apparent purpose," [*114] see *177 Ill. 2d at 445, 687 N.E.2d at 58* -- fails to provide [***116] adequate notice. [11] "It is difficult to imagine," the plurality posits, "how any citizen of the city of Chicago standing in a public place . . . would know if he or she had an 'apparent purpose.'" *Ante*, at 12-13. The plurality underestimates the intellectual capacity of the citizens of Chicago. Persons of ordinary intelligence are perfectly capable of evaluating how outsiders perceive their conduct, and here "it is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [loitering] and that would be covered by the statute." See *Smith v. Goguen, 415 U.S. 566, 584, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974)* (White, J., concurring in judgment). Members of a group standing on the corner staring blankly into space, for example, are likely well aware that passersby would conclude that they have "no apparent purpose." In any event, because this is a facial challenge, the plurality's ability to hypothesize that some individuals, in some circumstances, may be unable to ascertain how their actions appear to outsiders is irrelevant to our analysis. Here, we are asked to determine whether the ordinance is "vague in all of its applications." *Hoffman Estates, 455 U.S. at 497*. The answer is unquestionably no.

> 11 The Court asserts that we cannot second-guess the Illinois Supreme Court's conclusion that the definition "'provides absolute discretion to police officers to determine what activities constitute loitering,'" *ante*, at 17 (quoting *177 Ill. 2d 440, 457, 687 N.E.2d 53, 63, 227 Ill. Dec. 130 (1997)*. While we are bound by a state court's construction of a statute, the Illinois court "did not, strictly speaking, construe the [ordinance] in the sense of defining the meaning of a particular statutory word or phase. Rather, it merely characterized [its] 'practical effect' . . . . This assessment does not bind us." *Wisconsin v. Mitchell, 508 U.S. 476, 484, 124 L. Ed. 2d 436, 113 S. Ct. 2194 (1993)*.

* * *

Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so -- the people who will have to live with the consequences of [*115] today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described, "There is only about maybe one or two percent of the people in the city

causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." Tr. 126. By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens the very thing that JUSTICE STEVENS, *ante,* at 10, elevates above all else -- the "freedom of movement." And that is a shame. I respectfully dissent.

REFERENCES

21 Am Jur 2d, Criminal Law 17; 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions 367, 368; 77 Am Jur 2d, Vagrancy and Related Offenses 3, 7

USCS, *Constitution, Amendment 14*

L Ed Digest, Municipal Corporations 37.7

L Ed Index, Certainty and Definiteness; Due Process; Vagrancy

Annotation References:

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine. *75 L Ed 2d 1049.*

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

Validity of loitering statutes and ordinances. *25 ALR 3d 836.*

EXHIBIT "5"

LEXSEE 439 U.S. 379

COLAUTTI, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. v. FRANKLIN ET AL.

No. 77-891

SUPREME COURT OF THE UNITED STATES

439 U.S. 379*; *99 S. Ct. 675*; *58 L. Ed. 2d 596*; *1979 U.S. LEXIS 51

October 3, 1978, Argued
January 9, 1979, Decided

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

DISPOSITION: Affirmed.

SUMMARY:

In an action brought in the United States District Court for the Eastern District of Pennsylvania prior to the effective date of the Pennsylvania Abortion Control Act, the District Court held unconstitutional certain provisions of the Act, among others, the viability determination and standard of care provisions of 5(a) of the Act, requiring, upon pain of penal sanction for its violation, that every person performing or inducing an abortion (1) make a determination "based on his experience, judgment, or professional competence that the fetus is not viable," and (2) upon determining that a fetus "is viable or ... may be viable" to "exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted" and to adopt that abortion technique "which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother" (*401 F Supp 554*). On direct appeal to the United States Supreme Court from the decision of the three-judge District Court, the Supreme Court vacated part of the District Court's judgment and remanded the case (*49 L Ed 2d 1204*). Among other things, the three-judge District Court, on remand, adhered to its original view regarding 5(a)'s unconstitutionality, and declared 5(a)'s provisions invalid on vagueness and overbreadth grounds.

On direct appeal, the United States Supreme Court affirmed. In an opinion by Blackmun, J., joined by Brennan, Stewart, Marshall, Powell, and Stevens, JJ., it was held that 5(a) of the Act was unconstitutionally vague both as to its requirement for determining viability and as to its requirement concerning standard of care.

White, J., joined by Burger, Ch. J., and Rehnquist, J., dissented on the ground that the challenged provisions of the Pennsylvania Abortion Control Act were not unconstitutionally vague.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

ABORTION §1

STATUTES §18

vagueness -- viability determination -- standard of care for physician --

Headnote:[1A][1B][1C][1D]

A state criminal statute which requires every person performing or inducing an abortion to make a determination "based on his experience, judgment, or professional competence that the fetus is not viable," and also requires such person, if he determines that the fetus "is viable or ... may be viable" to "exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted" and to adopt that abortion technique "which would provide the best op-

portunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother," is unconstitutionally vague both as to its requirement for determining viability and its requirement as to standard of care. (White, J., Burger, Ch. J., and Rehnquist, J., dissented from this holding.)

[***LEdHN2]

STATUTES §26

abortions -- penal provisions -- standing of physicians --

Headnote:[2A][2B]

Physicians who would be subject to potential criminal liability if they failed to utilize a prescribed abortion technique when a fetus was viable or when there was sufficient to believe that the fetus might be viable, as required under a state statute, have standing to challenge the constitutionality of such state statute in a federal court action, and their challenge presents a justiciable controversy.

[***LEdHN3]

ABORTION §1

state restriction -- viability of fetus -- determining state interest --

Headnote:[3]

For purposes of the rule that prior to the viability of a fetus a state may not seek to further its interest in the potential life of the fetus by directly restricting a woman's decision on terminating her pregnancy but that the state, after viability, may regulate or even prohibit abortion except where necessary, in appropriate medical judgment, to preserve the life of health of the woman carrying the fetus, "viability" is reached when, in the judgment of the physician attending the pregnant woman, there is, on the particular facts of the case before him, a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support; because viability may differ with each pregnancy, neither legislatures nor the courts may proclaim one of the elements entering into the ascertainment of viability--be it weeks of gestation, fetal weight, or any other single factor--as the determinant of when the state has a compelling interest in the life or health of the fetus.

[***LEdHN4]

STATUTES §18

criminal -- vagueness --

Headnote:[4]

As a matter of due process, a criminal statute which fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or which is so indefinite that it encourages arbitrary and erratic arrests and convictions, is void for vagueness, such being especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.

[***LEdHN5]

COURTS §757.5

Supreme Court abstention -- abortion statute -- vagueness --

Headnote:[5A][5B]

In determining the constitutionality, on vagueness grounds, of a state statute subjecting a physician who performs an abortion to potential criminal liability if he fails to utilize a statutorily prescribed technique when the fetus "is viable" or "may be viable," the United States Supreme Court will not abstain sua sponte, under the doctrine of federal court abstention, on the issue whether the phrase "may be viable" is synonomous with, or is merely intended to explicate, the meaning of the word "viable."

[***LEdHN6]

STATUTES §81

construction -- rendering part inoperative --

Headnote:[6]

A statute should be interpreted so as not to render one part inoperative.

[***LEdHN7]

STATUTES §172

interpretation -- definition declaring meaning --

Headnote:[7A][7B]

A statutory definition which declares what a term "means" excludes any meaning that is not stated.

[***LEdHN8]

ABORTION §1

state regulation -- determination of viability --

Headnote:[8]

The determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the

responsible attending physician, and any state regulation that impinges upon such determination, if it is to be constitutional, must allow the attending physician the room he needs to make his best medical judgment.

[***LEdHN9]

ERROR §1262

appellees' assertions -- ground not considered below --

Headnote:[9A][9B]

Appellees, as parties prevailing in the trial court, may assert any ground in support of the trial court's judgment, whether or not that ground was relied upon or even considered by the trial court.

SYLLABUS

Section 5 (a) of the Pennsylvania Abortion Control Act requires every person who performs an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. If such person determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable," then he must exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive, and must use the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique is not necessary to preserve the mother's life or health. The Act, in § 5 (d), also imposes a penal sanction for a violation of § 5 (a). Appellees brought suit claiming, *inter alia*, that § 5 (a) is unconstitutionally vague, and a three-judge District Court upheld their claim. *Held*:

1. The viability-determination requirement of § 5 (a) is void for vagueness. Pp. 390-397.

(a) Though apparently the determination of whether the fetus "is viable" is to rest upon the basis of the attending physician's "experience, judgment or professional competence," it is ambiguous whether that subjective language applies to the second condition that activates the duty to the fetus, *viz.*, "sufficient reason to believe that the fetus may be viable." Pp. 391-392.

(b) The intended distinction between "is viable" and "may be viable" is elusive. Apparently those phrases refer to distinct conditions, one of which indeterminately differs from the definition of viability set forth in *Roe v. Wade, 410 U.S. 113*, and *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52*. Pp. 392-394.

(c) The vagueness of the viability-determination requirement is compounded by the fact that § 5 (d) subjects the physician to potential criminal liability without regard to fault. Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the Act is little more than "a trap for those who act in good faith," *United States v. Ragen, 314 U.S. 513, 524*, and the perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. Pp. 394-397.

2. The standard-of-care provision is likewise impermissibly vague. It is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the patient's health and increased chances of fetal survival. Where conflicting duties of such magnitude are involved, there must be greater statutory precision before a physician may be subjected to possible criminal sanctions. Pp. 397-401.

COUNSEL: Carol Los Mansmann, Special Assistant Attorney General of Pennsylvania, argued the cause for appellants. With her on the brief was J. Jerome Mansmann, Special Assistant Attorney General.

Roland Morris argued the cause and filed a brief for appellees.

* Burt Neuborne and Sylvia Law filed a brief for the American Public Health Assn. et al. as amici curiae urging affirmance.

Briefs of amici curiae were filed by George E. Reed and Patrick F. Geary for the United States Catholic Conference; and by Dennis J. Horan, John D. Gorby, Victor G. Rosenblum, and Dolores V. Horan for Americans United for Life, Inc.

JUDGES: BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, post, p. 401.

OPINION BY: BLACKMUN

OPINION

[*380] [***599] [**678] MR. JUSTICE BLACKMUN delivered the opinion of the Court.

[***LEdHR1A] [1A]At issue here is the constitutionality of subsection (a) of § 5 [1] of [***600] the Pennsylvania Abortion Control Act, 1974 Pa. Laws,

[*381] Act No. 209, Pa. Stat. Ann., Tit. 35, § 6605 (a) (Purdon 1977). This statute subjects a physician who performs an abortion to potential criminal liability if he fails to utilize a statutorily prescribed technique when the fetus "is viable" or when there is "sufficient reason to believe that the fetus may be viable." A three-judge Federal District Court [2] declared § 5 (a) unconstitutionally vague and overbroad and enjoined its enforcement. App. 239a-244a. Pursuant to *28 U. S. C. § 1253*, we noted probable jurisdiction *sub nom. Beal v. Franklin, 435 U.S. 913 (1978).*

1 Section 5 reads in pertinent part:

> "(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.
>
> . . . .
>
> "(d) Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted."

2 The three-judge court was designated in September 1974 pursuant to *28 U. S. C. § 2281 (1970 ed.)*. This statute was repealed by Pub. L. 94-381, § 1, 90 Stat. 1119, but the repeal did not apply to any action commenced on or before August 12, 1976. § 7.

I

The Abortion Control Act was passed by the Pennsylvania Legislature, over the Governor's veto, in the year following this Court's decisions in *Roe v. Wade, 410 U.S. 113 (1973)*, and *Doe v. Bolton, 410 U.S. 179 (1973)*. It was a comprehensive statute.

Section 1 gave the Act its title. Section 2 defined, among other terms, "informed consent" and "viable." The latter was specified to mean "the capability of a fetus to live outside the [*382] mother's womb albeit with artificial aid." See *Roe v. Wade, 410 U.S., at 160.*

Section 3 (a) proscribed the performance of an abortion "upon any person in the absence of informed consent thereto by such person." Section 3 (b)(i) prohibited the performance of an abortion in the absence of the written consent of the woman's spouse, provided that the spouse could be located and notified, and the abortion was not certified by a licensed physician "to be necessary in order to preserve the life or health of the mother." Section 3 (b)(ii), applicable [**679] if the woman was unmarried and under the age of 18, forbade the performance of an abortion in the absence of the written consent of "one parent or person in loco parentis" of the woman, unless the abortion was certified by a licensed physician "as necessary in order to preserve the life of the mother." Section 3 (e) provided that whoever performed an abortion without such consent was guilty of a misdemeanor of the first degree.

Section 4 provided that whoever, intentionally and willfully, took the life of a premature infant aborted alive, was guilty of murder of the [***601] second degree. Section 5 (a), set forth in n. 1, *supra*, provided that if the fetus was determined to be viable, or if there was sufficient reason to believe that the fetus might be viable, the person performing the abortion was required to exercise the same care to preserve the life and health of the fetus as would be required in the case of a fetus intended to be born alive, and was required to adopt the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique was not necessary in order to preserve the life or health of the mother. Section 5 (d), also set forth in n. 1, imposed a penal sanction for a violation of § 5 (a).

Section 6 specified abortion controls. It prohibited abortion during the stage of pregnancy subsequent to viability, except where necessary, in the judgment of a licensed physician, to preserve the life or health of the mother. No abortion [*383] was to be performed except by a licensed physician and in an approved facility. It required that appropriate records be kept, and that quarterly reports be filed with the Commonwealth's Department of Health. And it prohibited solicitation or advertising with respect to abortions. A violation of § 6 was a misdemeanor of the first or third degrees, as specified.

Section 7 prohibited the use of public funds for an abortion in the absence of a certificate of a physician stating that the abortion was necessary in order to preserve the life or health of the mother. Finally, § 8 au-

thorized the Department of Health to make rules and regulations with respect to performance of abortions and the facilities in which abortions were performed. See Pa. Stat. Ann., Tit. 35, §§ 6601-6608 (Purdon 1977).

[***LEdHR2A] [2A]Prior to the Act's effective date, October 10, 1974, the present suit was filed in the United States District Court for the Eastern District of Pennsylvania challenging, on federal constitutional grounds, nearly all of the Act's provisions. [3] [*384] The three-judge [**680] court on October 10 [***602] issued a preliminary injunction restraining the enforcement of a number of those provisions. [4] Each side sought a class-action determination; the plaintiffs', but not the defendants', motion to this effect was granted. [5]

3 The plaintiffs named in the complaint, as amended, were Planned Parenthood Association of Southeastern Pennsylvania, Inc., a nonprofit corporation; appellee John Franklin, M. D., a licensed and board-certified obstetrician and gynecologist and medical director of Planned Parenthood; Concern for Health Options: Information, Care and Education, Inc. (CHOICE), a nonprofit corporation; and Clergy Consultation Service of Northeastern Pennsylvania, a voluntary organization. Later, appellee Obstetrical Society of Philadelphia intervened as a party plaintiff. Named as original defendants were F. Emmett Fitzpatrick, Jr., District Attorney of Philadelphia County, and Helene Wohlgemuth, the then Secretary of Welfare of the Commonwealth of Pennsylvania. Subsequently, the Commonwealth's Attorney General and the Commonwealth itself intervened as parties defendant.

The District Court, in a ruling not under challenge here, eventually dismissed Planned Parenthood, CHOICE, and Clergy Consultation as plaintiffs. *Planned Parenthood Assn.* v. *Fitzpatrick, 401 F.Supp. 554, 562, 593-594 (1975).*

The present posture of the case, as a consequence, is a suit between Dr. Franklin and the Obstetrical Society, as plaintiffs-appellees, and Aldo Colautti, the present Secretary of Welfare, the Attorney General, the Commonwealth, and the District Attorney, as defendants-appellants.

[***LEdHR2B] [2B]We agree with the District Court's ruling in the cited 1975 opinion, *401 F.Supp., at 561-562, 594*, that under *Doe v. Bolton, 410 U.S. 179, 188 (1973)*, the plaintiff physicians have standing to challenge § 5 (a), and that their claims present a justiciable controversy. See *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 62 (1976).*

4 The court preliminarily enjoined the enforcement of the spousal- and parental-consent requirements, § 3 (b); the penal provisions of § 3 (e); the requirements of §§ 5 (a) and (d); the restriction on abortions subsequent to viability, § 6 (b); the facility-approval requirement, § 6 (c); the reporting provisions, § 6 (d); most of the penal provisions of § 6 (i); the restrictions on funding of abortions, § 7; and the definitions of "viable" and "informed consent" in § 2. Record, Doc. No. 16; see *Planned Parenthood Assn.* v. *Fitzpatrick, 401 F.Supp., at 559.*

5 The court ruled that "the present action is determined to be a class action on behalf of the class of Pennsylvania physicians who perform abortions and/or counsel their female patients with regard to family planning and pregnancy including the option of abortion, and the sub-class of members of the Obstetrical Society of Philadelphia who practice in Pennsylvania." Record, Doc. No. 57.

The case went to trial in January 1975. The court received extensive testimony from expert witnesses on all aspects of abortion procedures. The resulting judgment declared the Act to be severable, upheld certain of its provisions, and held other provisions unconstitutional. *Planned Parenthood Assn.* v. *Fitzpatrick, 401 F.Supp. 554 (1975).* [6] The court sustained the definition of "informed consent" in § 2; the facility-approval requirement and certain of the reporting requirements of § 6; § 8's authorization of rules and regulations; and, by a divided vote, the informed consent requirement of § 3 (a). It overturned § 3 (b)(i)'s spousal-consent requirement [*385] and, again by a divided vote, § 3 (b)(ii)'s parental-consent requirement; § 6's reporting requirements relating to spousal and parental consent; § 6's prohibition of advertising; and § 7's restriction on abortion funding. The definition of "viable" in § 2 was declared void for vagueness and, because of the incorporation of this definition, § 6's proscription of abortions after viability, except to preserve the life or health of the woman, was struck down. Finally, in part because of the incorporation of the definition of "viable," and in part because of the perceived overbreadth of the phrase "may be viable," the court invalidated the viability-determination and standard-of-care provisions of § 5 (a). *401 F.Supp., at 594.*

6 See also *Doe v. Zimmerman, 405 F.Supp. 534 (MD Pa. 1975).*

Both sides appealed to this Court. While the appeals were pending, the Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)*; *Planned Parenthood of*

Central Missouri v. Danforth, 428 U.S. 52 (1976); and *Singleton v. Wulff, 428 U.S. 106 (1976). Virginia State Board* shed light on the prohibition of advertising for abortion services. *Planned Parenthood* had direct bearing on the patient-, spousal-, and parental-consent issues and was instructive on the definition-of-viability issue. *Singleton* concerned the issue of standing to challenge abortion regulations. Accordingly, that portion of the three-judge court's judgment which was the subject of the plaintiffs' appeal was summarily affirmed. *Franklin v. Fitzpatrick, 428 U.S. 901 (1976).* And that portion of the judgment which was the subject of the defendants' appeal [***603] was vacated and remanded for further consideration in the light of *Planned Parenthood, Singleton*, and *Virginia State Board. Beal v. Franklin, 428 U.S. 901 (1976).*

On remand, the parties entered into a stipulation which disposed of all issues except the constitutionality of §§ 5 (a) and 7. Relying on this Court's supervening decisions in *Beal v. Doe, 432 U.S. 438 (1977)*, and *Maher v. Roe, 432 U.S. 464 (1977)*, the District Court found, contrary to its original view, [*386] see *401 F.Supp., at 594*, that § 7 did not violate either Tit. XIX of the Social Security Act, as added, 79 [**681] Stat. 343, and amended, *42 U. S. C. § 1396 et seq.*, or the *Equal Protection Clause of the Fourteenth Amendment.* App. 241a. The court, however, declared: "After reconsideration of section 5 (a) in light of the most recent Supreme Court decisions, we adhere to our original view and decision that section 5 (a) is unconstitutional." *Id., at 240*a-214a. Since the plaintiffs-appellees have not appealed from the ruling with respect to § 7, the only issue remaining in this protracted litigation is the validity of § 5 (a).

II

Three cases in the sensitive and earnestly contested abortion area provide essential background for the present controversy.

In *Roe v. Wade, 410 U.S. 113 (1973)*, this Court concluded that there is a right of privacy, implicit in the liberty secured by the *Fourteenth Amendment*, that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id., at 153.* This right, we said, although fundamental, is not absolute or unqualified, and must be considered against important state interests in the health of the pregnant woman and in the potential life of the fetus. "These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" *Id., at 162-163.* For both logical and biological reasons, we indicated that the State's interest in the potential life of the fetus reaches the compelling point at the stage of viability. Hence, prior to viability, the State may not seek to further this interest by directly restricting a woman's decision whether or not to terminate her pregnancy. [7] But after viability, the [*387] State, if it chooses, may regulate or even prohibit abortion except where necessary, in appropriate medical judgment, to preserve the life or health of the pregnant woman. *Id., at 163-164.*

7 In *Maher v. Roe, 432 U.S. 464, 471-477 (1977)*, the Court ruled that a State may withhold funding to indigent women even though such withholding influences the abortion decision prior to viability. The Court, however, reaffirmed that a State during this period may not impose direct obstacles -- such as criminal penalties -- to further its interest in the potential life of the fetus.

We did not undertake in *Roe* to examine the various factors that may enter into the determination of viability. We simply observed that, in the medical and scientific communities, a fetus is considered viable if [***604] it is "potentially able to live outside the mother's womb, albeit with artificial aid." *Id., at 160.* We added that there must be a potentiality of "meaningful life," *id., at 163*, not merely momentary survival. And we noted that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id., at 160.* We thus left the point flexible for anticipated advancements in medical skill.

Roe stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out. We indicated that up to the points where important state interests provide compelling justifications for intervention, "the abortion decision in all its aspects is inherently, and primarily, a medical decision," *id., at 166*, and we added that if this privilege were abused, "the usual remedies, judicial and intra-professional, are available." *Ibid.*

Roe's companion case, *Doe v. Bolton, 410 U.S. 179 (1973)*, underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment. After the Court there reiterated that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand," *id., at 189*, the Court discussed, in a vagueness-attack context, the Georgia statute's requirement that a physician's decision to perform an abortion must rest upon "his best clinical judgment." The Court found it critical that that [*388] judgment " [**682] may be exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient." *Id., at 192.*

The third case, *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)*, stressed similar themes. There a Missouri statute that defined viability was challenged on the ground that it conflicted with the discussion of viability in *Roe* and that it was, in reality, an attempt to advance the point of viability to an earlier stage in gestation. The Court rejected that argument, repeated the *Roe* definition of viability, *428 U.S., at 63*, and observed again that viability is "a matter of medical judgment, skill, and technical ability, and we preserved [in *Roe*] the flexibility of the term." *Id., at 64*. The Court also rejected a contention that "a specified number of weeks in pregnancy must be fixed by statute as the point of viability." *Id., at 65*. It said:

"In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." [***605] *Id., at 64*.

[***LEdHR3] [3]In these three cases, then, this Court has stressed viability, has declared its determination to be a matter for medical judgment, and has recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period. We reaffirm these principles. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering [*389] into the ascertainment of viability -- be it weeks of gestation or fetal weight or any other single factor -- as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. And we have recognized no attempt to stretch the point of viability one way or the other.

With these principles in mind, we turn to the issues presented by the instant controversy.

III

[***LEdHR1B] [1B]The attack mounted by the plaintiffs-appellees upon § 5 (a) centers on both the viability-determination requirement and the stated standard of care. The former provision, requiring the physician to observe the care standard when he determines that the fetus is viable, or when "there is sufficient reason to believe that the fetus may be viable," is asserted to be unconstitutionally vague because it fails to inform the physician when his duty to the fetus arises, and because it does not make the physician's good-faith determination of viability conclusive. This provision is also said to be unconstitutionally overbroad, because it carves out a new time period prior to the stage of viability, and could have a restrictive effect on a couple who wants to abort a fetus determined by genetic testing to be defective. [8] The standard of care, and in particular the requirement that the physician employ the abortion technique "which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in [**683] order to preserve the life or health of the mother," is said to be void for vagueness and to be unconstitutionally restrictive in failing to afford [*390] the physician sufficient professional discretion in determining which abortion technique is appropriate.

8 The plaintiffs-appellees introduced evidence that modern medical technology makes it possible to detect whether a fetus is afflicted with such disorders as Tay-Sachs disease and Down's syndrome (mongolism). Such testing, however, often cannot be completed until after 18-20 weeks' gestation. App. 53a-56a (testimony of Hope Punnett, Ph. D.).

The defendants-appellants, in opposition, assert that the Pennsylvania statute is concerned only with post-viability abortions and with prescribing a standard of care for those abortions. They assert that the terminology "may be viable" correctly describes the statistical probability of fetal survival associated with viability; that the viability-determination requirement is otherwise sufficiently definite to be interpreted by the medical community; and that it is for the legislature, not the judiciary, [***606] to determine whether a viable but genetically defective fetus has a right to life. They contend that the standard-of-care provision preserves the flexibility required for sound medical practice, and that it simply requires that when a physician has a choice of procedures of equal risk to the woman, he must select the procedure least likely to be fatal to the fetus.

IV

[***LEdHR1C] [1C]We agree with plaintiffs-appellees that the viability-determination requirement of § 5 (a) is ambiguous, and that its uncertainty is aggravated by the absence of a scienter requirement with respect to the finding of viability. Because we conclude that this portion of the statute is void for vagueness, we find it unnecessary to consider appellees' alternative arguments based on the alleged overbreadth of § 5 (a).

A

[***LEdHR4] [4]It is settled that, as a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss, 347 U.S. 612, 617 (1954)*, or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972)*, is void for vagueness. See generally *Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)*. [*391] This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights. *Id., at 109*; *Smith v. Goguen, 415 U.S. 566, 573 (1974)*; *Keyishian v. Board of Regents, 385 U.S. 589, 603-604 (1967)*.

Section 5 (a) requires every person who performs or induces an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. If such person determines that the fetus is viable, or if "there is sufficient reason to believe that the fetus may be viable," then he must adhere to the prescribed standard of care. See n. 1, *supra*. This requirement contains a double ambiguity. First, it is unclear whether the statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard. Second, it is uncertain whether the phrase "may be viable" simply refers to viability, as that term has been defined in *Roe* and in *Planned Parenthood*, or whether it refers to an undefined penumbral or "gray" area prior to the stage of viability.

The statute requires the physician to conform to the prescribed standard of care if one of two conditions is satisfied: if he determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable." Apparently, the determination of whether the fetus "is viable" is to be based on the attending physician's "experience, judgment or professional competence," a subjective point of reference. But it is unclear whether the same phrase applies to the second triggering condition, that is, to "sufficient reason to believe that the fetus may be viable." In other words, it is ambiguous [***607] whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending [**684] physician, or "sufficient reason" from the perspective of a cross section of the medical community or a panel of experts. The latter, obviously, portends not an inconsequential hazard for the typical private practitioner who may not [*392] have the skills and technology that are readily available at a teaching hospital or large medical center.

[***LEdHR5A] [5A]The intended distinction between the phrases "is viable" and "may be viable" is even more elusive. Appellants argue that no difference is intended, and that the use of the "may be viable" words "simply incorporates the acknowledged medical fact that a fetus is 'viable' if it has that statistical 'chance' of survival recognized by the medical community." Brief for Appellants 28. The statute, however, does not support the contention that "may be viable" is synonymous with, or merely intended to explicate the meaning of, "viable." [9]

> 9 [***LEdHR5B] [5B]Appellants do not argue that federal-court abstention is required on this issue, nor is it appropriate, given the extent of the vagueness that afflicts § 5 (a), for this Court to abstain *sua sponte*. See *Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976)*.

[***LEdHR6] [6]Section 5 (a) requires the physician to observe the prescribed standard of care if he determines "that the fetus is viable *or* if there is sufficient reason to believe that the fetus may be viable" (emphasis supplied). The syntax clearly implies that there are two distinct conditions under which the physician must conform to the standard of care. Appellants' argument that "may be viable" is synonymous with "viable" would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. See *United States v. Menasche, 348 U.S. 528, 538-539 (1955)*.

[***LEdHR7A] [7A]Furthermore, the suggestion that "may be viable" is an explication of the meaning of "viable" flies in the face of the fact that the statute, in § 2, already defines "viable." This, presumably, was intended to be the exclusive definition of "viable" throughout the Act. [10] In this respect, it is significant [*393] that § 6 (b) of the Act speaks only of the limited availability of abortion during the stage of a pregnancy "subsequent to viability." The concept of viability is just as important in § 6 (b) as it is in § 5 (a). Yet in § 6 (b) the legislature found it unnecessary to explain that a "viable" fetus includes one that "may be viable."

> 10 [***LEdHR7B] [7B]The statute says that viable "means," not "includes," the capability of a fetus "to live outside the mother's womb albeit with artificial aid." As a rule, "[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978).

Since we must reject appellants' theory that "may be viable" means "viable," a second serious ambiguity appears in the statute. On the one hand, as appellees urge and as the District Court found, see *401 F.Supp., at 572*, it may be that "may be viable" carves out a new time

period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood [***608] of survival that physicians associate with viability. On the other hand, although appellants do not argue this, it may be that "may be viable" refers to viability as physicians understand it, and "viable" refers to some undetermined stage later in pregnancy. We need not resolve this question. The crucial point is that "viable" and "may be viable" apparently refer to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and in *Planned Parenthood.* [11]

11 Since our ruling today is confined to the conclusion that the viability-determination requirement of § 5 (a) is impermissibly vague, there is no merit in the dissenting opinion's suggestion, *post*, at 406, that the Court has "tacitly [disowned]" the definition of viability as set forth in *Roe* and *Planned Parenthood.* On the contrary, as noted above, *supra, at 388*, we *reaffirm* what was said in those decisions about this critical concept.

[**685] Because of the double ambiguity in the viability-determination requirement, this portion of the Pennsylvania statute is readily distinguishable from the requirement that an abortion must be "necessary for the preservation of the mother's life or health," upheld against a vagueness challenge in *United* [*394] *States v. Vuitch, 402 U.S. 62, 69-72 (1971)*, and the requirement that a physician determine, on the basis of his "best clinical judgment," that an abortion is "necessary," upheld against a vagueness attack in *Doe v. Bolton, 410 U.S., at 191-192.* The contested provisions in those cases had been interpreted to allow the physician to make his determination in the light of all attendant circumstances -- psychological and emotional as well as physical -- that might be relevant to the well-being of the patient. The present statute does not afford broad discretion to the physician. Instead, it conditions potential criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights.

B

The vagueness of the viability-determination requirement of § 5 (a) is compounded by the fact that the Act subjects the physician to potential criminal liability without regard to fault. Under § 5 (d), see n. 1, *supra*, a physician who fails to abide by the standard of care when there is sufficient reason to believe that the fetus "may be viable" is subject "to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted." To be sure, the Pennsylvania law of criminal homicide, made applicable to the physician by § 5 (d), conditions guilt upon a finding of scienter. See Pa. Stat. Ann., Tit. 18, §§ 2501-2504 (Purdon 1973 and Supp. 1978). The required mental state, however, is that of "intentionally, knowingly, recklessly or negligently [causing] the death of another human being." § 2501 (1973). Thus, the Pennsylvania law of criminal homicide requires scienter with respect to whether the physician's actions will result in the death of the fetus. But neither the Pennsylvania law of criminal homicide, nor the Abortion Control Act, requires that the [*395] physician be culpable in failing to find [***609] sufficient reason to believe that the fetus may be viable. [12]

12 Section 5 (a) does provide that the determination of viability is to be based on the physician's "experience, judgment or professional competence." A subjective standard keyed to the physician's individual skill and abilities, however, is different from a requirement that the physician be culpable or blameworthy for his performance under such a standard. Moreover, as noted above, it is ambiguous whether this subjective language applies to the second condition that activates the duty to the fetus, namely, "sufficient reason to believe that the fetus may be viable."

This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea.* See, for example, *United States v. United States Gypsum Co., 438 U.S. 422, 434-446 (1978)*; *Papachristou v. Jacksonville, 405 U.S., at 163*; *Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952).* [13] Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." *United States v. Ragen, 314 U.S. 513, 524* [**686] *(1942).*

13 "[The] requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. United States, 325 U.S. 91, 101-102 (1945)* (plurality opinion).

The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the [*396] quality of the available medical facilities; and other factors. [14] Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. [15] In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to [***610] the stage of viability. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

14 See App. 5a-6a, 10a, 17a (testimony of Louis Gerstley III, M. D.); *id.*, at 77a-78a, 81a (testimony of Thomas W. Hilgers, M. D.); *id.*, at 93a-101a, 109a, 112a (testimony of William J. Keenan, M.D.).

15 See *id.*, at 8a (testimony of Dr. Gerstley) (viability means 5% chance of survival, "certainly at least two to three percent"); *id., at 104*a (testimony of Dr. Keenan) (10% chance of survival would be viable); *id., at 144*a (deposition of John Franklin, M. D.) (viability means "ten percent or better" probability of survival); *id., at 132*a (testimony of Arturo Hervada, M. D.) (it is misleading to be obsessed with a particular percentage figure).

[***LEdHR8] [8]Because we hold that the viability-determination provision of § 5 (a) is void on its face, we need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability. We reaffirm, however, that "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Planned Parenthood of Central Missouri v.* [*397] *Danforth, 428 U.S., at 64.* State regulation that impinges upon this determination, if it is to be constitutional, must allow the attending physician "the room he needs to make his best medical judgment." *Doe v. Bolton, 410 U.S., at 192.*

V

[***LEdHR1D] [1D] [***LEdHR9A] [9A]We also conclude that the standard-of-care provision of § 5 (a) is impermissibly vague. [16] The standard-of-care provision, when it applies, requires the physician to

"exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so [**687] long as a different technique would not be necessary in order to preserve the life or health of the mother."

Plaintiffs-appellees focus their attack on the second part of the standard, requiring the physician to employ the abortion technique offering the greatest possibility of fetal survival, provided some other technique would not be necessary in order to preserve the life or health of the mother. [17]

16

[***LEdHR9B] [9B]The dissenting opinion questions whether the alleged vagueness of the standard-of-care provision is properly before us, since it is said that this issue was not reached by the District Court. That court, however, declared § 5 (a) unconstitutional in its entirety, including both the viability-determination requirement and the standard-of-care provision. App. 243a. Appellees, as the prevailing parties, may of course assert any ground in support of that judgment, "whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970).*

17 In *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 81-84 (1976)*, the Court struck down a provision similar to the first part of the standard-of-care provision of § 5 (a), on the ground that it applied at all stages of gestation and not just to the period subsequent to viability. Except to the extent that § 5 (a) is also alleged to apply prior to the point of viability, a contention we do not reach, see *supra, at 390*, appellees do

not challenge the standard-of-care provision on overbreadth grounds.

[*398] The District Court took extensive testimony from various physicians about their understanding of this requirement. That testimony is illuminating. When asked what method of abortion they would prefer to use [***611] in the second trimester in the absence of § 5 (a), the plaintiffs' experts said that they thought saline amnio-infusion was the method of choice. [18] This was described as a method involving removal of amniotic fluid and injection of a saline or other solution into the amniotic sac. See *Planned Parenthood of Central Missouri v. Danforth, 428 U.S., at 75-79.* All physicians agreed, however, that saline amnio-infusion nearly always is fatal to the fetus, [19] and it was commonly assumed that this method would be prohibited by the statute.

18 App. 11a (testimony of Dr. Gerstley); *id.*, at 28a (testimony of Dr. Franklin).

19 See, *e. g., id.*, at 28a (testimony of Dr. Franklin); *id.*, at 36a (testimony of Fred Mecklenburg, M. D.).

When the plaintiffs' and defendants' physician-experts respectively were asked what would be the method of choice under § 5 (a), opinions differed widely. Preferences ranged from no abortion, to prostaglandin infusion, to hysterotomy, to oxytocin induction. [20] Each method, it was generally conceded, involved disadvantages from the perspective of the woman. Hysterotomy, a type of Caesarean section procedure, generally was considered to have the highest incidence of fetal survival of any of the abortifacients. Hysterotomy, however, is associated with the risks attendant upon any operative procedure involving anesthesia and incision of [*399] tissue. [21] And all physicians agreed that future children born to a woman having a hysterotomy would have to be delivered by Caesarean section because of the likelihood of rupture of the scar. [22]

20 There was testimony that dilation and curettage and dilation and suction, two of the more common methods of abortion in the first trimester, normally are not used in the second trimster. *Id.*, at 39a-40a (testimony of Dr. Mecklenburg).

21 *Id.*, at 23a (testimony of Dr. Franklin); *id.*, at 43a (testimony of Dr. Mecklenburg); *id.*, at 73a (testimony of Dr. Hilgers).

22 See, *e. g., id.*, at 13a (testimony of Dr. Gerstley); *id.*, at 28a (testimony of Dr. Franklin).

Few of the testifying physicians had had any direct experience with prostaglandins, described as drugs that stimulate uterine contractibility, inducing premature expulsion of the fetus. See *Planned Parenthood of Central Missouri v. Danforth, 428 U.S., at 77-78.* It was generally agreed that the incidence of fetal survival with prostaglandins would be significantly greater than with saline amnio-infusion. [23] Several physicians testified, however, that prostaglandins have undesirable side effects, such as nausea, vomiting, headache, and diarrhea, and indicated that they are unsafe with patients having a history of asthma, glaucoma, hypertension, cardiovascular disease, or epilepsy. [24] See [**688] *Wynn v. Scott, 449 F.Supp. 1302, 1326 (ND Ill. 1978).* One physician recommended oxytocin induction. He doubted, however, whether the procedure would be fully effective in all cases, and he indicated that the procedure was prolonged and expensive. [25]

23 See, *e. g., id.*, at 11a-12a (testimony of Dr. Gerstley); *id.*, at 28a (testimony of Dr. Franklin).

24 See *id.*, at 11a (testimony of Dr. Gerstley); *id.*, at 37a-38a (testimony of Dr. Mecklenburg); *id.*, at 72a (testimony of Dr. Hilgers).

25 *Id.*, at 12a (testimony of Dr. Gerstley).

The parties acknowledge that [***612] there is disagreement among medical authorities about the relative merits and the safety of different abortion procedures that may be used during the second trimester. See Brief for Appellants 24. The appellants submit, however, that the only legally relevant considerations are that alternatives exist among abortifacients, [*400] "and that the physician, mindful of the state's interest in protecting viable life, must make a competent and good faith medical judgment on the feasibility of protecting the fetus' chance of survival in a manner consistent with the life and health of the pregnant woman." *Id.*, at 25. We read § 5 (a), however, to be much more problematical.

The statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict. The woman's life and health are not mentioned in the first part of the stated standard of care, which sets forth the general duty to the viable fetus; they are mentioned only in the second part which deals with the choice of abortion procedures. Moreover, the second part of the standard directs the physician to employ the abortion technique best suited to fetal survival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother" (emphasis supplied). In this context, the word "necessary" suggests that a particular technique must be indispensable to the woman's life or health -- not merely desirable -- before it may be adopted. And "the life or health of the mother," as used in § 5 (a), has not been construed by the courts of the Commonwealth to mean, nor does it necessarily imply, that all factors relevant to the welfare of the woman may be taken into account by the physician in

making his decision. Cf. *United States v. Vuitch, 402 U.S., at 71-72*; *Doe v. Bolton, 410 U.S., at 191.*

Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties of this magnitude are involved, the [*401] State, at the least, must pro-

cial aid." This is the point at which the State's interest in protecting fetal [*402] life becomes sufficiently strong to permit it to "go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *410 U.S., at 163-164.*

The Court obviously crafted its definition of viability with some care, and it chose to define that term not as that stage of development at which the fetus actually *is* able or actually *has* the ability to survive outside the mother's womb, with or without artificial aid, but as that point at which the fetus is *potentially* able to survive. In

sician to possible criminal sanctions.

Appellants' further suggestion that § 5 (a) requires only that the physician make a good-faith selection of the proper abortion procedure finds no support in either the language or an authoritative interpretation of the statute.

potentially able do not mean the same thing. Potential ability is not actual ability. It is ability "[existing] in possibility, not in actuality." Webster's New International Dictionary (2d ed. 1958). The Court's definition of viability in *Roe* v. *Wade* reaches an earlier point in the de-

termination of viability and because that term, as defined in § 2, was held to be unenforceably vague; and second, because the section required a determination of when a fetus may be viable, it was thought to regulate a period of time prior to viability and was therefore considered to be invalid under this Court's cases. The District Court was not disturbed by the fact that its opinion declared the term "viability" as used in this Court's opinion in *Roe* v. *Wade* to be hopelessly vague since it understood that opinion also to have given specific content to that term and to have held that a State could not consider any fetus to be viable prior to the 24th week of pregnancy. This was concrete guidance to the States, and because the "may be viable" provision of § 5 (a) " [**690] [tended] to carve out a . . . period of time of potential viability [which might cover a period of] 20 to 26 weeks gestation," *401 F.Supp., at 572*, the State was unlawfully regulating the second trimester. Because it sought to enforce § 5 (a), § 5 (d) was also invalidated. Section 6 (b), which forbade all abortions after viability, also fell to the challenge of vagueness.

The District Court's judgment was pending on appeal here when *Planned Parenthood of Central Missouri v. Danforth,* [*404] *supra*, was argued and decided. There, the state Act defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." *428 U.S., at 63*. This definition was attacked as impermissibly expanding the *Roe* v. *Wade* definition of viability; the "mere possibility of momentary survival," it was argued, was not the proper standard under the Court's cases. *428 U.S., at 63*. It was also argued in this Court that the "may be" language of the Missouri statute was vulnerable for the same reasons that the "may be" provision of the Pennsylvania statute had been invalidated by the District Court in the case now before us. Brief for Appellants, O. T. 1975, No. 74-1151, pp. 65-66, quoting *Planned Parenthood Assn.* v. *Fitzpatrick, supra, at 571-572*. This Court, however, rejected these arguments and sustained the Missouri definition as consistent with *Roe*, "even when read in conjunction with" another section of the Act that proscribed all abortions not necessary to preserve the life or health of the mother "unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable," that is, that it has not reached that stage at which it may exist indefinitely outside the mother's womb. *428 U.S., at 63-64*. [***615] The Court noted that one of the appellant doctors "had no particular difficulty with the statutory definition" and added that the Missouri definition might well be considered more favorable to the complainants than the *Roe* definition since the "point when life can be 'continued indefinitely outside the womb' may well occur later in pregnancy than the point where the fetus is 'potentially able to live outside the mother's womb.'" *428 U.S., at 64*. The Court went on to make clear that it was not the proper function of the legislature or of the courts to place viability at a specific point in the gestation period. The "flexibility of the term," which was essentially a medical concept, was to be preserved. *Ibid.* The Court plainly reaffirmed what it had held [*405] in *Roe* v. *Wade*: Viability refers not only to that stage of development when the fetus actually has the capability of existing outside the womb but also to that stage when the fetus *may have* the ability to do so. The Court also reaffirmed that at any time after viability, as so understood, the State has the power to prohibit abortions except when necessary to preserve the life or health of the mother.

In light of *Danforth*, several aspects of the District Court's judgment in the *Fitzpatrick* case were highly questionable, and that judgment was accordingly vacated and remanded to the District Court for reconsideration. *Beal v. Franklin, 428 U.S. 901 (1976)*. A drastically modified judgment eventuated. The term "viability" could not be deemed vague in itself, and hence the definition of that term in § 2 and the proscription of § 6 (b) against post-viability abortions were sustained. The District Court, however, in a conclusory opinion adhered to its prior view that § 5 (a) was unconstitutional, as was § 5 (d) insofar as it related to § 5 (a).

Affirmance of the District Court's judgment is untenable. The District Court originally thought § 5 (a) was vague because the term "viability" was itself vague. The Court scotched that notion in *Danforth*, and the District Court then sustained the Pennsylvania definition of viability. In doing so, it necessarily nullified the major reason for its prior invalidation of § 5 (a), which was that it incorporated the supposedly vague standard of § 2. But the District Court had also said that the "may be viable" standard [**691] was invalid as an impermissible effort to regulate a period of "potential" viability. This was the sole remaining articulated ground for invalidating § 5 (a). But this is the very ground that was urged and rejected in *Danforth*, where this Court sustained the Missouri provision defining viability as the stage at which the fetus "may" have the ability to survive outside the womb and reaffirmed the flexible concept of viability announced in *Roe*.

[*406] In affirming the District Court, the Court does not in so many words agree with the District Court but argues that it is too difficult to know whether the Pennsylvania Act simply intended, as the State urges, to go no further than *Roe* permitted in protecting a fetus that is potentially able to survive or whether it intended to carve out a protected period prior to viability as defined in *Roe*. The District Court, although otherwise seriously in error, had no such trouble with the Act. It understood the "may be viable" provision [***616] as

an attempt to protect a period of potential life, precisely the kind of interest that *Roe* protected but which the District Court erroneously thought the State was not entitled to protect. [1] *Danforth*, as I have said, reaffirmed *Roe* in this respect. Only those with unalterable determination to invalidate the Pennsylvania Act can draw any measurable difference insofar as vagueness is concerned between "viability" defined as the ability to survive and "viability" defined as that stage at which the fetus may have the ability to survive. It seems to me that, in affirming, the Court is tacitly disowning the "may be" standard of the Missouri law as well as the "potential ability" [*407] component of viability as that concept was described in *Roe*. This is a further constitutionally unwarranted intrusion upon the police powers of the States.

1 The District Court observed:

> *"Roe* makes it abundantly clear that the compelling point at which a state in the interest of fetal life may regulate, or even prohibit, abortion is not before the 24th week of gestation of the fetus, at which point the Supreme Court recognized the fetus then presumably *has the capability* of meaningful life outside the mother's womb. Consequently, *Roe* recognizes only two periods concerning fetuses. The period prior to viability, when the state may not regulate in the interest of fetal life, and the period after viability, when it may prohibit altogether or regulate as it sees fit. The 'may be viable' provision of Section 5 (a) tends to carve out a third period of time of *potential* viability." *Planned Parenthood Assn.* v. *Fitzpatrick, 401 F.Supp. 554, 572 (ED Pa. 1975)* (emphasis added).
>
> Thus, the court interpreted the term "viability" more restrictively than *Roe*, read in its entirety, permitted but coextensively with the definition in § 2. Based on its misapprehension of *Roe*, the court condemned § 5 (a) essentially for reaching the period when the fetus has the *potential* "capability of meaningful life outside the mother's womb." *Ibid.*

II

Apparently uneasy with its work, the Court has searched for and seized upon two additional reasons to support affirmance, neither of which was relied upon by the District Court. The Court first notes that under § 5 (d), failure to make the determinations required by § 5 (a), or otherwise to comply with its provisions, subjects the abortionist to criminal prosecution under those laws that "would pertain to him had the fetus been a child who was intended to be born and not aborted." Although concededly the Pennsylvania law of criminal homicide conditions guilt upon a finding that the defendant intentionally, knowingly, recklessly, or negligently caused the death of another human being, the Court nevertheless goes on to declare that the abortionist could be successfully prosecuted for criminal homicide without any such fault or omission in determining whether or not the fetus is viable or may be viable. This alleged lack of a scienter requirement, the Court says, fortifies its holding that § 5 (a) is void for vagueness.

This seems to me an incredible construction of the Pennsylvania statutes. The District Court suggested nothing of the sort, and appellees focus entirely on § 5 (a), ignoring the homicide statutes. The latter not only define the specified degrees of scienter [**692] that are required for the various homicides, but also provide that ignorance or mistake as to a matter of fact, for which there is a reasonable explanation, is a defense to a homicide charge if it negatives the mental state necessary for conviction. *Pa. Stat. Ann., Tit. 18, § 304* [***617] (Purdon 1973). Given this background, I do not see how it can be seriously argued that a doctor who makes a good-faith mistake about whether a fetus is or is not viable could be successfully prosecuted [*408] for criminal homicide. This is the State's submission in this Court; the court below did not address the matter; and at the very least this is something the Court should not decide without hearing from the Pennsylvania courts.

Secondly, the Court proceeds to find the standard-of-care provision in § 5 (a) to be impermissibly vague, particularly because of an asserted lack of a *mens rea* requirement. I am unable to agree. In the first place, the District Court found fault with § 5 (a) only because of its viability and "may be viable" provisions. It neither considered nor invalidated the standard-of-care provision. Furthermore, the complaint did not expressly attack § 5 (a) on this ground, and plaintiffs' request for findings and conclusions challenged the section only on the grounds of the overbreadth and vagueness of the viability and the "may be viable" provisions. There was no request to invalidate the standard-of-care provision. Also, the plaintiffs' post-trial brief dealt with the matter in only the most tangential way. Appellees took no cross-appeal; and although they argue the matter in their brief on the merits in this Court, I question whether they are entitled to have still another provision of the Pennsylvania Act declared unconstitutional in this Court in the first instance, thereby and to that extent expanding the relief they obtained in the court below. [2] *United States v. New York Telephone Co., 434 U.S. 159, 166 n. 8 (1977).*

2 Unquestionably, rehabilitating § 5 (a) to satisfy this Court's opinion will be a far more ex-

tensive and more difficult task than that which the State faced under the District Court's ruling.

In any event, I cannot join the Court in its determined attack on the Pennsylvania statute. As in the case with a mistaken viability determination under § 5 (a), there is no basis for asserting the lack of a scienter requirement in a prosecution for violating the standard-of-care provision. I agree with the State that there is not the remotest chance that any abortionist will be prosecuted on the basis of a good-faith [*409] mistake regarding whether to abort, and if he does, with respect to which abortion technique is to be used. If there is substantial doubt about this, the Court should not complain of a lack of an authoritative state construction, as it does, but should direct abstention and permit the state courts to address the issues in the light of the Pennsylvania homicide laws with which those courts are so much more familiar than are we or any other federal court.

III

Although it seems to me that the Court has considerably narrowed the scope of the power to forbid and regulate abortions that the States could reasonably have expected to enjoy under *Roe* and *Danforth*, the Court has not yet invalidated a statute simply requiring abortionists to determine whether a fetus is viable and forbidding the abortion of a viable fetus except where necessary to save the life or health of the mother. [***618] Nor has it yet ruled that the abortionist's determination of viability under such a standard must be final and is immune to civil or criminal attack. Sections 2 and 6 (b) of the Pennsylvania law, for example, remain undisturbed by the District Court's judgment or by the judgment of this Court.

What the Court has done is to issue a warning to the States, in the name of vagueness, that they should not attempt to forbid or regulate abortions when there is a chance for the survival of the fetus, but it is not sufficiently large that the abortionist considers the fetus to be viable. This edict has no constitutional warrant, and I cannot join it.

REFERENCES

1 Am Jur 2d, Abortion 1.5

1 Am Jur Pl & Pr Forms (Rev), Abortion, Forms 1 et seq.

1 Am Jur Proof of Facts 15, Abortion and Miscarriage

US L Ed Digest, Abortion 1; Statutes 18

ALR Digests, Abortion 1; Statutes 29

L Ed Index to Annos, Abortion; Certainty and Definiteness

ALR Quick Index, Abortion; Certainty and Definiteness

Federal Quick Index, Abortion; Certainty and Definiteness

Annotation References:

Validity, under Federal Constitution, of abortion laws. *35 L Ed 2d 735.*

Supreme Court's definition and application of doctrine of "abstention" where questions of state law are controlling in federal civil case. *20 L Ed 2d 1623.*

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

Illustrations as to when statute defining criminal offense is subject to attack as vague, indefinite, or uncertain. *83 L Ed 893.*

EXHIBIT "6"

LEXSEE 269 U.S. 385

CONNALLY, COMMISSIONER, ET AL. v. GENERAL CONSTRUCTION COMPANY

No. 314

SUPREME COURT OF THE UNITED STATES

269 U.S. 385; 46 S. Ct. 126; 70 L. Ed. 322; 1926 U.S. LEXIS 929

November 30, December 1, 1925, Argued
January 4, 1926, Decided

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

APPEAL from a decree of the District Court awarding an interlocutory injunction, upon the bill and a motion to dismiss it (demurrer), in a suit to restrain state and county officials of Oklahoma from enforcing a statute purporting, inter alia, to prescribe a minimum for the wages of workmen employed by contractors in the execution of contracts with the State, and imposing fine or imprisonment for each day's violation.

DISPOSITION: *3 Fed. 2d 666*, affirmed.

LAWYERS' EDITION HEADNOTES:

Criminal law -- sufficiency of penal statute. --

Headnote:

The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.

Constitutional law -- validity of vague statute. --

Headnote:

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Constitutional law -- requiring current rate of wages -- uncertainty. --

Headnote:

A statute requiring a contractor, under penalty, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed," is so uncertain as to deprive contractors of their property without due process of law.

SYLLABUS

1. A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law. P. 391.

2. Oklahoma Comp. Stats. 1921, §§ 7255, 7257, imposing severe, cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed," -- *held* void for uncertainty. P. 393.

COUNSEL: Messrs. George F. Short, Attorney General of Oklahoma, and J. Berry King, with whom Mr. Leon S. Hirsh was on the brief, for appellants.

The constitutionality of statutes is the strongest presumption known to the courts. *United States v. Brewer, 139 U.S. 278*; *State ex rel. Hastings v. Smith, 35 Neb. 13*; *State v. Lancashire Fire Ins. Co., 66 Ark. 466*; *Commonwealth v. Libbey, 216 Mass. 356*. The "Current Wage Law" meets all the requirements of definiteness considered in cases involving other statutes dependent upon a state of mind, the Oklahoma law being dependent upon a

given state of facts, readily ascertainable. *Waters-Pierce Oil Co. v. Texas, 212 U.S. 86.* Decisions upon the Sherman Anti-Trust Act are undoubtedly of considerable bearing in a case of this type, for had not a more liberal construction been there indulged than is required of the "Current Wage Law," the term "undue and unreasonable restraint of trade" would never have been considered sufficiently definite to sustain a prosecution as due process of law. *Standard Oil Co. v. United States, 221 U.S. 31.* See *United States v. Reading Co., 226 U.S. 84*; *United States v. American Tobacco Co., 221 U.S. 106*; *United States v. Eastman Kodak Co., 226 Fed. 65*; and *Northern Securities Co. v. United States, 193 U.S. 197* -- all defining, in one way or another, what acts are "undue and unreasonable" acts, contracts or combinations resulting in, or tending to result in a monopoly or restraint of trade. *United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290. Nash v. United States, 229 U.S. 373*, foreclosed the entire question of vagueness and uncertainty. *United States v. Patterson, 201 Fed. 697.* In *State v. Tibbetts, 205 Pac. 776*, the question of uncertainty by reason of the term "current rate of per diem wages" was not involved; but the statute was attacked on rehearing for uncertainty of the term "locality" and held to be valid. Indefiniteness as to the term "locality" cannot be asserted by appellee since the Tibbetts Case and the Waters-Pierce Oil Company Case definitely foreclose that question.

Were it not for this proviso as to wages, the entire salutary effect of the "Eight Hour Law" would be aborted. General classes of labor maintain a fairly uniform rate of pay -- what might properly be termed a "market price." Such was the recognition given to the term "prevailing rate of wages" in *Ryan v. City of New York, 79 N. Y. S. 599* and *McMahon v. City of New York, 47 N. Y. S. 1018.* There can be but one prevailing or market scale for each type of labor. In each locality there must be a current rate dictated by the law of supply and demand, modified by the standard of living in the particular community, the price of commodities and other various elements.

See *People ex rel. Rodgers v. Coler, 166 N. Y. 1*; *People v. Crane, 214 N. Y. 154*; *Fox v. Washington, 236 U.S. 273*; *Mutual Film Corp. v. Industrial Commission, 236 U.S. 246*; *Ellis v. United States, 206 U.S. 246*; *Bradford v. State, 78 Tex. Cr. 285*; *Commonwealth v. Reilly, 142 N. E. 915*; *Galveston, H. & S. A. Ry. v. Enderle, 170 S. W. 278*; *State v. Texas & Pacific R. Co., 106 Tex. 18*; *Morse v. Brown, 206 Fed. 232.*

Statutes containing such provisions as prohibiting the driving of vehicles "at a speed greater than is reasonable or prudent" have been held, in numerous cases, to be valid against the charge of vagueness and uncertainty of the offense prescribed. See also *State v. Quinlan, 86 N. J. L. 120*; *United States v. Sacks of Flour, 180 Fed. 518*; *Aiton v. Bd. of Medical Examiners, 13 Ariz. 354*; *People v. Apflebaum, 251 Ill. 18*; *Klafter v. State Bd. of Examiners, 259 Ill. 15*; *Katzman v. Commonwealth, 140 Ky. 124*; *State v. Lawrence, 9 Okla. Cr. 16*; *Stewart v. State, 4 Okla. Cr. 564*; *Mustard v. Elwood, 223 Fed. 225*; *Miller v. United States, 41 App. D. C. 52*; *Keefer v. State, 174 Ind. 255*; *State v. Newman Lbr. Co., 102 Miss. 802*; *Tanner v. Little, 240 U.S. 369*; *Pitney v. Washington, 240 U.S. 387*; *United States v. United States Brewers' Ass'n., 239 Fed. 163*; *Denver Jobbers' Ass'n. v. People ex rel. Dixon, 21 Colo. App. 350.*

A close study of all of the foregoing decisions demonstrates that a mental attitude as the standard of certainty almost invariably sustains the constitutionality of a statute. Where the standard is dependent upon a condition or state of facts, ascertainable by investigation, as a "current rate or per diem wages" in a given locality, a law based thereon is within all requirements of "due process."

There is no unlawful delegation of legislative power in the provision, in the Oklahoma labor laws, that the Commissioner of Labor is to carry into effect all the laws in relation to labor, passed by the Legislature of the State.

The provisions in question are not in conflict with the Federal Constitution as a taking of private property without compensation, nor as an interference with the freedom of contract.

Mr. J. D. Lydick, with whom Messrs. Charles E. McPherren, K. C. Sturdevant and Irvin L. Wilson were on the brief, for appellee.

JUDGES: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone.

OPINION BY: SUTHERLAND

OPINION

[*388] [**126] [***327] MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to enjoin certain state and county officers of Oklahoma from enforcing the provisions of § 7255 and § 7257, Compiled Oklahoma Statutes, 1921, challenged as unconstitutional. Section 7255 creates an eight-hour day for all persons employed by or on behalf of the state, etc., and provides "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen,

mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the State, . . . and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the State, . . . shall be deemed to be employed by or on behalf of the State, . . ." For any violation of the section, a penalty is imposed by § 7257 of a fine of not less than fifty nor more than five hundred dollars or imprisonment for not less than three nor more than six months. Each day that the violation continues is declared to be a separate offense.

[*389] [**127] The material averments of the bill, shortly stated, are to the following effect: The construction company, under contracts with the state, is engaged in constructing certain bridges within the state. In such work, it employs a number of laborers, workmen and mechanics, with each of whom it has agreed as to the amount of wages to be paid upon the basis of an eight-hour day; and the amount so agreed upon is reasonable and commensurate with the services rendered and agreeable to the employee in each case.

The Commissioner of Labor complained that the rate of wages paid by the company to laborers was only $ 3.20 per day, whereas, he asserted, the current rate in the locality where the work was being done was $ 3.60, and gave notice that, unless advised of an intention immediately to comply with the law, action would be taken to enforce compliance. From the correspondence set forth in the bill, it appears that the commissioner based his complaint upon an investigation made by his representative concerning wages "paid to laborers in the vicinity of Cleveland," Oklahoma, near which town one of the bridges was being constructed. This investigation disclosed the following list of employers with the daily rate of wages paid by each: City, $ 3.60 and $ 4.00; Johnson Refining Co., $ 3.60 and $ 4.05; Prairie Oil & Gas, $ 4.00; Gypsy Oil Co., $ 4.00; Gulf Pipe Line Co., $ 4.00; Brickyard, $ 3.00 and $ 4.00; I. Hansen, $ 3.60; General Construction Co., $ 3.20; Moore & Pitts Ice Co., $ 100 per month; Cotton Gins, $ 3.50 and $ 4.00; Mr. Pitts, $ 4.00; Prairie Pipe Line Co., $ 4.00; C. B. McCormack, $ 3.00; Harry McCoy, $ 3.00. The scale of wages paid by the construction company to its laborers was stated to be as follows: 6 men at $ 3.20 per day; 7 men at $ 3.60; 4 men at $ 4.00; 2 men at $ 4.40; 4 men at $ 4.80; 1 man at $ 5.20; and 1 man at $ 6.50.

In determining the rate of wages to be paid by the company, the commissioner claimed to be acting under [*390] authority of a statute of Oklahoma which imposes [***328] upon him the duty of carrying into effect all laws in relation to labor. In the territory surrounding the bridges being constructed by plaintiff, there is a variety of work performed by laborers, etc., the value of whose services depends upon the class and kind of labor performed and the efficiency of the workmen. Neither the wages paid nor the work performed are uniform; wages have varied since plaintiff entered into its contracts for constructing the bridges and employing its men; and it is impossible to determine under the circumstances whether the sums paid by the plaintiff or the amount designated by the commissioner or either of them constitute the current per diem wage in the locality. Further averments are to the effect that the commissioner has threatened the company and its officers, agents and representatives with criminal prosecutions under the foregoing statutory provisions, and, unless restrained, the county attorneys for various counties named will institute such prosecutions; and that, under § 7257, providing that each day's failure to pay current wages shall constitute a separate offense, maximum penalties may be inflicted aggregating many thousands of dollars in fines and many years of imprisonment.

The constitutional grounds of attack, among others, are that the statutory provisions, if enforced, will deprive plaintiff, its officers, agents and representatives, of their liberty and property without due process of law, in violation of the *Fourteenth Amendment to the federal Constitution*; that they contain no ascertainable standard of guilt; that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and that the term "locality" itself is fatally vague and uncertain. The bill is a long one, and, without further review, it is enough to say that, if the constitutional attack upon the statute be sustained, the averments justify the equitable relief prayed.

[*391] Upon the bill and a motion to dismiss it, in the nature of a demurrer attacking its sufficiency, an application for an interlocutory injunction was heard by a court of three judges, under § 266 Jud. Code, and granted; the allegations of the bill being taken as true. *3 Fed. 2d 666.*

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *International Harvester Co. v. Kentucky, 234 U.S. 216, 221*; *Collins v. Kentucky, 234 U.S. 634, 638.*

The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes in-

volved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co.* v. *Sherman, 266 U.S. 497, 502*; [**128] *Omaechevarria v. Idaho, 246 U.S. 343, 348*, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash v. United States, 229 U.S. 373, 376*; *International Harvester Co. v. Kentucky, supra, p. 223*, or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co., 255 U.S. 81, 92*, "that, for reasons found to [*392] result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." See also, *Waters-Pierce Oil Co.* v. *Texas (No. 1), 212 U.S. 86, 108*. Illustrative cases on the other hand are *International Harvester Co. v. Kentucky, supra, Collins v. Kentucky, supra*, and *United States v. Cohen Grocery Co., supra*, and cases there cited. The *Cohen Grocery Case* involved the validity of § 4 of the Food Control Act of 1917, which imposed a penalty upon any person who should make "any [***329] unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act.

Among the cases cited in support of that conclusion is *United States v. Capital Traction Co., 34 App. D. C. 592*, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding," was held to be void for uncertainty. In the course of its opinion, that court said (pp. 596, 598):

"The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

[*393] ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

In the light of these principles and decisions, then we come to the consideration of the legislation now under review, requiring the contractor, at the risk of incurring severe and cumulative penalties, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed."

We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction. * The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The [*394] "current rate of wages" is not simple but progressive -- from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. See *People ex rel. Rodgers v. Coler, 166 N. Y. 1, 24-25*.

> * The commissioner's own investigation shows that wages ranged from $ 3.00 to $ 4.05 per day; and the scale of wages paid by the construction company to its laborers, twenty-five in number, ranged from $ 3.20 to $ 6.50 per day, all but six of them being paid at $ 3.60 or more.

Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the

existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations. To construe the phrase "current rate of wages" as meaning either the lowest rate or the highest rate or any intermediate rate or, if it were possible to determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the legislature as to promote it. See *State v. Partlow, 91 N. C. 550, 553*; [***330] *Commonwealth* [**129] *v. Bank of Pennsylvania, 3 Watts & S. 173, 177.*

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the criminal court of appeals on rehearing in *State v. Tibbetts, 205 Pac. 776, 779.* But all the court did there was to define the word "locality" as meaning "place," [*395] "near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. See *Schmidt v. Kansas City Distilling Co., 90 Mo. 284, 296*; *Woods v. Cochrane and Smith, 38 Iowa 484, 485*; *State ex rel. Christie v. Meek, 26 Wash. 405, 407-408*; *Millville Imp. Co.* v. *Pitman, etc., Gas Co., 75 N. J. Law 410, 412*; *Thomas* v. *Marshfield*, 10 Pick. 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term "neighborhood" was not sufficiently certain to identify the grantees. In other connections or under other conditions the term "locality" might be definite enough, but not so in a statute such as that under review imposing criminal penalties. Certainly, the expression "near the place" leaves much to be desired in the way of a delimitation of boundaries; for it at once provokes the inquiry, "how near?" And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary -- as in the present case it is alleged it does vary -- among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

Interlocutory decree affirmed.

[*396] MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in the result on the ground that the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland.

EXHIBIT "7"

LEXSEE 408 U.S. 104, 108-109

GRAYNED v. CITY OF ROCKFORD

No. 70-5106

SUPREME COURT OF THE UNITED STATES

408 U.S. 104; 92 S. Ct. 2294; 33 L. Ed. 2d 222; 1972 U.S. LEXIS 26

January 19, 1972, Argued
June 26, 1972, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF ILLINOIS.

DISPOSITION: *46 Ill. 2d 492, 263 N. E. 2d 866*, affirmed in part and reversed in part.

SYLLABUS

1. Antipicketing ordinance, virtually identical with one invalidated as violative of equal protection in *Police Department of Chicago* v. *Mosley, ante*, p. 92, is likewise invalid. P. 107.

2. Antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague or overbroad. The ordinance is not vague since, with fair warning, it prohibits only actual or imminent, and willful, interference with normal school activity, and is not a broad invitation to discriminatory enforcement. *Cox v. Louisiana, 379 U.S. 536*; *Coates v. Cincinnati, 402 U.S. 611*, distinguished. The ordinance is not overbroad as unduly interfering with *First Amendment* rights since expressive activity is prohibited only if it "materially disrupts classwork." *Tinker v. Des Moines School District, 393 U.S. 503, 513.* Pp. 107-121.

COUNSEL: Sophia H. Hall argued the cause for appellant. With her on the briefs were William R. Ming, Jr., and Aldus S. Mitchell.

William E. Collins argued the cause for appellee. With him on the brief were A. Curtis Washburn and Charles F. Thomas.

JUDGES: Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, White, Powell, and Rehnquist, JJ., joined. Blackmun, J., filed a statement joining in the judgment and in Part I of the Court's opinion and concurring in the result as to Part II of the opinion, post, p. 121. Douglas, J., filed an opinion dissenting in part and joining in Part I of the Court's opinion, post, p. 121.

OPINION BY: MARSHALL

OPINION

[*105] [***225] [**2297] MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial complaints, a more public demonstration of protest was planned. On April 25, 1969, approximately 200 people -- students, their family members, and friends -- gathered next to the school grounds. Appellant, whose brother and twin sisters were attending the school, was part of this group. The demonstrators marched around on a sidewalk about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." Others, without placards, made the "power to the people" sign with their upraised and clenched fists.

[***226] In other respects, the evidence at appellant's trial was sharply contradictory. Government wit-

nesses reported that the demonstrators repeatedly cheered, chanted, baited policemen, and made other noise that was audible in the school; that hundreds of students were distracted from their school activities and lined the classroom windows to watch the demonstration; that some demonstrators successfully yelled to their friends to leave the school building and join the demonstration; that uncontrolled latenesses after period changes in the school were far greater than usual, with late students admitting that they had been watching the demonstration; and that, in general, orderly school procedure was disrupted. Defense witnesses claimed that the demonstrators were at all times quiet and orderly; that they did not seek to violate the law, but only to "make [*106] a point"; that the only noise was made by policemen using loudspeakers; that almost no students were noticeable at the schoolhouse windows; and that orderly school procedure was not disrupted.

[***LEdHR1A] [1A]After warning the demonstrators, the police arrested 40 of them, including appellant. [1] For participating in the [**2298] demonstration, Grayned was tried and convicted of violating two Rockford ordinances, hereinafter referred to as the "antipicketing" ordinance and the "antinoise" ordinance. A $ 25 fine was imposed for each violation. Since Grayned challenged the constitutionality of each ordinance, he appealed directly to the Supreme Court of Illinois. Ill. Sup. Ct. Rule 302. He claimed that the ordinances were invalid on their face, but did not urge that, as applied to him, the ordinances had punished constitutionally protected activity. The Supreme Court of Illinois held that both ordinances were constitutional on their face. *46 Ill. 2d 492, 263 N. E. 2d 866 (1970).* We noted probable jurisdiction, *404 U. S. 820 (1971).* We conclude that the antipicketing ordinance is unconstitutional, but affirm the court below with respect to the antinoise ordinance.

[***LEdHR1B] [1B]

1 Police officers testified that "there was no way of picking out any one in particular" while making arrests. Report of Proceedings in Circuit Court, 17th Judicial Circuit, Winnebago County 66. However, apparently only males were arrested. *Id.*, at 65, 135, 147. Since appellant's sole claim in this appeal is that he was convicted under facially unconstitutional ordinances, there is no occasion for us to evaluate either the propriety of these selective arrests or the sufficiency of evidence that appellant himself actually engaged in conduct within the terms of the ordinances. MR. JUSTICE DOUGLAS, in concluding that appellant's particular behavior was protected by the *First Amendment*, reaches a question not presented by the parties here or in the court below. See Tr. of Oral Arg. 16-17; Jurisdictional Statement 3; *City of Rockford v. Grayned, 46 Ill. 2d 492, 494, 263 N. E. 2d 866, 867 (1970).*

[*107] I

[***LEdHR2] [2] [***LEdHR3A] [3A]At the time of appellant's arrest and conviction, Rockford's antipicketing ordinance provided that

"A person commits disorderly conduct when he knowingly:

. . . .

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection [***227] does not prohibit the peaceful picketing of any school involved in a labor dispute . . . ." Code of Ordinances, c. 28, § 18.1 (i).

This ordinance is identical to the Chicago disorderly conduct ordinance we have today considered in *Police Department of Chicago* v. *Mosley, ante*, p. 92. For the reasons given in *Mosley*, we agree with dissenting Justice Schaefer below, and hold that § 18.1 (i) violates the *Equal Protection Clause of the Fourteenth Amendment.* Appellant's conviction under this invalid ordinance must be reversed. [2]

[***LEdHR3B] [3B]

2 In November 1971, the antipicketing ordinance was amended to delete the labor picketing proviso. As Rockford notes, "This amendment and deletion has, of course, no effect on Appellant's personal situation." Brief 2. Necessarily, we must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted.

II

The antinoise ordinance reads, in pertinent part, as follows:

"No person, while on public or private grounds adjacent to any building in which a school or any [*108] class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." Code of Ordinances, c. 28, § 19.2 (a).

Appellant claims that, on its face, this ordinance is both vague and overbroad, and therefore unconstitution-

al. We conclude, however, that the ordinance suffers from neither of these related infirmities.

A. Vagueness

[***LEdHR4] [4]It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity [**2299] to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. [3] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. [4] A vague [***228] law impermissibly delegates [*109] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [5] Third, but related, where a vague statute "abut[s] upon sensitive areas of basic *First Amendment* freedoms," [6] it "operates to inhibit the exercise of [those] freedoms." [7] Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [8]

3 *E. g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961); United States v. Harriss, 347 U.S. 612, 617 (1954); Jordan v. De George, 341 U.S. 223, 230-232 (1951); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Construction Co., 269 U.S. 385, 391 (1926); United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921); International Harvester Co. v. Kentucky, 234 U.S. 216, 223-224 (1914).*

4 *E. g., Papachristou v. City of Jacksonville, supra; Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Gregory v. Chicago, 394 U.S. 111, 120 (1969)* (Black, J., concurring); *Interstate Circuit v. Dallas, 390 U.S. 676, 684-685 (1968); Ashton v. Kentucky, 384 U.S. 195, 200 (1966); Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Shuttlesworth v. Birmingham, 382 U.S. 87, 90-91 (1965); Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558, 559-560 (1948); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Herndon v. Lowry, 301 U.S. 242, 261-264 (1937).*

5 Where *First Amendment* interests are affected, a precise statute "evincing a legislative judgment that certain specific conduct be . . . proscribed," *Edwards v. South Carolina, 372 U.S. 229, 236 (1963)*, assures us that the legislature has focused on the *First Amendment* interests and determined that other governmental policies compel regulation. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 32; *Garner v. Louisiana, 368 U.S. 157, 200, 202 (1961)* (Harlan, J., concurring in judgment).

6 *Baggett v. Bullitt, 377 U.S. 360, 372 (1964).*

7 *Cramp v. Board of Public Instruction, 368 U.S., at 287.*

8 *Baggett v. Bullitt, supra, at 372*, quoting *Speiser v. Randall, 357 U.S. 513, 526 (1958).* See *Interstate Circuit v. Dallas, supra, at 684; Ashton v. Kentucky, supra, at 195, 200-201; Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Smith v. California, 361 U.S. 147, 150-152 (1959); Winters v. New York, 333 U.S. 507 (1948); Stromberg v. California, 283 U.S. 359, 369 (1931).*

[***LEdHR5A] [5A] [***LEdHR6] [6]Although the question is close, we conclude that the antinoise ordinance is not impermissibly vague. The court below rejected appellant's arguments "that proscribed conduct was not sufficiently specified and that police were given too broad a discretion in determining whether conduct was proscribed." *46 Ill. 2d, at 494, 263 N. E. 2d, at 867.* Although it referred to other, similar statutes it had recently construed and upheld, the court [*110] below [**2300] did not elaborate on the meaning of the antinoise ordinance. [9] In this situation, as Mr. Justice Frankfurter put it, we must "extrapolate its allowable meaning." [10] Here, we are "relegated . . . to the words of the ordinance itself," [11] to the interpretations the court below has given to analogous statutes, [12] and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it. [13] "Extrapolation," of course, is a delicate task, for it is not within our power to construe and narrow state laws. [14]

9 The trial magistrate simply charged the jury in the words of the ordinance. The complaint and verdict form used slightly different language. See n. 24, *infra.*

10 *Garner v. Louisiana, 368 U.S., at 174* (concurring in judgment).

11 *Coates v. Cincinnati, 402 U.S., at 614.*

12 *E. g., Gooding v. Wilson, 405 U.S. 518 (1972).*

13 *E. g., Lake Carriers Assn. v. MacMullan, 406 U.S. 498, 506-508 (1972); Cole v. Richardson, 405 U.S. 676 (1972); Ehlert v. United States, 402 U.S. 99, 105, 107 (1971)*; cf. *Poe v. Ullman, 367 U.S. 497 (1961).*

14 *United States v. 37 Photographs, 402 U.S. 363, 369 (1971).*

[***LEdHR5B] [5B]With that warning, we find no unconstitutional vagueness in the antinoise ordinance. Condemned to the use of words, we can never expect [***229] mathematical certainty from our language. [15] The words of the Rockford ordinance are marked by "flexibility and reasonable breadth, rather than meticulous specificity," *Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (CA8 1969)* (Blackmun, J.), cert. denied, *398 U.S. 965 (1970)*, but we think it is clear what the ordinance as a whole prohibits. Designed, according to its preamble, "for the protection of Schools," the ordinance forbids deliberately [*111] noisy or diversionary [16] activity that disrupts or is about to disrupt normal school activities. It forbids this willful activity at fixed times -- when school is in session -- and at a sufficiently fixed place -- "adjacent" to the school. [17] Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase "tends to disturb." [18] However, in *Chicago v. Meyer, 44 Ill. 2d 1, 4, 253 N. E. 2d 400, 402 (1969)*, and *Chicago v. Gregory, 39 Ill. 2d 47, 233 N. E. 2d 422 (1968)*, reversed on other grounds, *394 U.S. 111 (1969)*, the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia*, a "diversion tending to disturb the peace," and held that it permitted conviction only where there was " [**2301] *imminent* threat of violence." (Emphasis supplied.) See *Gregory v. Chicago, 394 U.S. 111, 116-117, 121-122 (1969)* (Black, J., concurring). [19] Since *Meyer* was specifically cited in the opinion below, and it in turn drew heavily on *Gregory*, we think it proper to conclude that the Supreme Court of Illinois would interpret the Rockford ordinance to prohibit only actual [*112] or imminent interference with the "peace or good order" of the school. [20]

15 It will always be true that the fertile legal "imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question." *American Communications Assn. v. Douds, 339 U.S. 382, 412 (1950).*

16 "Diversion" is defined by *Webster's Third New International Dictionary* as "the act or an instance of diverting from one course or use to another . . . : the act or an instance of diverting (as the mind or attention) from some activity or concern . . . : a turning aside . . . : something that turns the mind from serious concerns or ordinary matters and relaxes or amuses."

17 Cf. *Cox v. Louisiana, 379 U.S. 559, 568-569 (1965)* ("near" the courthouse not impermissibly vague).

18 See *Gregory v. Chicago, 394 U.S., at 119-120* (Black, J., concurring); *Gooding v. Wilson, 405 U.S., at 525-527*; *Craig v. Harney, 331 U.S. 367, 372 (1947)*; cf. *Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)* (statute punishing "fighting words," that have a "*direct* tendency to cause acts of violence," upheld); *Street v. New York, 394 U.S. 576, 592 (1969).*

19 Cf. *Chicago v. Terminiello, 400 Ill. 23, 79 N. E. 2d 39 (1948)*, reversed on other grounds, *337 U. S. 1, 6 (1949).*

20 Some intermediate appellate courts in Illinois appear to have interpreted the phrase "tending to" out of the Chicago ordinance entirely, at least in some contexts. *Chicago v. Hansen, 337 Ill. App. 663, 86 N. E. 2d 415 (1949)*; *Chicago v. Holmes, 339 Ill. App. 146, 88 N. E. 2d 744 (1949)*; *Chicago v. Nesbitt, 19 Ill. App. 2d 220, 153 N. E. 2d 259 (1958)*; but cf. *Chicago v. Williams, 45 Ill. App. 2d 327, 195 N. E. 2d 425 (1963).*

In its brief, the city of Rockford indicates that its sole concern is with *actual* disruption. "[A] court and jury [are] charged with the duty of determining whether or not . . . a school *has been disrupted* and that the defendant's conduct, [no matter what it was,] caused or contributed to cause the disruption." Brief for Appellee 16 (emphasis supplied). This was the theory on which the city tried appellant's case to the jury, Report, *supra*, n. 1, at 12-13, although the jury was instructed in the words of the ordinance. As already noted, *supra*, n. 1, no challenge is made here to the Rockford ordinance as applied in this case.

Although [***230] the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed." [21] Although the Rockford ordinance may not be as precise as the statute we upheld in *Cameron v. Johnson, 390 U.S. 611 (1968)* -- which prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from" any courthouse -- we think that, as in *Cameron*, the ordinance here clearly "delineates its reach in words of common understanding." *Id., at 616.*

21 *American Communications Assn. v. Douds, 339 U.S., at 412.*

[*113] *Cox v. Louisiana, 379 U.S. 536 (1965)*, and *Coates v. Cincinnati, 402 U.S. 611 (1971)*, on which appellant particularly relies, presented completely different situations. In *Cox*, a general breach of the peace ordinance had been construed by state courts to mean "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." The Court correctly concluded that, as construed, the ordinance permitted persons to be punished for merely expressing unpopular views. [22] In *Coates*, the ordinance punished the sidewalk assembly of three or more persons who "conduct themselves in a manner annoying to [**2302] persons passing by . . ." We held, in part, that the ordinance was impermissibly vague because enforcement depended on the completely subjective standard of "annoyance."

22 Cf. *Edwards v. South Carolina, 372 U.S. 229 (1963)*; *Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)*. Similarly, in numerous other cases, we have condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences. *Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)*; *Staub v. City of Baxley, 355 U.S. 313 (1958)*; *Saia v. New York, 334 U.S. 558 (1948)*; *Schneider v. State, 308 U.S. 147, 163-164 (1939)*; *Lovell v. Griffin, 303 U.S. 444 (1938)*; *Hague v. CIO, 307 U.S. 496 (1939)*.

[***LEdHR5C] [5C]In contrast, Rockford's antinoise ordinance does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement. Rockford does not claim the broad power to punish all "noises" and "diversions." [23] The vagueness of these terms, by themselves, is dispelled by the ordinance's requirements that (1) the "noise or diversion" be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the "noise or diversion"; and (3) the acts be [*114] "willfully" done. [24] "Undesirables [***231] " or their "annoying" conduct may not be punished. The ordinance does not permit people to "stand on a public sidewalk . . . only at the whim of any police officer." [25] Rather, there must be demonstrated interference with school activities. As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. The Rockford City Council has made the basic policy choices, and has given fair warning as to what is prohibited. "The ordinance defines boundaries sufficiently distinct" for citizens, policemen, juries, and appellate judges. [26] It is not impermissibly vague.

23 Cf. *Cox v. Louisiana, 379 U.S. 536, 546-550 (1965)*; *Edwards v. South Carolina, 372 U.S., at 234-237*.

24 Tracking the complaint, the jury verdict found Grayned guilty of "wilfully causing diversion of good order of public school in session, in that while on school grounds and while school was in session, did wilfully make and assist in the making of a diversion which tended to disturb the peace and good order of the school session and class thereof."

25 *Shuttlesworth v. Birmingham, 382 U.S., at 90*.

26 *Chicago v. Fort, 46 Ill. 2d 12, 16, 262 N. E. 2d 473, 476 (1970)*, a case cited in the opinion below.

B. Overbreadth

[***LEdHR7] [7] [***LEdHR8] [8]A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct. [27] Although appellant does not claim that, as applied to him, the antinoise ordinance has punished protected expressive activity, he claims that the ordinance is overbroad on its face. Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge. [28] The crucial question, then, is [*115] whether the ordinance sweeps within its prohibitions what may not be punished under the *First* and *Fourteenth Amendments*. Specifically, appellant contends that the Rockford ordinance unduly interferes with *First* and *Fourteenth Amendment* rights to picket on a public sidewalk near a school. We disagree.

27 See *Zwickler v. Koota, 389 U.S. 241, 249-250 (1967)*, and cases cited.

28 *E. g., Gooding v. Wilson, 405 U.S. 518 (1972)*; *Coates v. Cincinnati, 402 U.S., at 616*; *Dombrowski v. Pfister, 380 U.S., at 486*, and cases cited; *Kunz v. New York, 340 U.S. 290 (1951)*.

"

[***LEdHR9] [9]In considering the right of a municipality to control the use of public streets for the expression of religious [or political] views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing [**2303] public questions.' *Hague v. CIO, 307 U.S. 496, 515 (1939)*." *Kunz v. New York, 340 U.S. 290, 293*

(1951). See *Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969)*.The right to use a public place for expressive activity may be restricted only for weighty reasons.

[***LEdHR10] [10] [***LEdHR11] [11]Clearly, government has no power to restrict such activity because of its message. [29] Our cases make equally clear, however, that reasonable "time, place and manner" regulations may be necessary to further significant governmental interests, [***232] and are permitted. [30] For example, two parades cannot march on the same street simultaneously, and government may allow only one. *Cox v. New Hampshire, 312 U.S. 569, 576 (1941)*. A demonstration or parade on a large street during rush hour [*116] might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Cox v. Louisiana, 379 U.S., at 554*. If overamplified loudspeakers assault the citizenry, government may turn them down. *Kovacs v. Cooper, 336 U.S. 77 (1949)*; *Saia v. New York, 334 U.S. 558, 562 (1948)*. Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the *First Amendment*. [31] Of course, where demonstrations turn violent, they lose their protected quality as expression under the *First Amendment*. [32]

29 *Police Department of Chicago* v. *Mosley, ante*, p. 92.

30 *Cox v. New Hampshire, 312 U.S. 569, 575-576 (1941)*; *Kunz v. New York, 340 U.S., at 293-294*; *Poulos v. New Hampshire, 345 U.S. 395, 398 (1953)*; *Cox v. Louisiana, 379 U.S., at 554-555*; *Cox v. Louisiana, 379 U.S. 559 (1965)*; *Adderley v. Florida, 385 U.S. 39, 46-48 (1966)*; *Food Employees v. Logan Valley Plaza, 391 U.S. 308, 320-321 (1968)*; *Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)*.

31 *Police Department of Chicago* v. *Mosley, ante*, at 95-96, and cases cited.

32 See generally T. Emerson, The System of Freedom of Expression 328-345 (1970).

[***LEdHR12] [12] [***LEdHR13] [13] [***LEdHR14] [14]The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." [33] Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana, 383 U.S. 131 (1966)*, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; [34] the regulation must be narrowly [*117] tailored [**2304] to further the State's legitimate interest. [35] Access [***233] to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [*First Amendment* rights] cannot constitutionally be denied broadly . . . ." [36] Free expression "must not, in the guise of regulation, be abridged or denied." [37]

33 Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1042 (1969). Cf. *Cox v. Louisiana, 379 U.S. 559 (1965)*; *Adderley v. Florida, 385 U.S. 39 (1966)*; *Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968)*; *Tinker v. Des Moines School District, 393 U.S. 503 (1969)*.

34 *E. g., Schneider v. State, 308 U.S. 147 (1939)*; *Talley v. California, 362 U.S. 60 (1960)*; *Saia v. New York, 334 U.S., at 562*; *Cox v. New Hampshire, 312 U.S., at 574*; *Hague v. CIO, 307 U.S., at 516*. See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1.

35 *De Jonge v. Oregon, 299 U.S. 353, 364-365 (1937)*; *Lovell v. Griffin, 303 U.S., at 451*; *Schneider v. State, 308 U.S., at 164*; *Cantwell v. Connecticut, 310 U.S., at 307*; *Cox v. Louisiana, 379 U.S., at 562-564*; *Davis v. Francois, 395 F.2d 730 (CA5 1968)*. Cf. *Shelton v. Tucker, 364 U.S. 479, 488 (1960)*; *NAACP v. Button, 371 U.S. 415, 438 (1963)*.

36 *Food Employees v. Logan Valley Plaza, 391 U.S., at 315*.

37 *Hague v. CIO, 307 U.S., at 516*.

[***LEdHR15A] [15A]In light of these general principles, we do not think that Rockford's ordinance is an unconstitutional regulation of activity around a school. Our touchstone is *Tinker v. Des Moines School District, 393 U.S. 503 (1969)*, in which we considered the question of how to accommodate *First Amendment* rights with the "special characteristics of the school environment." *Id., at 506*. *Tinker* held that the Des Moines School District could not punish students for wearing black armbands to school in protest of the Vietnam war. Recognizing that "'wide exposure to . . . robust exchange of ideas'" is an "important part of the educational process" and should be nurtured, *id., at 512*, we concluded that free expression could not be barred from the school campus. We made clear that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," *id., at 508*, [38] and that particular expressive activity could not be prohibited because of a "mere desire to avoid the dis-

comfort and unpleasantness that always accompany an unpopular viewpoint," *id., at 509*. But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use [*118] all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but only if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id., at 513*. The wearing of armbands was protected in *Tinker* because the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder." *Id., at 514*. Compare *Burnside v. Byars, 363 F.2d 744 (CA5 1966)*, and *Butts v. Dallas Ind. School District, 436 F.2d 728 (CA5 1971)*, with *Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (CA5 1966)*.

38 Cf. *Hague v. CIO, supra, at 516*.

[***LEdHR16] [16]Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker v. Des Moines School District, 393 U.S., at 513*.[39]

39 In *Tinker* we recognized that the principle of that case was not limited to expressive activity within the school building itself. *Id., at 512 n. 6, 513-514*. See *Esteban v. Central Missouri State College, 415 F.2d 1077 (CA8 1969)* (Blackmun, J.), cert. denied, *398 U.S. 965 (1970)*; *Jones v. Board of Regents, 436 F.2d 618 (CA9 1970)*; *Hammond v. South Carolina State College, 272 F.Supp. 947 (SC 1967)*, cited in *Tinker*.

[***LEdHR17] [17]We [***234] would be ignoring reality if we did not recognize that the public schools in a community are important institutions, and are often the focus of [**2305] significant grievances. [40] Without interfering with normal school activities, [*119] daytime picketing and handbilling on public grounds near a school can effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students. Some picketing to that end will be quiet and peaceful, and will in no way disturb the normal functioning of the school. For example, it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. [41] On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse. [42]

40 Cf. *Thornhill v. Alabama, 310 U.S., at 102*. It goes without saying that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State, 308 U.S., at 163*.

41 Cf. *Jones v. Board of Regents, supra*.

42 Cf. *Barker v. Hardway, 283 F.Supp. 228* (SD W. Va.), aff'd, *399 F.2d 638 (CA4 1968)*, cert. denied, *394 U.S. 905 (1969)* (Fortas, J., concurring).

Rockford's antinoise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with *First Amendment* rights. Far from having an impermissibly broad prophylactic ordinance, [43] Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an individualized basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted. [*120] And the ordinance gives no license to punish anyone because of what he is saying. [44]

43 See *Jones v. Board of Regents, supra; Hammond v. South Carolina State College, supra*.

44 Compare *Scoville v. Board of Education, 425 F.2d 10* (CA7), cert. denied, *400 U.S. 826 (1970)*; *Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (MD Ala. 1967)* (cited in *Tinker*).

[***LEdHR18] [18]We recognize that the ordinance prohibits some picketing that is neither violent nor physically obstructive. Noisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance's reach. Such expressive conduct may be constitutionally protected at other places or other times, cf. *Edwards v. South Carolina, 372 U.S. 229 (1963)*;*Cox v. Louisiana, 379 U.S. 536 (1965)*, but next to a school, while classes are in session, it may be prohibited. [45] The [***235] antinoise ordinance imposes no such restriction on expressive activity before or

after the school session, while the student/faculty "audience" enters and leaves the school.

45 Different considerations, of course, apply in different circumstances. For example, restrictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus, just as an assembly that is permitted outside a dormitory would be inappropriate in the middle of a mathematics class.

[**2306] [***LEdHR15B] [15B]In *Cox v. Louisiana, 379 U.S. 559 (1965)*, this Court indicated that, because of the special nature of the place, [46] persons could be constitutionally prohibited from picketing "in or near" a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice." Likewise, in *Cameron v. Johnson, 390 U.S. 611 (1968)*, we upheld a statute prohibiting [*121] picketing "in such a manner as to obstruct or unreasonably interfere

50 It is possible, of course, that there will be unconstitutional applications; but that is not a matter which presently concerns us. See *Shuttlesworth v. Birmingham, 382 U.S., at 91*, and n. 1, *supra*.

The judgment is

Affirmed in part and reversed in part.

MR. JUSTICE BLACKMUN joins in the judgment and in Part I of the opinion of the Court. He concurs in the result as to Part II of the opinion.

DISSENT BY: DOUGLAS (In Part)

DISSENT

[***236] MR. JUSTICE DOUGLAS, dissenting in part.

While I join Part I of the Court's opinion, I would also reverse the appellant's conviction under the antinoise ordinance.

[*122] The municipal ordinance on which this

picketing did not stop, and some 40 demonstrators, including appellant, were arrested.

The picketing lasted 20 to 30 minutes and some students went to the windows of the classrooms to observe it. It is not clear how many there were. The picketing [*123] was, however, orderly or, as one officer testified, "very orderly." There was no violence. And appellant made no noise whatever.

What Mr. Justice Roberts said in *Hague v. CIO, 307 U.S. 496, 515-516*, has never been questioned:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

[***237] We held in *Cox v. Louisiana, 379 U.S. 536, 544-545*, that a State could not infringe the right of free speech and free assembly by convicting demonsrators under a "disturbing the peace" ordinance where all that the students in that case did was to protest segregation and discrimination against blacks by peaceably assembling and marching to the courthouse where they sang, prayed, and listened to a speech, but where there was no violence, no rioting, no boisterous conduct.

The school where the present picketing occurred was the center of a racial conflict. Most of the pickets were indeed students in the school. The dispute doubtless disturbed the school; and the blaring of the loudspeakers of the police was certainly a "noise or diversion" in the [*124] meaning of the ordinance. But there was no evidence that appellant was noisy or boisterous or rowdy. He walked quietly and in an orderly manner. As I read this record, the disruptive force loosed at this school was an issue dealing with race -- an issue that is preeminently one for solution by *First Amendment* means. * That is all that was done here; and the entire picketing, including appellant's part in it, was done in the best *First Amendment* tradition.

* The majority asserts that "appellant's sole claim . . . is that he was convicted under facially unconstitutional ordinances" and that there is, therefore, no occasion to consider whether his activities were protected by the *First Amendment*. *Ante*, at 106 n. 1. Appellant argues, however, that the ordinance is overly broad in that it punishes constitutionally protected activity. A statute may withstand an overbreadth attack "only if, as authoritatively construed . . . , it is not susceptible of application to speech . . . that is protected by the *First* and *Fourteenth Amendments*." *Gooding v. Wilson, 405 U.S. 518, 520 (1972)*. If the ordinance applies to appellant's activities and if appellant's activities are constitutionally protected, then the ordinance is overly broad and, thus, unconstitutional. There is no merit, therefore, to the Court's suggestion that the question whether "appellant's particular behavior was protected by the *First Amendment*," *ante*, at 106 n. 1, is not presented.

REFERENCES

16 Am Jur 2d, Constitutional Law 346, 500

US L Ed Digest, Constitutional Law 501; Statutes 14, 17

ALR Digests, Constitutional Law 430; Statutes 26, 44

L Ed Index to Anno (Rev ed), Equal Protection of the Laws; Freedom of Speech, Press, Religion, and Assembly

ALR Quick Index, Equal Protection of Law; Freedom of Speech and Press; Picketing

Federal Quick Index, Equal Protection of the Laws; Freedom of Speech and Press; Picketing

Annotation References:

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

The Supreme Court and the right of free speech and press. *93 L Ed 1151 ,2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.*

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. *32 ALR3d 551.*

Nonlabor picketing or boycott. *93 ALR2d 1284.*

Validity of statute or ordinance against picketing. 35 ALR 1200, 108 ALR 1119, 122 ALR 1043, 125 ALR 963, 130 ALR 1303.

EXHIBIT "8"

LEXSEE 455 U.S. 489

VILLAGE OF HOFFMAN ESTATES ET AL. v. THE FLIPSIDE, HOFFMAN ESTATES, INC.

No. 80-1681

SUPREME COURT OF THE UNITED STATES

455 U.S. 489*; *102 S. Ct. 1186*; *71 L. Ed. 2d 362*; *1982 U.S. LEXIS 78*; *50 U.S.L.W. 4267

December 9, 1981, Argued
March 3, 1982, Decided

SUBSEQUENT HISTORY: Petition for Rehearing Denied April 26, 1982.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: *639 F.2d 373*, reversed and remanded.

DECISION:

Municipal ordinance requiring license to sell "items designed or marketed for use with illegal cannabis or drugs," held not unconstitutionally vague or overbroad.

SUMMARY:

A village enacted an ordinance regulating the sale of drug paraphernalia. The ordinance requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs". A store selling drug paraphernalia in the village brought an action in the United States District Court for the Northern District of Illinois challenging the ordinance prior to its enforcement as unconstitutionally vague and overbroad. The District Court upheld the constitutionality of the ordinance. On appeal, the United States Court of Appeals for the Seventh Circuit reversed, holding that the ordinance was impermissibly vague on its face (*639 F2d 373*).

On appeal, the United States Supreme Court reversed and remanded. In an opinion by Marshall, J., expressing the view of Burger, Ch. J., and Brennan, Blackmun, Powell, Rehnquist, and O'Connor, JJ., it was held that (1) the ordinance did not infringe upon the *First Amendment* rights of a merchandiser of items purported to be regulated by the ordinance and was not overbroad as inhibiting the *First Amendment* rights of other parties since (a) the ordinance does not restrict speech as such but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose and thus the ordinance does not embrace noncommercial speech, (b) insofar as any commercial speech interest was implicated, it was only the attenuated interest in displaying and marketing merchandise in the manner the retailer desires, and (c) it was irrelevant whether the ordinance had an overbroad scope encompassing other persons' commercial speech, (2) the ordinance is not impermissibly vague in all of its applications and could therefore not be challenged on its face as unduly vague in violation of due process as applied to a business engaged in selling drug paraphernalia since (a) the language "designed for use" is not unconstitutionally vague on its face insofar as it is sufficiently clear to cover at least some of the items sold by the business, and (b) the language "marketed for use" gave the business ample warning that its marketing activities required a license.

White, J., concurring in the judgment, expressed the view that the court need not have discussed the overbreadth problem in order to reach the result since the Court of Appeals did not discuss any problem of overbreadth but rather erroneously held the ordinance void for vagueness.

Stevens, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAW §952

First Amendment -- drug paraphernalia ordinance -- commercial speech --

Headnote:[1A][1B]

A village's ordinance which requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs" does not infringe upon the *First Amendment* rights of a merchandiser of items purported to be regulated by the ordinance, and is not overbroad as inhibiting the *First Amendment* rights of other parties, even though guidelines interpreting the ordinance utilized the proximity of drug-related literature as an indicium that paraphernalia are "marketed for use with illegal cannabis or drugs" since (1) the ordinance does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose, (2) insofar as any commercial speech interest is implicated, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires, and (3) it is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons because the overbreadth doctrine does not apply to commercial speech.

[***LEdHN2]

CORPORATIONS §37.7

drug paraphernalia ordinance -- vagueness --

Headnote:[2A][2B][2C]

A municipal ordinance which requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs" is not impermissibly vague in all of its applications and therefore may not be challenged on its face as unduly vague in violation of due process as applied to a business engaged in selling drug paraphernalia since (1) the language "designed for use" is not unconstitutionally vague on its face insofar as it is sufficiently clear to cover at least some of the items sold by the business and (2) the language "marketed for use" gives the business ample warning that its marketing activities require a license.

[***LEdHN3]

STATUTES §26

statute overbreadth and vagueness challenge --

Headnote:[3]

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct and if it does not, then the overbreadth challenge must fail; the court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications since a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others, it being necessary for a court to examine the complainant's conduct before analyzing other hypothetical applications of the law.

[***LEdHN4]

COURTS §810

facial challenge -- state law -- state court construction --

Headnote:[4A][4B]

In evaluating a facial challenge to a state law, a federal court must consider any limiting construction that a state court or state enforcement agency has proffered, and, in making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment.

[***LEdHN5]

STATUTES §17

vagueness challenge -- criteria --

Headnote:[5A][5B]

Vagueness challenges to statutes which do not involve *First Amendment* freedoms must be examined in the light of the facts of the case at hand.

[***LEdHN6]

STATUTES §26

vagueness challenge -- standing --

Headnote:[6A][6B]

One to whose conduct a statute clearly applies may not successfully challenge it for vagueness, since to sustain such a challenge, the complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.

[***LEdHN7]

LAW §954

First Amendment -- commercial speech -- government regulation --

Headnote:[7]

With regard to the protections of the *First Amendment* on commercial speech, the government may regulate or ban entirely speech proposing an illegal transaction.

[***LEdHN8]

CORPORATIONS §37.7

STATUTES §17

constitutional challenge -- over Breadth --

Headnote:[8]

With regard to whether a municipal ordinance is unconstitutional by virtue of having an overbroad scope, the overbreadth doctrine does not apply to commercial speech; however, a law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth doctrine may nevertheless be challenged on its face as unduly vague in violation of due process, although in order to succeed the complainant must demonstrate that the law is impermissibly vague in all of its applications.

[***LEdHN9]

LAW §710

drug paraphernalia ordinance; substantive due process --

Headnote:[9A][9B]

A retailer's right to sell smoking accessories, and the purchaser's right to buy and use them, are entitled only to minimal due process protection, regulation of items that have some lawful as well as unlawful uses not being an irrational means of discouraging drug use; accordingly, a municipal "drug paraphernalia" ordinance which requires a business to obtain a license if it sells certain items does not constitute a denial of substantive due process on the grounds that it would inhibit innocent users of items covered by the ordinance.

[***LEdHN10]

STATUTES §33

drug paraphernalia law -- vagueness challenge --

Headnote:[10A][10B]

In the event that a state court should construe a municipal drug paraphernalia licensing ordinance as prohibiting the sale of all pipes, of whatever description, then a seller of corncob pipes could not complain that the law is unduly vague, but could object that the law is not intended to cover such items.

[***LEdHN11]

CORPORATIONS §37.7

municipal ordinance -- vagueness challenge --

Headnote:[11]

The degree of vagueness that the Federal Constitution tolerates of a municipal ordinance depends in part on the nature of the enactment, and therefore economic regulation is subject to a less strict vagueness test because its subject-matter is often more narrow, and because businesses can be expected to consult relevant legislation in advance of action; perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of a constitutionally protected right such as, for example, if the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

[***LEdHN12]

CORPORATIONS §37.7

vagueness -- standards for enforcement --

Headnote:[12A][12B][12C]

A municipal ordinance regulating the sale of drug paraphernalia which requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs" is not void for vagueness in a preenforcement challenge to it on the grounds that it provides insufficient standards for enforcement, especially where the ordinance is sufficiently clear to overcome the speculative danger of arbitrary enforcement and where the possibility exists that the village enacting the ordinance will take further steps to minimize the dangers of arbitrary enforcement; the theoretical possibility that the village will enforce its ordinance against a paperclip placed next to certain literature is of no due process significance unless the possibility ripens into a prosecution.

[***LEdHN13]

CORPORATIONS §37.7

facial vagueness -- business regulation --

Headnote:[13]

In reviewing a municipal business regulation for facial vagueness, the principle inquiry is whether the law affords fair warning of what is proscribed.

[***LEdHN14]

COURTS §123

drug paraphernalia ordinance -- inquiry into wisdom and effectiveness -- Supreme Court --

Headnote:[14]

Whether municipal ordinances regulating or prohibiting the sale of drug paraphernalia are wise or effective is not the province of the United States Supreme Court.

SYLLABUS

An ordinance of appellant village requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Guidelines define the items (such as "roach clips," which are used to smoke cannabis, "pipes," and "paraphernalia"), the sale of which is required to be licensed. Appellee, which sold a variety of merchandise in its store, including "roach clips" and specially designed pipes used to smoke marihuana, upon being notified that it was in possible violation of the ordinance, brought suit in Federal District Court, claiming that the ordinance is unconstitutionally vague and overbroad, and requesting injunctive and declaratory relief and damages. The District Court upheld the ordinance and awarded judgment to the village defendants. The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face.

Held: The ordinance is not facially overbroad or vague but is reasonably clear in its application to appellee. Pp. 494-505.

(a) In a facial challenge to the overbreadth and vagueness of an enactment, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications. Pp. 494-495.

(b) The ordinance here does not violate appellee's *First Amendment* rights nor is it overbroad because it inhibits such rights of other parties. The ordinance does not restrict speech as such but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose and thus does not embrace noncommercial speech. With respect to any commercial speech interest implicated, the ordinance's restriction on the manner of marketing does not appreciably limit appellee's communication of information, except to the extent it is directed at commercial activity promoting or encouraging illegal drug use, an activity which, if deemed "speech," is speech proposing an illegal transaction and thus subject to government regulation or ban. It is irrelevant whether the ordinance has an overbroad scope encompassing other persons' commercial speech, since the overbreadth doctrine does not apply to commercial speech. Pp. 495-497.

(c) With respect to the facial vagueness challenge, appellee has not shown that the ordinance is impermissibly vague in all of its applications. The ordinance's language "designed . . . for use" is not unconstitutionally vague on its face, since it is clear that such standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i. e.*, features designed by the manufacturer. Thus, the "designed for use" standard is sufficiently clear to cover at least some of the items that appellee sold, such as "roach clips" and the specially designed pipes. As to the "marketed for use" standard, the guidelines refer to the display of paraphernalia and to the proximity of covered items to otherwise uncovered items, and thus such standard requires scienter on the part of the retailer. Under this test, appellee had ample warning that its marketing activities required a license, and by displaying a certain magazine and certain books dealing with illegal drugs physically close to pipes and colored rolling paper, it was in clear violation of the guidelines, as it was in selling "roach clips." Pp. 499-503.

(d) The ordinance's language is sufficiently clear that the speculative danger of arbitrary enforcement does not render it void for vagueness in a pre-enforcement facial challenge. Pp. 503-504.

COUNSEL: Richard N. Williams argued the cause and filed briefs for appellants.

Michael L. Pritzker argued the cause and filed a brief for appellee.

* Ronald A. Zumbrun and John H. Findley filed a brief for Community Action Against Drug Abuse as amicus curiae urging reversal.

Charles A. Trost filed a brief for American Businesses for Constitutional Rights as amicus curiae urging affirmance.

Briefs of amici curiae were filed for the State of Arkansas et al. by Steve Clark, Attorney General of Arkansas, J. D. MacFarlane, Attorney General of Colorado, Carl R. Ajello, Attorney General of Connecticut, Richard S. Gebelein, Attorney General of Delaware, Jim Smith, Attorney General of Florida, and Mitchell D. Franks, David H. Leroy, Attorney General of Idaho, Linley E. Pearson, Attorney General of Indiana, Robert T. Stephan, Attorney General of Kansas,

William J. Guste, Jr., Attorney General of Louisiana, James E. Tierney, Attorney General of Maine, Stephen H. Sachs, Attorney General of Maryland, and Paul F. Strain, Dennis M. Sweeney, and Linda H. Lamone, Assistant Attorneys General, Paul L. Douglas, Attorney General of Nebraska, Richard H. Bryan, Attorney General of Nevada, James R. Zazzali, Attorney General of New Jersey, Jeff Bingaman, Attorney General of New Mexico, Rufus L. Edmisten, Attorney General of North Carolina, and David S. Crump and James L. Wallace, Jr., Deputy Attorneys General, Jan Eric Cartwright, Attorney General of Oklahoma, Leroy S. Zimmerman, Attorney General of Pennsylvania, Mark White, Attorney General of Texas, David L. Wilkinson, Attorney General of Utah, and Kenneth O. Eikenberry, Attorney General of Washington; and for the Village of Wilmette, Illinois, by Robert J. Mangler.

JUDGES: MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, post, p. 507. STEVENS, J., took no part in the consideration or decision of the case.

OPINION BY: MARSHALL

OPINION

[*491] [***367] [**1189] JUSTICE MARSHALL delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A]This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Village of Hoffman Estates Ordinance No. 969-1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. *639 F.2d 373 (1981)*. We noted probable jurisdiction, *452 U.S. 904 (1981)*, and now reverse.

I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside), sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices, and jewelry, in its store located in the [**1190] village of Hoffman Estates, Ill. (village). [1] On February [*492] 20, 1978, the village enacted an ordinance regulating drug paraphernalia, to be effective May 1, 1978. [2] The ordinance makes it unlawful for any person "to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor." The license fee is $ 150. A business must also file affidavits that the licensee and its employees have not been convicted of a drug-related offense. Moreover, the business must keep a record of each sale of a regulated item, including the name and address of the [***368] purchaser, to be open to police inspection. No regulated item may be sold to a minor. A violation is subject to a fine of not less than $ 10 and not more than $ 500, and each day that a violation continues gives rise to a separate offense. A series of licensing guidelines prepared by the Village Attorney define "Paper," "Roach Clips," "Pipes," and "Paraphernalia," the sale of which is required to be licensed. [3]

1 More specifically, the District Court found:

"[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as 'National Lampoon,' 'Rolling Stone,' and 'High Times.' The novelty devices and tobacco-use related items plaintiff displayed and sold in its store ranged from small commodities such as clamps, chain ornaments and earrings through cigarette holders, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color. Plaintiff sold cigarette holders, 'alligator clips,' herb sifters, vials, and a variety of tobacco snuff." *485 F.Supp. 400, 403 (ND Ill. 1980)*.

2 The text of the ordinance is set forth in the Appendix to this opinion.

3 The guidelines provide:

"LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

"Paper -- white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

"Roach Clips -- designed for use with illegal cannabis or drugs and therefore covered.

"Pipes -- if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

"Paraphernalia -- if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered."

[*493] After an administrative inquiry, the village determined that Flipside and one other store appeared to be in violation of the ordinance. The Village Attorney notified Flipside of the existence of the ordinance, and made a copy of the ordinance and guidelines available to Flipside. Flipside's owner asked for guidance concerning which items were covered by the ordinance; the Village Attorney advised him to remove items in a certain section of the store "for his protection," and he did so. App. 71. The items included, according to Flipside's description, a clamp, chain ornaments, an "alligator" clip, key chains, necklaces, earrings, cigarette holders, glove stretchers, scales, strainers, a pulverizer, squeeze bottles, pipes, water pipes, pins, an herb sifter, mirrors, vials, cigarette rolling papers, and tobacco snuff. On May 30, 1978, instead of applying for a license or seeking clarification via the administrative procedures that the village had established for its licensing ordinances, [4] Flipside filed this lawsuit in the United States District Court for the Northern District of Illinois.

4 Ordinance No. 932-1977, the Hoffman Estates Administrative Procedure Ordinance, was enacted prior to the drug paraphernalia ordinance, and provides that an interested person may petition for the adoption of an interpretive rule. If the petition is denied, the person may place the matter on the agenda of an appropriate village committee for review. The Village Attorney indicated that no interpretive rules had been adopted with respect to the drug paraphernalia ordinance because no one had yet applied for a license. App. 68.

[**1191] The complaint alleged, *inter alia*, that the ordinance is unconstitutionally vague and overbroad, and requested injunctive and declaratory relief and damages. The District Court, after hearing testimony, declined to grant a preliminary injunction. The case was tried without a jury on additional evidence and stipulated testimony. The court issued [*494] an opinion upholding the constitutionality of the ordinance, and awarded judgment to the village defendants. *485 F.Supp. 400 (1980).*

The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face. The court reviewed the language of the ordinance and guidelines and found it vague with respect to certain conceivable applications, such [***369] as ordinary pipes or "paper clips sold next to *Rolling Stone* magazine." *639 F.2d, at 382.* It also suggested that the "subjective" nature of the "marketing" test creates a danger of arbitrary and discriminatory enforcement against those with alternative lifestyles. *Id., at 384.* Finally, the court determined that the availability of administrative review or guidelines cannot cure the defect. Thus, it concluded that the ordinance is impermissibly vague on its face.

II

[***LEdHR3] [3] [***LEdHR4A] [4A] [***LEdHR5A] [5A] [***LEdHR6A] [6A]In a facial challenge to the overbreadth and vagueness of a law, [5] a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. [6] If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates [*495] no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. [7] A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

[***LEdHR4B] [4B]

5 A "facial" challenge, in this context, means a claim that the law is "invalid *in toto* -- and therefore incapable of any valid application." *Steffel v. Thompson, 415 U.S. 452, 474 (1974).* In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered. *Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).*

6 In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt, 377 U.S. 360, 372 (1964)*, quoting

Speiser v. Randall, 357 U.S. 513, 526 (1958); see *Grayned, supra, at 109*; cf. *Young v. American Mini Theatres, Inc., 427 U.S. 50, 58-61 (1976).*

[***LEdHR5B] [5B] [***LEdHR6B] [6B]

7 "[Vagueness] challenges to statutes which do not involve *First Amendment* freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie, 419 U.S. 544, 550 (1975).* See *United States v. Powell, 423 U.S. 87, 92-93 (1975)*; *United States v. National Dairy Products Corp., 372 U.S. 29, 32-33, 36 (1963).* "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy, 417 U.S. 733, 756 (1974).* The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).* Such a provision simply has *no* core." *Smith v. Goguen, 415 U.S. 566, 578 (1974).*

The Court of Appeals in this case did not explicitly consider whether the ordinance reaches constitutionally protected conduct and is overbroad, nor whether the ordinance is vague in all of its applications. Instead, the court determined that the ordinance is void for vagueness because it is unclear in *some* of its applications to the [**1192] conduct of Flipside and of other hypothetical parties. [***370] Under a proper analysis, however, the ordinance is not facially invalid.

III

[***LEdHR1B] [1B]We first examine whether the ordinance infringes Flipside's *First Amendment* rights or is overbroad because it inhibits the *First Amendment* rights of other parties. Flipside makes the exorbitant claim that the village has imposed a "prior restraint" on speech because the guidelines treat the proximity of drug-related literature as an indicium that paraphernalia are "marketed for use with illegal cannabis or [*496] drugs." Flipside also argues that because the presence of drug-related designs, logos, or slogans on paraphernalia may trigger enforcement, the ordinance infringes "protected symbolic speech." Brief for Appellee 25.

These arguments do not long detain us. First, the village has not directly infringed the noncommercial speech of Flipside or other parties. The ordinance licenses and regulates the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs," Guidelines, *supra* n. 3, but does not prohibit or otherwise regulate the sale of literature itself. Although drug-related designs or names on cigarette papers may subject those items to regulation, the village does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose. The scope of the ordinance therefore does not embrace noncommercial speech.

[***LEdHR7] [7] [***LEdHR8] [8] [***LEdHR9A] [9A] [***LEdHR10A] [10A]Second, insofar as any *commercial* speech interest is implicated here, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires. We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information [8] -- with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n, 447 U.S. 557, 563-564 (1980)*; *Pittsburgh Press Co.* v. *Human Relations Comm'n, 413 U.S. 376, 388 (1973).* Finally, it is irrelevant whether the ordinance has an [*497] overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech. *Central Hudson, supra*, at 565, n. 8. [9]

8 Flipside explained that it placed items that the village considers drug paraphernalia in locations near a checkout counter because some are "point of purchase" items and others are small and apt to be shoplifted. App. 43. Flipside did not assert that its manner of placement was motivated in any part by a desire to communicate information to its customers.

[***LEdHR9B] [9B] [***LEdHR10B] [10B]

9 Flipside also argues that the ordinance is "overbroad" because it could extend to "innocent" and "lawful" uses of items as well as uses with illegal drugs. Brief for Appellee 10, 33-35. This argument seems to confuse vagueness and overbreadth doctrines. If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness. We find that claim unpersuasive in this pre-enforcement facial challenge. See *infra*, at 497-504. If Flipside is objecting that the ordinance would inhibit innocent uses of items found to be covered by the ordinance, it is complaining of denial of substantive

due process. The latter claim obviously lacks merit. A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection. Here, the village presented evidence of illegal drug use in the community. App. 37. Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use. See *Exxon Corp.* v. *Governor of Maryland, 437 U.S. 117, 124-125 (1978).*The hostility of some lower courts to drug paraphernalia laws -- and particularly to those regulating the sale of items that have many innocent uses, see, *e. g., 639 F.2d 373, 381-383 (1981)*; *Record Revolution No. 6, Inc.* v. *City of Parma, 638 F.2d 916, 928 (CA6 1980)*, vacated and remanded, *451 U.S. 1013 (1981)* -- may reflect a belief that these measures are ineffective in stemming illegal drug use. This perceived defect, however, is not a defect of clarity. In the unlikely event that a state court construed this ordinance as prohibiting the sale of all pipes, of whatever description, then a seller of corncob pipes could not complain that the law is unduly vague. He could, of course, object that the law was not intended to cover such items.

[***371] [**1193] IV

A

[***LEdHR2B] [2B]A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications. Flipside makes no such showing.

[*498] The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)*:

"Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omitted).

[***LEdHR11] [11]These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, [10] and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. [11] Indeed, the regulated enterprise may have the ability [***372] to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. [12] The Court has also expressed greater tolerance of [*499] enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. [13] And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. [14]

10 *Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)* (dictum; collecting cases).

11 See, *e. g., United States v. National Dairy Products Corp., 372 U.S. 29 (1963).* Cf. *Smith v. Goguen, 415 U.S., at 574.*

12 See *Joseph E. Seagram & Sons, Inc.* v. *Hostetter, 384 U.S. 35, 49 (1966)*; *McGowan v. Maryland, 366 U.S. 420, 428 (1961).*

13 See *Barenblatt v. United States, 360 U.S. 109, 137 (1959)* (Black, J., with whom Warren, C. J., and Douglas, J., joined, dissenting); *Winters v. New York, 333 U.S. 507, 515 (1948).*

14 See, *e. g., Colautti v. Franklin, 439 U.S. 379, 395 (1979)*; *Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952)*; *Screws v. United States, 325 U.S. 91, 101-103 (1945)* (plurality opinion). See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 87, n. 98 (1960).

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech [**1194] or of association, a more stringent vagueness test should apply. [15]

15 See, *e. g., Papachristou, supra; Grayned, 408 U.S., at 109.*

B

[***LEdHR2C] [2C]This ordinance simply regulates business behavior and contains a scienter requirement with respect to the alternative "marketed for use" standard. The ordinance nominally imposes only civil

penalties. However, the village concedes that the ordinance is "quasi-criminal," and its prohibitory and stigmatizing effect may warrant a relatively strict test. [16] [*500] Flipside's facial challenge fails because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside.

16 The village stipulated that the purpose of the ordinance is to discourage use of the regulated items. App. 33. Moreover, the prohibitory and stigmatizing effects of the ordinance are clear. As the Court of Appeals remarked, "few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing their names and addresses to a register available to the police." *639 F.2d, at 377.* The proposed register is entitled, "Retail Record for Items Designed or Marketed for Use with Illegal Cannabis or Drugs." Record, Complaint, App. B. At argument, counsel for the village admitted that the ordinance is "quasi-criminal." Tr. of Oral Arg. 4-5.

The ordinance requires Flipside to obtain a license if it sells "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes." Flipside expresses no uncertainty about which drugs this description encompasses; as the District Court noted, *485 F.Supp., at 406*, Illinois law clearly defines cannabis and numerous other controlled drugs, including cocaine. Ill. Rev. Stat., ch. 56 1/2, paras. 703 and 1102(g) (1980). On the other hand, the words "items, effect, paraphernalia, accessory or thing" do not identify the type of merchandise that the village [***373] desires to regulate. [17] Flipside's challenge thus appropriately focuses on the language "designed or marketed for use." Under either the "designed for use" or "marketed for use" standard, we conclude that at least some of the items sold by Flipside are covered. Thus, Flipside's facial challenge is unavailing.

17 The District Court apparently relied principally on the growing vernacular understanding of "paraphernalia" as drug-related items, and therefore did not separately analyze the meaning of "designed or marketed for use." *485 F.Supp., at 405-407.* We agree with the Court of Appeals that a regulation of "paraphernalia" alone would not provide much warning of the nature of the items regulated. *639 F.2d, at 380.*

1. "Designed for use"

The Court of Appeals objected that "designed . . . for use" is ambiguous with respect to whether items must be inherently suited only for drug use; whether the retailer's intent or manner of display is relevant; and whether the intent of a third party, the manufacturer, is critical, since the manufacturer is the "designer." *639 F.2d, at 380-381.* For the reasons that follow, we conclude that this language is not unconstitutionally vague on its face.

The Court of Appeals' speculation about the meaning of "design" is largely unfounded. The guidelines refer to "paper [*501] of colorful design" and to other specific items as conclusively "designed" or not "designed" for illegal use. [18] A principal meaning [**1195] of "design" is "[to] fashion according to a plan." Webster's New International Dictionary of the English Language 707 (2d ed. 1957). Cf. *Lanzetta v. New Jersey, 306 U.S. 451, 454, n. 3 (1939).* It is therefore plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i. e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items which are principally used for nondrug purposes, such as ordinary pipes, are not "designed for use" with illegal drugs. Moreover, no issue of fair warning is present in this case, since Flipside concedes that the phrase refers to structural characteristics of an item. [19]

18 The guidelines explicitly provide that "white paper . . . may be displayed," and that "Roach Clips" are "designed for use with illegal cannabis or drugs *and therefore* covered" (emphasis added). The Court of Appeals criticized the latter definition for failing to explain what a "roach clip" is. This criticism is unfounded because that technical term has sufficiently clear meaning in the drug paraphernalia industry. Without undue burden, Flipside could easily determine the meaning of the term. See American Heritage Dictionary of the English Language 1122 (1980) (defining "roach" as "[the] butt of a marijuana cigarette"); R. Lingeman, Drugs from A to Z: A Dictionary 213-214 (1969) (defining "roach" and "roach holder"). Moreover, the explanation that a retailer may display certain paper "not necessarily designed for use" clarifies that the ordinance at least embraces items that are necessarily designed for use with cannabis or illegal drugs.

19 "It is readily apparent that under the Hoffman Estates scheme, the 'designed for use' phrase refers to the physical characteristics of items deemed *per se* fashioned for use with drugs; and that, if any intentional conduct is implicated by the phrase, it is the intent of the 'designer' (i. e.

patent holder or manufacturer) whose intent for an item or 'design' is absorbed into the physical attributes, or structural 'design' of the finished product." Brief for Appellee 42-43. Moreover, the village President described drug paraphernalia as items *"[manufactured]* for that purpose and marketed for that purpose." App. 82 (emphasis added).

[*502] The [***374] ordinance and guidelines do contain ambiguities. Nevertheless, the "designed for use" standard is sufficiently clear to cover at least some of the items that Flipside sold. The ordinance, through the guidelines, explicitly regulates "roach clips." Flipside's co-operator admitted that the store sold such items, see Tr. 26, 30, and the village Chief of Police testified that he had never seen a "roach clip" used for any purpose other than to smoke cannabis. App. 52. The Chief also testified that a specially designed pipe that Flipside marketed is typically used to smoke marihuana. *Ibid.* Whether further guidelines, administrative rules, or enforcement policy will clarify the more ambiguous scope of the standard in other respects is of no concern in this facial challenge.

2. "Marketed for use"

Whatever ambiguities the "designed . . . for use" standard may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. A retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. The standard requires scienter, since a retailer could scarcely "market" items "for" a particular use without intending that use.

Under this test, Flipside had ample warning that its marketing activities required a license. Flipside displayed the magazine High Times and books entitled Marijuana Grower's Guide, Children's Garden of Grass, and The Pleasures of Cocaine, physically close to pipes and colored rolling papers, in clear violation of the guidelines. As noted above, Flipside's co-operator admitted that his store sold "roach clips," which are principally used for illegal purposes. Finally, in the [*503] same section

[***LEdHR12A] [12A] [***LEdHR13] [13]The Court of Appeals also held that the ordinance provides insufficient standards for enforcement. Specifically, the court feared that the ordinance might be used to harass individuals with alternative lifestyles and views. *639 F.2d, at 384.*In reviewing a business regulation for facial vagueness, however, the principal inquiry is whether the law affords fair warning [**1196] of what is proscribed. Moreover, this emphasis is almost inescapable in reviewing a pre-enforcement challenge to a law. Here, no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech. The language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness. Cf. *Papachristou v. City of Jacksonville, 405 U.S. 156, 168-171* [***375] *(1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).*

[***LEdHR12B] [12B]We do not suggest that the risk of discriminatory enforcement is insignificant here. Testimony of the Village Attorney who drafted the ordinance, the village President, and the Police Chief revealed confusion over whether the ordinance applies to certain items, as well as extensive reliance on the "judgment" of police officers to give meaning to the ordinance and to enforce it fairly. At this stage, however, we are not prepared to hold that this risk jeopardizes the entire ordinance. [21]

[***LEdHR12C] [12C]

21 The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine, *639 F.2d, at 382*, is of no due process significance unless the possibility ripens into a prosecution.

[*504] Nor do we assume that the village will take no further steps to minimize the dangers of arbitrary enforcement. The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope. We also find it significant that

Joseph E. Seagram & Sons, Inc. v. *Hostetter, 384 U.S. 35, 52 (1966).* [22]

22 The Court of Appeals also referred to potential *Fourth Amendment* problems resulting from the recordkeeping requirement, which "implies that a customer who purchases an item 'designed or marketed for use with illegal cannabis or drugs' intends to *use* the item with illegal cannabis or drugs. A further implication could be that a customer is subject to police scrutiny or even to a search warrant on the basis of the purchase of a legal item." *Id., at 384.* We will not address these *Fourth Amendment* issues here. In a pre-enforcement challenge it is difficult to determine whether *Fourth Amendment* rights are seriously threatened. Flipside offered no evidence of a concrete threat below. In a postenforcement proceeding Flipside may attempt to demonstrate that the ordinance is being employed in such an unconstitutional manner, and that it has standing to raise the objection. It is appropriate to defer resolution of these problems until such a showing is made.

VI

[***LEdHR14] [14]Many American communities have recently enacted laws regulating or prohibiting the sale of drug paraphernalia. [*505] To determine whether these laws are wise or effective is not, of course, the province of this Court. See *Ferguson v. Skrupa, 372 U.S. 726, 728-730 (1963).*We hold only that such legislation is not facially overbroad or vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings [***376] consistent with this opinion.

It is so ordered.

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

[**1197] APPENDIX TO OPINION OF THE COURT

Village of Hoffman Estates Ordinance No. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

[*506] *Section 1*: That the Hoffman Estates Municipal Code be amended by adding thereto an additional Section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16 -- ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open [***377] to the

inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

[*507] E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $ 150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($ 10.00) nor more than five hundred dollars ($ 500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

[**1198] *Section 4*: That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5: That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

CONCUR BY: WHITE

CONCUR

JUSTICE WHITE, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. I do not, however, believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented by the ordinance.

I agree with the majority that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." *Ante*, at 495. I also agree with the majority's statement that the "marketed for use" standard in the ordinance is "sufficiently clear." There is, in my view, no need to go any further: If it [*508] is "transparently clear" that some particular conduct is restricted by the ordinance, the ordinance survives a facial challenge on vagueness grounds.

Technically, overbreadth is a standing doctrine that permits parties in cases involving *First Amendment* challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the *First Amendment* rights of others not presently before the Court. *Broadrick v. Oklahoma, 413 U.S. 601, 612-615 (1973)*. Whether the appellee may make use of the overbreadth doctrine depends, in the first instance, on whether or not it has a colorable claim that the ordinance infringes on constitutionally protected, [***378] noncommercial speech of others. Although appellee claims that the ordinance does have such an effect, that argument is tenuous at best and should be left to the lower courts for an initial determination.

Accordingly, I concur in the judgment reversing the decision below.

REFERENCES

16 Am Jur 2d, Constitutional Law 522; 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions 367

USCS, *Constitution, 1st Amendment*

US L Ed Digest, Constitutional Law 952, 954; Municipal Corporations 37.7

L Ed Index to Annos, Freedom of Speech, Press, Religion and Assembly; Licenses and License Taxes; Municipal Corporations

ALR Quick Index, Freedom of Speech and Press; Licenses and Permits; Municipal Corporations

Federal Quick Index, Freedom of Speech and Press; Licenses and Permits; Municipal Corporations

Annotation References:

Supreme Court's views as to overbreadth of legislation in connection with *First Amendment* rights. *45 L Ed 2d 725.*

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances . *40 L Ed 2d 823.*

EXHIBIT "9"

LEXSEE 461 U.S. 352

KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. v. LAWSON

No. 81-1320

SUPREME COURT OF THE UNITED STATES

461 U.S. 352; 103 S. Ct. 1855; 75 L. Ed. 2d 903; 1983 U.S. LEXIS 159; 51 U.S.L.W. 4532

November 8, 1982, Argued
May 2, 1983, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *658 F.2d 1362*, affirmed and remanded.

DECISION:

California loitering statute requiring "credible and reliable" identification at police request held unconstitutionally vague.

SUMMARY:

An individual who had been detained or arrested on approximately 15 occasions under a California statute, which required persons who loiter or wander on the streets to provide a credible and reliable identification and to account for their presence when requested by a peace officer under circumstances that would justify a valid stop, brought a civil action seeking a declaratory judgment that the statute was unconstitutional, a mandatory injunction seeking to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The United States District Court for the Southern District of California held that the statute was overbroad and enjoined enforcement of the statute but held that damages were not recoverable. The United States Court of Appeals for the Ninth Circuit affirmed the District Court determination as to the statute's unconstitutionality (*658 F2d 1362*).

On appeal, the United States Supreme Court affirmed and remanded. In an opinion by O'Connor, J., joined by Burger, Ch. J., and Brennan, Marshall, Blackmun, Powell, and Stevens, JJ., it was held that the statute was unconstitutionally vague on its face within the meaning of the *due process clause of the Fourteenth Amendment* because it encouraged arbitrary enforcement by failing to clarify what is contemplated by the requirement that a suspect provide a credible and reliable identification.

White, J., joined by Rehnquist, J., dissented, expressing the view that the statute was not unconstitutionally vague since a criminal statute is not unconstitutionally vague on its face unless it is impermissibly vague in all of its possible applications.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

STATUTES §18.9

loitering statute -- vagueness --

Headnote:[1A][1B][1C]

A state criminal statute that requires persons who loiter or wander on the streets to provide a credible and reliable identification and to account for their presence when requested by a peace officer under circumstances that would justify a valid stop is unconstitutionally vague on its face within the meaning of the *due process clause of the Fourteenth Amendment* because it encourages arbitrary enforcement by failing to clarify what is contemplated by the requirement that a suspect provide a credible and reliable identification. (White and Rehnquist, JJ., dissented from this holding.)

[***LEdHN2]

COURTS §810

facial challenge -- state law -- state court construction --

Headnote:[2]

In evaluating a facial challenge to a state law, a federal court must consider any limiting construction that a state court or enforcement agency has proffered.

[***LEdHN3]

COURTS §805.3

vagueness of state statute -- interpretation by state court --

Headnote:[3A][3B]

For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation the United States Supreme Court must take the statute as though it read precisely as the highest court of the state has interpreted it.

[***LEdHN4]

COURTS §790.3

construction of state statute by state intermediate appellate court --

Headnote:[4A][4B]

An opinion by a state intermediate appellate court is authoritative for purposes of defining a state statute where the opinion has construed the statute, where the state's highest court has refused review, and where the opinion has been the law of the state for 9 years.

[***LEdHN5]

ARREST §2

objective facts --

Headnote:[5A][5B]

Fourth Amendment concerns are implicated where a state statute permits investigative detentions in situations where the police officers lack a reasonable suspicion of criminal activity based on objective facts.

[***LEdHN6]

STATUTES §17

limitation on individual freedoms --

Headnote:[6]

Statutory limitations on constitutional individual freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression.

[***LEdHN7]

STATUTES §18

void-for-vagueness doctrine -- penal statute --

Headnote:[7]

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

[***LEdHN8]

STATUTES §18

void-for-vagueness doctrine -- arbitrary enforcement --

Headnote:[8]

Although the void-for-vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine, which is the requirement that a legislature establish minimal guidelines to govern law enforcement.

[***LEdHN9]

STATUTES §18

facial challenge -- penal statute --

Headnote:[9A][9B]

The United States Supreme Court permits a facial void-for-vagueness challenge to a statute if a law reaches a substantial amount of constitutionally protected conduct; where a statute imposes criminal penalties, the standard of certainty is higher (White and Rehnquist, JJ., dissented from this holding.)

[***LEdHN10]

WITNESSES §72

questioning of citizens -- compulsion --

Headnote:[10A][10B]

While police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

[***LEdHN11]

SEIZURE §11

detention -- level of suspicion sufficient to justify stop --

Headnote:[11]

In providing that a detention under a state statute may occur only where there is the level of suspicion sufficient to justify a constitutional stop, a state insures the existence of neutral limitations on the conduct of individual officers.

[***LEdHN12]

STATUTES §18

definiteness and clarity -- penal statute --

Headnote:[12]

The concern with curbing criminal activity cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity.

[***LEdHN13]

ERROR §1339

constitutional questions -- review --

Headnote:[13A][13B]

On appeal from a United States Court of Appeals judgment affirming a United States District Court's judgment holding a state statute unconstitutional, the United States Supreme Court, in affirming the judgment on the ground of the statute's unconstitutionality as void for vagueness, would not decide other questions raised by the parties where its resolution of the other issues would decide constitutional questions in advance of the necessity of doing so.

SYLLABUS

A California statute requires persons who loiter or wander on the streets to identify themselves and to account for their presence when requested by a peace officer. The California Court of Appeal has construed the statute to require a person to provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of *Terry v. Ohio, 392 U.S. 1*. The California court has defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Appellee, who had been arrested and convicted under the statute, brought an action in Federal District Court challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement, and the Court of Appeals affirmed.

Held: The statute, as drafted and as construed by the state court, is unconstitutionally vague on its face within the meaning of the *Due Process Clause of the Fourteenth Amendment* by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Pp. 355-361.

COUNSEL: A. Wells Petersen, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, and Jay M. Bloom, Deputy Attorney General.

Mark D. Rosenbaum, by invitation of the *Court, 459 U.S. 964*, argued the cause as amicus curiae in support of the judgment below. With him on the brief were Dennis M. Perluss, Fred Okrand, Mary Ellen Gale, Robert H. Lynn, and Charles S. Sims. *

* Briefs of amici curiae urging reversal were filed by William L. Cahalan, Edward Reilly Wilson, and Timothy A. Baughman for the Wayne County Prosecutor's Office; and by Wayne W. Schmidt, James P. Manak, and Fred E. Inbau for Americans for Effective Law Enforcement, Inc., et al.

Briefs of amici curiae urging affirmance were filed by Eugene G. Iredale for the California Attorneys for Criminal Justice; and by Michael Ratner for the Center for Constitutional Rights.

Briefs of amici curiae were filed by John K. Van de Kamp, Harry B. Sondheim, and John W. Messer for the Appellate Committee of the California District Attorneys Association; by Dan Stormer, John Huerta, and Peter Schey for the National Lawyers Guild et al.; and by Quin Denvir and William Blum for the State Public Defender of California.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, post, p. 362. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 369.

OPINION BY: O'CONNOR

OPINION

[*353] [***906] [**1856] JUSTICE O'CONNOR delivered the opinion of the Court.

[***LEdHR1A] [1A]This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio, 392 U.S. 1 (1968).* [1] We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the *Due Process Clause of the Fourteenth Amendment* by failing to clarify what is contemplated [*354] by the requirement that a suspect provide a "credible and reliable" identification. [***907] Accordingly, we affirm the judgment of the court below.

1 -

California Penal Code Ann. § 647(e) (West 1970) provides:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

I

Appellee Edward Lawson was detained or arrested on approximately 15 occasions between March 1975 and January 1977 pursuant to *Cal. Penal Code Ann. § 647(e)* (West 1970). [2] Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

2 The District Court failed to find facts concerning the particular occasions on which Lawson was detained or arrested under *§ 647(e).* However, the trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. Tr. 266-267. Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. *Id.*, at 207. The appellee states that he has never been stopped by police for any reason apart from his detentions under *§ 647(e).*

Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment that *§ 647(e)* is unconstitutional, a mandatory injunction to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The District Court found that *§ 647(e)* was overboard because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." App. to Juris. Statement A-78. The District Court enjoined enforcement of the statute, but held that Lawson could not recover damages because the officers involved acted in the good-faith belief that each detention or arrest was lawful.

Appellant H. A. Porazzo, Deputy Chief Commander of the California Highway Patrol, appealed the District Court decision to the Court of Appeals for the Ninth Circuit. Lawson [*355] cross-appealed, arguing that he [**1857] was entitled to a jury trial on the issue of damages against the officers. The Court of Appeals affirmed the District Court determination as to the unconstitutionality of *§ 647(e). 658 F.2d 1362 (1981).* The appellate court determined that the statute was unconstitutional in that it violates the *Fourth Amendment's* proscription against unreasonable searches and seizures, it contains a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. Finally, the Court of Appeals reversed the District Court as to its holding that Lawson was not entitled to a jury trial to determine the good faith of the officers in his damages action against them, and remanded the case to the District Court for trial.

The officers appealed to this Court from that portion of the judgment of the Court of Appeals which declared *§ 647(e)* unconstitutional and which enjoined its enforcement. We noted probable jurisdiction pursuant to *28 U. S. C. § 1254(2). 455 U.S. 999 (1982).*

II

[***LEdHR2] [2] [***LEdHR3A] [3A] [***LEdHR4A] [4A] [***LEdHR5A] [5A]In the courts below, Lawson mounted an attack on the [***908] facial validity of *§ 647(e).* [3] "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or en-

forcement agency has proffered." *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, n. 5 (1982)*. As construed by the California Court of Appeal, [4] *§ 647(e)* requires that an individual [*356] provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* detention. [5] *People v. Solomon, 33 Cal. App. 3d 429,* [**1858] *108 Cal. Rptr. 867* [*357] *(1973)*. "Credible and reliable" identification is defined by the State Court of Appeal as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id., at 438, 108 Cal. Rptr., at 873*. In addition, a suspect may be required to "*account for his presence* . . . to the extent that it assists in producing credible and reliable identification . . . ." *Id., at 438, 108 Cal. Rptr., at 872*. Under the [***909] terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest. [6]

3 The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. See *Steffel v. Thompson, 415 U.S. 452 (1974)*. Nor have appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to *§ 647(e)*, and that these 15 stops occurred in a period of less than two years. Thus, there is a "credible threat" that Lawson might be detained again under *§ 647(e)*. See *Ellis v. Dyson, 421 U.S. 426, 434 (1975)*.

[***LEdHR3B] [3B] [***LEdHR4B] [4B]

4 In *Wainwright v. Stone, 414 U.S. 21, 22-23 (1973)*, we held that "[for] the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' *Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273 (1940)*." The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in *People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973)*, that the State Supreme Court has refused review, and that *Solomon* has been the law of California for nine years. In these circumstances, we agree with the Ninth Circuit that the *Solomon* opinion is authoritative for purposes of defining the meaning of *§ 647(e)*. See *658 F.2d 1362, 1364-1365, n. 3 (1981)*.

[***LEdHR5B] [5B]

5 The *Solomon* court apparently read *Terry v. Ohio, 392 U.S. 1 (1968)*, to hold that the test for a *Terry* detention was whether the officer had information that would lead a reasonable man to believe that the intrusion was appropriate. The Ninth Circuit noted that according to *Terry*, the applicable test under the *Fourth Amendment* requires that the police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *392 U.S., at 21*. The Ninth Circuit then held that although what *Solomon* articulated as the *Terry* standard differed from what *Terry* actually held, "[we] believe that the *Solomon* court meant to incorporate in principle the standards enunciated in *Terry*." *658 F.2d, at 1366, n. 8*. We agree with that interpretation of *Solomon*. Of course, if the *Solomon* court misread *Terry* and interpreted *§ 647(e)* to permit investigative detentions in situations where the officers lack a reasonable suspicion of criminal activity based on objective facts, *Fourth Amendment* concerns would be implicated. See *Brown v. Texas, 443 U.S. 47 (1979)*.

In addition, the *Solomon* court appeared to believe that both the *Terry* detention *and* frisk were proper under the standard for *Terry* detentions, and since the frisk was more intrusive than the request for identification, the request for identification *must* be proper under *Terry*. See *33 Cal. App. 3d, at 435, 108 Cal. Rptr., at 870-871*. The Ninth Circuit observed that the *Solomon* analysis was "slightly askew." *658 F.2d, at 1366, n. 9*. The court reasoned that under *Terry*, the frisk, as opposed to the detention, is proper only if the detaining officer reasonably believes that the suspect may be armed and dangerous, in addition to having an articulable suspicion that criminal activity is afoot.

6 In *People v. Caylor, 6 Cal. App. 3d 51, 56, 85 Cal. Rptr. 497, 501 (1970)*, the court suggested that the State must prove that a suspect detained under *§ 647(e)* was loitering or wandering for "evil purposes." However, in *Solomon*, which the court below and the parties concede is "authoritative" in the absence of a California Supreme Court decision on the issue, there is no discussion of any requirement that the State prove "evil purposes."

III

[***LEdHR6] [6]Our Constitution is designed to maximize individual freedoms within a framework of

ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).

[***LEdHR7] [7] [***LEdHR8] [8]As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra; Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Connally v. General Construction Co., 269 U.S. 385 (1926).* Although the doctrine focuses [*358] both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith, 415 U.S., at 574.* Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id., at 575.* [7]

7 Our concern for minimal guidelines finds its roots as far back as our decision in *United States v. Reese, 92 U.S. 214, 221 (1876)*:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

[***LEdHR9A] [9A]*Section 647(e)*, as presently drafted and as construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under *§ 647(e). Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90* [**1859] *(1965).* [***910] Our concern here is based upon the "potential for arbitrarily suppressing *First Amendment* liberties. . . ." *Id., at 91.* In addition, *§ 647(e)* implicates consideration of the constitutional right to freedom of movement. See *Kent v. Dulles, 357 U.S. 116, 126 (1958); Aptheker v. Secretary of State, 378 U.S. 500, 505-506 (1964).* [8]

[***LEdHR9B] [9B]

8 In his dissent, JUSTICE WHITE claims that "[the] upshot of our cases . . . is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Post*, at 370. The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).* Second, where a statute imposes criminal penalties, the standard of certainty is higher. See *Winters v. New York, 333 U.S. 507, 515 (1948).* This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. See, *e. g., Colautti v. Franklin, 439 U.S. 379, 394-401 (1979); Lanzetta v. New Jersey, 306 U.S. 451 (1939).* The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the *First Amendment*. . . ." *Post*, at 371. However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." *Post*, at 370. But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. See, *e. g., Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967); NAACP v. Button, 371 U.S. 415, 433 (1963).* See also Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 110-113 (1960).

No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on *Parker v. Levy, 417 U.S. 733 (1974)*, but in that case we deliberately applied a less stringent vagueness analysis "[because] of the factors differentiating military society from civilian society." *Id., at 756. Hoffman Estates, supra*, also relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech

or free association are affected, see *455 U.S., at 494, 495, 498-499*, the Court emphasized that the ordinance in *Hoffman Estates* "simply regulates business behavior" and that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." *Id., at 499, 498.*

[*359] *Section 647(e)* is not simply a "stop-and-identify" statute. Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reasonable assurance" of its authenticity, and that provides "means for later getting in touch with the person who has identified himself." *Solomon, 33 Cal. App. 3d, at 438, 108 Cal. Rptr., at 872-873.* In addition, the suspect may also have to account for his presence "to the extent it assists in producing [*360] credible and reliable identification." *Id., at 438, 108 Cal. Rptr., at 872.*

[***LEdHR10A] [10A]At oral argument, the appellants confirmed that a suspect violates *§ 647(e)* unless "the officer [is] satisfied that the identification is reliable." Tr. of Oral Arg. 6. In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him, [9] or could satisfy the identification requirement [***911] simply by reciting his name and address. See *Id., at 6-10.*

[***LEdHR10B] [10B]

9 To the extent that *§ 647(e)* criminalizes a suspect's failure to answer such questions put to him by police officers, *Fifth Amendment* concerns are implicated. It is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi, 394 U.S. 721, 727, n. 6 (1969).*

[***LEdHR1B] [1B] [***LEdHR11] [11]It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "[entrusts] [**1860] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Smith, supra, at 575* (quoting *Gregory v. Chicago, 394 U.S. 111, 120 (1969)* (Black, J., concurring)). *Section 647(e)* "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'" *Papachristou, 405 U.S., at 170* (quoting *Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)*), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974)* (POWELL, J., concurring in result). In providing that a detention under *§ 647(e)* may occur only where there is the level of suspicion sufficient to justify a *Terry* stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." *Brown v. Texas, 443* [*361] *U.S., at 51.*Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

[***LEdHR12] [12]Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. See *Lanzetta v. New Jersey, 306 U.S. 451 (1939). Section 647(e)*, as presently construed, requires that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, see *United States v. Petrillo, 332 U.S. 1, 7-8 (1947)*, this is not a case where further precision in the statutory language is either impossible or impractical.

IV

[***LEdHR1C] [1C] [***LEdHR13A] [13A]We conclude *§ 647(e)* is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. [10] Accordingly, the judgment of [*362] the Court of Appeals is affirmed, [***912] and the case is remanded for further proceedings consistent with this opinion.

[***LEdHR13B] [13B]

10 Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See *Burton v. United States, 196 U.S. 283, 295 (1905)*; *Liverpool, N. Y. & P. S.S. Co.* v. *Commissioners of Emigration, 113 U.S. 33, 39 (1885).* See also *Ashwander v. TVA, 297 U.S. 288, 346-347 (1936)* (Brandeis, J., concurring). The remaining issues raised by the parties include whether *§ 647(e)*

implicates *Fourth Amendment* concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*, whether the requirement that an individual identify himself during a *Terry* stop violates the *Fifth Amendment* protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal statute creates other vagueness problems. The appellee also argues that *§ 647(e)* permits arrests on less than probable cause. See *Michigan v. DeFillippo, 443 U.S. 31, 36 (1979).*

It is so ordered.

CONCUR BY: BRENNAN

CONCUR

JUSTICE BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, *Cal. Penal Code Ann. § 647(e)* (West 1970), as interpreted by California courts, is unconstitutionally vague. Even if the defect identified by the Court were cured, however, I would hold that this statute violates the *Fourth* [**1861] *Amendment.* [1] Merely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer.

1 We have not in recent years found a state statute invalid directly under the *Fourth Amendment*, but we have long recognized that the government may not "authorize police conduct which trenches upon *Fourth Amendment* rights, regardless of the labels which it attaches to such conduct." *Sibron v. New York, 392 U.S. 40, 61 (1968).* In *Sibron*, and in numerous other cases, the *Fourth Amendment* issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the *Fourth Amendment*, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. See *Los Angeles* v. *Lyons, ante*, at 105-109; *Gomez v. Layton, 129 U. S. App. D. C. 289, 394 F.2d 764 (1968).* It goes without saying that the *Fourth Amendment* safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

[*363] It has long been settled that the *Fourth Amendment* prohibits the seizure and detention or search of an individual's person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy. See *Davis v. Mississippi, 394 U.S. 721, 726-727 (1969).* The scope of that exception to the probable-cause requirement for seizures of the person has been defined by a series of cases, beginning with *Terry v. Ohio, 392 U.S. 1 (1968)*, holding that a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect [***913] briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons. See, *e. g., United States v. Brignoni-Ponce, 422 U.S. 873, 880-884 (1975); Adams v. Williams, 407 U.S. 143, 145-146 (1972).* Where probable cause is lacking, we have expressly declined to allow significantly more intrusive detentions or searches on the *Terry* rationale, despite the assertion of compelling law enforcement interests. "For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York, 442 U.S. 200, 214 (1979).* [2]

2 A brief detention is usually sufficient as a practical matter to accomplish all legitimate law enforcement objectives with respect to individuals whom the police do not have probable cause to arrest. For longer detentions, even though they fall short of a full arrest, we have demanded not only a high standard of law enforcement necessity, but also objective indications that an individual would not consider the detention significantly intrusive. Compare *Dunaway v. New York, 442 U.S., at 212-216* (seizure of suspect without probable cause and custodial interrogation in police station violates *Fourth Amendment*), and *Davis v. Mississippi, 394 U.S. 721, 727-728 (1969)* (suspect may not be summarily detained and taken to police station for fingerprinting but may be ordered to appear at a specific time), with *Michigan v. Summers, 452 U.S. 692, 701-705 (1981)* (suspect may be detained in his own home without probable cause for time necessary to search the premises pursuant to a valid warrant sup-

ported by probable cause). See also *Florida v. Royer, 460 U.S. 491, 500 (1983)* (opinion of WHITE, J.) ("least intrusive means" requirement for searches not supported by probable cause).

[*364] *Terry* and the cases following it give full recognition to law enforcement officers' need for an "intermediate" response, short [**1862] of arrest, to suspicious circumstances; the power to effect a brief detention for the purpose of questioning is a powerful tool for the investigation and prevention of crimes. Any person may, of course, direct a question to another person in passing. The *Terry* doctrine permits police officers to do far more: If they have the requisite reasonable suspicion, they may use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official "show of authority," the use of physical force to restrain him, and a search of the person for weapons. *Terry v. Ohio, supra, at 19, n. 16*; see *Florida v. Royer, 460 U.S. 491, 498-499 (1983)* (opinion of WHITE, J.); *United States v. Mendenhall, 446 U.S. 544, 554 (1980)* (opinion of Stewart, J.). During such an encounter, few people will ever feel free not to cooperate fully with the police by answering their questions. Cf. 3 W. LaFave, Search and Seizure § 9.2, pp. 53-55 (1978). Our case reports are replete with examples of suspects' cooperation during *Terry* encounters, even when the suspects have a great deal to lose by cooperating. See, *e. g., Sibron v. New York, 392 U.S. 40, 45 (1968)*; *Florida v. Royer, supra, at 493-495*.

The price of that effectiveness, [***914] however, is intrusion on individual interests protected by the *Fourth Amendment*. We have held that the intrusiveness of even these brief stops for purposes of questioning is sufficient to render them "seizures" under the *Fourth Amendment*. See *Terry v. Ohio, 392 U.S., at 16*. For precisely that reason, the scope of seizures of the person on less than probable cause that *Terry* [*365] permits is strictly circumscribed to limit the degree of intrusion they cause. *Terry* encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.

"[The] person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id., at 34* (WHITE, J., concurring).

Failure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. See *Florida v. Royer, 460 U.S., at 501* (opinion of WHITE, J.); *id., at 509-511* (BRENNAN, J., concurring in result); *Dunaway v. New York, supra, at 216*.

The power to arrest -- or otherwise to prolong a seizure until a suspect had responded to the satisfaction of the police officers -- would undoubtedly elicit cooperation from a high percentage of even those very few individuals not sufficiently coerced by a show of authority, brief physical detention, and a frisk. We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. See, *e. g., Brown v. Texas, 443 U.S. 47, 52 (1979)*. But the balance struck by the *Fourth Amendment* between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion. See *Dunaway v. New York, supra; United States v. Brignoni-Ponce, 422 U.S., at 878*. Detention beyond the limits [*366] of *Terry* without probable cause would improve the effectiveness of legitimate police investigations by only a small margin, [**1863] but it would expose individual members of the public to exponential increases in both the intrusiveness of the encounter and the risk that police officers would abuse their discretion for improper ends. Furthermore, regular expansion of *Terry* encounters into more intrusive detentions, without a clear connection to any specific underlying crimes, is likely to exacerbate ongoing tensions, where they exist, between the police and the public. See Report of the National Advisory Commission on Civil Disorders 157-168 (1968).

[***915] In sum, under the *Fourth Amendment*, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. [3] They may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest. [4]

3 Police officers may have a similar power with respect to persons whom they reasonably believe to be material witnesses to a specific crime. See, *e. g.*, ALI Model Code of

Pre-Arraignment Procedure § 110.2(1)(b) (Proposed Official Draft 1975).

4 Of course, some reactions by individuals to a properly limited *Terry* encounter, *e. g.*, violence toward a police officer, in and of themselves furnish valid grounds for arrest. Other reactions, such as flight, may often provide the necessary information, in addition to that which the officers already possess, to constitute probable cause. In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that the person arrested was not being penalized for the exercise of his right to refuse to answer.

California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a [*367] *Terry* encounter, any more than it could abridge the protections of the *Fifth* and *Sixth Amendments* by making it a crime to refuse to answer police questions once a suspect has been taken into custody. To begin, the statute at issue in this case could not be constitutional unless the intrusions on *Fourth Amendment* rights it occasions were necessary to advance some specific, legitimate state interest not already taken into account by the constitutional analysis described above. Yet appellants do not claim that *§ 647(e)* advances any interest other than general facilitation of police investigation and preservation of public order -- factors addressed at length in *Terry, Davis*, and *Dunaway*. Nor do appellants show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and to pose questions under the aegis of state authority, is so necessary in pursuit of the State's legitimate interests as to justify the substantial additional intrusion on individuals' rights. Compare Brief for Appellants 18-19 (asserting that *§ 647(e)* is justified by state interest in "detecting and preventing crime" and "protecting the citizenry from criminal acts"), and *People v. Solomon, 33 Cal. App. 3d 429, 436-437, 108 Cal. Rptr. 867, 872 (1973)* (*§ 647(e)* justified by "the public need involved," *i. e.*, "protection of society against crime"), with *United States v. Brignoni-Ponce, supra, at 884* (federal interest in immigration control permits stops at the border itself without reasonable suspicion), and *California v. Byers, 402 U.S. 424, 456-458 (1971)* (Harlan, J., concurring in judgment) (state interest in regulating automobiles justifies making it a crime to refuse to stop after an automobile accident and report it). Thus, because the State's interests extend only so far as to justify the limited searches and seizures defined by [***916] *Terry*, the balance of interests described in that case and its progeny must control.

Second, it goes without saying that arrest and the threat of a criminal sanction [**1864] have a substantial impact on interests protected by the *Fourth Amendment*, far more severe than [*368] we have ever permitted on less than probable cause. Furthermore, the likelihood that innocent persons accosted by law enforcement officers under authority of *§ 647(e)* will have no realistic means to protect their rights compounds the severity of the intrusions on individual liberty that this statute will occasion. The arrests it authorizes make a mockery of the right enforced in *Brown v. Texas, 443 U.S. 47 (1979)*, in which we held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion. [5] If *§ 647(e)* remains in force, the validity of such arrests will be open to challenge only after the fact, in individual prosecutions for failure to produce identification. Such case-by-case scrutiny cannot vindicate the *Fourth Amendment* rights of persons like appellee, many of whom will not even be prosecuted after they are arrested, see *ante*, at 354. A pedestrian approached by police officers has no way of knowing whether the officers have "reasonable suspicion" -- without which they may not demand identification even under *§ 647(e)*, *ante*, at 356, and n. 5 -- because that condition depends solely on the objective facts known to the officers and evaluated in light of their experience, see *Terry v. Ohio, 392 U.S., at 30*; *United States v. Brignoni-Ponce, 422 U.S., at 884-885*. The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail bondsmen, firsthand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution. [6] The only response to be [*369] expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma. [7]

5 In *Brown* we had no need to consider whether the State can make it a crime to refuse to provide identification on demand during a seizure permitted by *Terry*, when the police have reasonable suspicion but not probable cause. See *443 U.S., at 53, n. 3.*

6 Even after arrest, however, he may not be forced to answer questions against his will, and -- in contrast to what appears to be normal procedure during *Terry* encounters -- he will be so informed. See *Miranda v. Arizona, 384 U.S. 436 (1966)*. In fact, if he indicates a desire to remain

silent, the police should cease questioning him altogether. *Id., at 473-474.*

7 When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted. Such individuals may be arrested, and they may not resist. But probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry*, including either arrest or the need to answer questions that the individual does not want to answer in order to avoid arrest or end a detention.

[***917] By defining as a crime the failure to respond to requests for personal information during a *Terry* encounter, and by permitting arrests upon commission of that crime, California attempts in this statute to compel what may not be compelled under the Constitution. Even if *§ 647(e)* were not unconstitutionally vague, the *Fourth Amendment* would prohibit its enforcement.

DISSENT BY: WHITE

DISSENT

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, *e. g., United States v. Mazurie, 419 U.S. 544, 550 (1975); United States v. Powell, 423 U.S. 87, 92-93 (1975).* If the actor is given sufficient notice that [**1865] his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to [*370] attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy, 417 U.S. 733, 756 (1974).* The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982).*

These general rules are equally applicable to cases where *First Amendment* or other "fundamental" interests are involved. The Court has held that in such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression," *Parker v. Levy, supra, at 756*; a "greater degree of specificity" is demanded than in other contexts. *Smith v. Goguen, 415 U.S. 566, 573 (1974).* But the difference in such cases "relates to how strict a test of vagueness shall be applied in judging a particular criminal statute." *Parker v. Levy, 417 U.S., at 756.* It does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own. See *ibid.* Of course, if his own actions are themselves protected by the *First Amendment* or other constitutional provision, or if the statute does not fairly warn that it is proscribed, he may not be convicted. But it would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.

The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally [***918] protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications. If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the [*371] law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack in a declaratory judgment action such as is involved in this case. Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.

Of course, the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the *First Amendment*; and, as I have indicated, I also agree that in *First Amendment* cases the vagueness analysis may be more demanding. But to imply, as the majority does, *ante*, at 358-359, n. 8, that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth, contrary to *Parker v. Levy, supra.*

If there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it

seems to me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers [**1866] with respect to other conduct should be dealt with in those situations. See, *e. g., Hoffman Estates, supra, at 504.* It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the State's power to sanction.

I would agree with the majority in this case if it made at least some sense to conclude that the requirement to provide "credible and reliable identification" after a valid stop on reasonable suspicion of criminal conduct is "impermissibly vague in all of its applications." *Hoffman Estates v. Flipside,* [*372] *supra, at 495.* * But the [***919] statute is not vulnerable on this ground; and the majority, it seems to me, fails to demonstrate that it is. Suppose, for example, an officer requests identification information from a suspect during a valid *Terry* stop and the suspect answers: "Who I am is just none of your business." Surely the suspect would know from the statute that a refusal to provide any information at all would constitute a violation. It would be absurd to suggest that in such a situation only the unfettered discretion of a police officer, who has legally stopped a person on reasonable suspicion, would serve to determine whether a violation of the statute has occurred.

"It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [a failure to provide credible and reliable identification] and that would be covered by the statute . . . . In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed [to have failed to meet the statute's requirements] by the State, but unpredictability in those situations does not change the certainty in others." *Smith v. Goguen, 415 U.S., at 584* (WHITE, J., concurring in judgment).

See *id., at 590* (BLACKMUN, J., joined by BURGER, C. J., agreeing with WHITE, J., on the vagueness issue). Thus, even if, as the majority cryptically asserts, the statute here [*373] implicates *First Amendment* interests, it is not vague on its face, however more strictly the vagueness doctrine should be applied. The judgment below should therefore not be affirmed but reversed and appellee Lawson remitted to challenging the statute as it has been or will be applied to him.

* The majority attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, by suggesting that we applied a "less strict vagueness test" because economic regulations were at issue. The Court there also found that the ordinances challenged might be characterized as quasi-criminal or criminal in nature and held that because at least some of respondent's conduct clearly was covered by the ordinance, the facial challenge was unavailing even under the "relatively strict test" applicable to criminal laws. *455 U.S., at 499-500.*

The majority finds that the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Ante*, at 358. At the same time, the majority concedes that "credible and reliable" has been defined by the state court to mean identification that carries reasonable assurance that the identification is authentic and that provides means for later getting in touch with the person. The narrowing construction given this statute by the state court cannot be likened to the "standardless" statutes involved in the cases cited by the majority. For example, *Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)*, involved a statute that made it a crime to be a "vagrant." The statute provided:

"'Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, . . . common drunkards, common night walkers, . . . lewd, wanton and lascivious persons, . . . common railers and brawlers, persons wandering or strolling around from place to place without [**1867] any lawful purpose or object, habitual loafers, . . . shall be deemed vagrants.'" *Id., at 156-157, n. 1.*

In *Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974)*, [***920] the statute at issue made it a crime "'for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" The present statute, as construed by the state courts, does not fall in the same category.

The statutes in *Lewis* v. *City of New Orleans and Smith v. Goguen, supra*, as well as other cases cited by the majority clearly involved threatened infringements of *First Amendment* [*374] freedoms. A stricter test of vagueness was therefore warranted. Here, the majority makes a vague reference to potential suppression of *First Amendment* liberties, but the precise nature of the liberties threatened is never mentioned. *Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965)*, is cited, but that case dealt with an ordinance making it a crime to "'stand

or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on,'" *id., at 90*, and the *First Amendment* concerns implicated by the statute were adequately explained by the Court's reference to *Lovell v. City of Griffin, 303 U.S. 444 (1938)*, and *Schneider v. State, 308 U.S. 147 (1939)*, which dealt with the *First Amendment* right to distribute leaflets on city streets and sidewalks. There are no such concerns in the present case.

Of course, if the statute on its face violates the *Fourth* or *Fifth Amendment* -- and I express no views about that question -- the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. As here construed and applied, the doctrine serves as an open-ended authority to oversee the States' legislative choices in the criminal law area and in this case leaves the State in a quandary as to how to draft a statute that will pass constitutional muster.

I would reverse the judgment of the Court of Appeals.

REFERENCES

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine

21 Am Jur 2d, Criminal Law 15-17; 39 Am Jur 2d, Highways, Streets, and Bridges 250

7 Am Jur Pl & Pr Forms (Rev), Constitutional Law, Forms 21, 38

USCS, *Constitution, 14th Amendment*

US L Ed Digest, Statutes 18, 18.9

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

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

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

Annotation References:

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine. *75 L Ed 2d 1049.*

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

Validity of loitering statutes and ordinances. 25 ALR3d 836.

Validity of vagrancy statutes and ordinances. 25 ALR3d 792.

EXHIBIT "10"

LEXSEE 383 U.S. 569

MALAT ET UX. v. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE

No. 487

SUPREME COURT OF THE UNITED STATES

383 U.S. 569; 86 S. Ct. 1030; 16 L. Ed. 2d 102; 1966 U.S. LEXIS 2016; 66-1 U.S. Tax Cas. (CCH) P9317; 17 A.F.T.R.2d (RLA) 604

March 3, 1966, Argued
March 21, 1966, Decided

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

DISPOSITION: *347 F.2d 23*, vacated and remanded.

SUMMARY:

In an action to obtain a federal income tax refund, the District Court for the Southern District of California denied the taxpayer relief, holding that certain income received in connection with a real-estate venture was derived from property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, so as to be taxable under 1221(1) of the 1954 Internal Revenue Code as ordinary income rather than as income from capital gains. The Court of Appeals for the Ninth Circuit affirmed (*347 F2d 23*), both the District Court and the Court of Appeals relying upon earlier decisions which had held that under 1221(1) property is held "primarily" for sale to customers in the ordinary course of trade or business if such sale is a "substantial" purpose of holding the property, even if it is not the "principal" purpose.

On certiorari, the United States Supreme Court vacated the judgments below and remanded the case to the District Court. In a per curiam opinion expressing the views of seven members of the Court, it was held that the term "primarily" as used in 1221(1) means "of first importance" or "principally," and that the District Court should make fresh findings of fact addressed to the statute as so construed.

Black, J., would affirm the judgments of the lower courts.

White, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

REVENUE §1.5

STATUTES §166

ordinary meaning --

Headnote:[1]

The words of statutes--including revenue acts--should be interpreted where possible in their ordinary, everyday senses.

[***LEdHN2]

STATUTES §100.5

departure from literal meaning --

Headnote:[2]

Departure from a literal reading of statutory language may, on occasion, be indicated by relevant internal evidence of the statute itself and necessary in order to effect the legislative purpose, but there is no occasion for such a departure where a literal reading of a statute is consistent with its legislative purpose.

[***LEdHN3]

TAXES §48

STATUTES §167.5

property held "primarily" for sale -- literal construction --

Headnote:[3]

The purpose of 1221(1) of the 1954 Internal Revenue Code, providing that income from property held "primarily" for sale to customers in the ordinary course of business is taxable as ordinary income rather than as income from capital gains, is to differentiate between the profits and losses arising from the everyday operation of a business on the one hand and the realization of appreciation in value accrued over a substantial period of time on the other, and a literal reading of the term "primarily" is consistent with this legislative purpose.

[***LEdHN4]

TAXES §48

ordinary income or capital gains -- property held "primarily" for sale --

Headnote:[4]

As used in 1221(1) of the 1954 Internal Revenue Code, providing that income from property held "primarily" for sale to customers in the ordinary course of business is taxable as ordinary income rather than as income from capital gains, the term "primarily" means "of first importance" or "principally."

[***LEdHN5]

ERROR §1698

remanding for findings --

Headnote:[5]

Rather than considering whether the result would be supportable on the facts if the lower courts had applied the correct legal standard in construing a federal income tax statute, the United States Supreme Court will remand a case to the Federal District Court for fresh factfindings, addressed to the statute as construed by the Supreme Court, where both the District Court and the Court of Appeals have applied an incorrect standard in construing the statute.

SYLLABUS

Upon the sale of real estate which had been acquired by a joint venture in which petitioners participated, petitioners reported the profits therefrom as capital gains. Respondent argued that the venture had a dual purpose, to develop the property for rental or to sell it, and that the profit was taxable as ordinary income. The District Court ruled that petitioners failed to establish that the property was not held primarily for sale to customers in the ordinary course of business, and that the profits were not capital gains under *26 U. S. C. § 1221 (1)*. The Court of Appeals affirmed. Respondent urges the construction of "primarily" as meaning that a purpose may be "primary" if it is a "substantial" one. *Held*: The word "primarily," as used in *§ 1221 (1)*, means "of first importance" or "principally."

COUNSEL: George T. Altman argued the cause and filed briefs for petitioners.

Jack S. Levin argued the cause for respondent. With him on the brief were Solicitor General Marshall, Acting Assistant Attorney General Roberts, Melva M. Graney and Carolyn R. Just.

JUDGES: Warren, Fortas, Harlan, Brennan, Black, Stewart, Clark, Douglas; White took no part in the decision of this case.

OPINION BY: PER CURIAM

OPINION

[*569] [***103] [**1031] Petitioner [1] was a participant in a joint venture which acquired a 45-acre parcel of land, the intended use for which is somewhat in dispute. Petitioner contends that the venturers' intention was to develop and operate an apartment project on the land; the respondent's position [*570] is that there was a "dual purpose" of developing the property for rental purposes or selling, whichever proved to be the more profitable. In any event, difficulties in obtaining the necessary financing were encountered, and the interior lots of the tract were subdivided and sold. The profit from those sales was reported and taxed as ordinary income.

1 The taxpayer and his wife who filed a joint return are the petitioners, but for simplicity are referred to throughout as "petitioner."

The joint venturers continued to explore the possibility of commercially developing the remaining exterior parcels. Additional frustrations in the form of zoning restrictions were encountered. These difficulties persuaded petitioner and another of the joint venturers of the desirability of terminating the venture; accordingly, they sold out their interests in the remaining [***104] property. Petitioner contends that he is entitled to treat the profits from this last sale as capital gains; the respondent takes the position that this was "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," [2] and thus subject to taxation as ordinary income.

2 Internal Revenue Code of 1954, *§ 1221 (1), 26 U. S. C. § 1221 (1)*:

"For purposes of this subtitle, the term 'capital asset' means property held by the taxpayer (whether or not connected with his trade or business), but does not include --

"(1) . . . property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

The District Court made the following finding:

"The members of [the joint venture], as of the date the 44.901 acres were acquired, intended either to sell the property or develop it for rental, depending upon which course appeared to be most profitable. The venturers realized that they had made a good purchase price-wise [**1032] and, if they were unable to obtain acceptable construction financing or rezoning . . . which would be prerequisite to commercial development, they would sell the property [*571] in bulk so they wouldn't get hurt. The purpose of either selling or developing the property continued during the period in which [the joint venture] held the property."

The District Court ruled that petitioner had failed to establish that the property was not held *primarily* for sale to customers in the ordinary course of business, and thus rejected petitioner's claim to capital gain treatment for the profits derived from the property's resale. The Court of Appeals affirmed, *347 F.2d 23*. We granted certiorari (*382 U.S. 900*) to resolve a conflict among the courts of appeals [3] with regard to the meaning of the term "primarily" as it is used in *§ 1221 (1) of the Internal Revenue Code of 1954*.

3 Compare *Rollingwood Corp.* v. *Commissioner, 190 F.2d 263, 266* (C. A. 9th Cir.); *American Can Co.* v. *Commissioner, 317 F.2d 604, 605* (C. A. 2d Cir.), with *United States v. Bennett, 186 F.2d 407, 410-411* (C. A. 5th Cir.); *Municipal Bond Corp.* v. *Commissioner, 341 F.2d 683, 688-689* (C. A. 8th Cir.). Cf. *Recordak Corp.* v. *United States, 163 Ct. Cl. 294, 300-301, 325 F.2d 460, 463-464*.

The statute denies capital gain treatment to profits reaped from the sale of "property held by the taxpayer *primarily* for sale to customers in the ordinary course of his trade or business." (Emphasis added.) The respondent urges upon us a construction of "primarily" as meaning that a purpose may be "primary" if it is a "substantial" one.

[***LEdHR1] [1] [***LEdHR2] [2] [***LEdHR3] [3] [***LEdHR4] [4]As we have often said, "the words of statutes -- including revenue acts -- should be interpreted where possible in their ordinary, everyday senses." *Crane v. Commissioner, 331 U.S. 1, 6*.And see *Hanover Bank v. Commissioner, 369 U.S. 672, 687-688*; *Commissioner v. Korell, 339 U.S. 619, 627-628*. Departure from a literal reading of statutory language may, on occasion, be indicated by relevant internal evidence of the statute itself [*572] and necessary in order to effect the legislative purpose. See, *e. g., Board of Governors v. Agnew, 329 U.S. 441, 446-448*. But this is not such an occasion. The purpose of the statutory provision with which we deal is to differentiate [***105] between the "profits and losses arising from the everyday operation of a business" on the one hand (*Corn Products Co.* v. *Commissioner, 350 U.S. 46, 52)* and "the realization of appreciation in value accrued over a substantial period of time" on the other. (*Commissioner v. Gillette Motor Co., 364 U.S. 130, 134*.) A literal reading of the statute is consistent with this legislative purpose. We hold that, as used in *§ 1221 (1)*, "primarily" means "of first importance" or "principally."

[***LEdHR5] [5]Since the courts below applied an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe, moreover, that the appropriate disposition is to remand the case to the District Court for fresh fact-findings, addressed to the statute as we have now construed it.

Vacated and remanded.

MR. JUSTICE BLACK would affirm the judgments of the District Court and the Court of Appeals.

MR. JUSTICE WHITE took no part in the decision of this case.

REFERENCES

Annotation References:

Federal income tax: when property is deemed to be held primarily for sale to customers in ordinary course of trade or business. *46 ALR2d 615*.

Federal income tax: when real estate is deemed to be held primarily for sale to customers in ordinary course of trade or business. *46 ALR2d 767*.

EXHIBIT "11"

LEXSEE 415 U.S. 566

SMITH, SHERIFF v. GOGUEN

No. 72-1254

SUPREME COURT OF THE UNITED STATES

415 U.S. 566; 94 S. Ct. 1242; 39 L. Ed. 2d 605; 1974 U.S. LEXIS 113

November 12, 1973, Argued
March 25, 1974, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

DISPOSITION: *471 F.2d 88*, affirmed.

SUMMARY:

The appellee, who wore a small cloth version of the United States 606'flag sewn on the seat of his trousers, was convicted under a Massachusetts statute which imposed criminal liability on anyone who publicly "treats contemptuously" the United States flag. Following the affirmance of his conviction by the *Massachusetts Supreme Judicial Court (____ Mass ____, 279 NE2d 666)*, the appellee was ordered released on a writ of habeas corpus by the United States District Court for the District of Massachusetts on the ground that the contempt portion of the Massachusetts statute was impermissibly vague under the *due process clause of the Fourteenth Amendment* as well as overbroad under the *First Amendment (343 F Supp 161)*. The Court of Appeals for the First Circuit affirmed (*471 F2d 88*).

On appeal, the United States Supreme Court affirmed. In an opinion by Powell, J., expressing the view of five members of the court, it was held that the "treats contemptuously" portion of the statute was void for vagueness under the *due process clause of the Fourteenth Amendment* because the statutory provision did not adequately give notice of what acts were criminal and did not set reasonable standards to guide law enforcement officers and juries.

White, J., concurring in the judgment, expressed the view that although the portion of the statute at issue was not unconstitutionally vague, it was unconstitutional under the *First* and *Fourteenth Amendments*.

Blackmun, J., joined by Burger, Ch. J., dissenting, expressed the view that the challenged part of the statute was neither unconstitutionally vague nor was it violative of the *First Amendment* since the Supreme Judicial Court of Massachusetts had interpreted the statute as being limited to the protection of the physical integrity of the flag.

Rehnquist, J., joined by Burger, Ch. J., dissenting, expressed the view that the statute was not unconstitutionally vague nor was it violative of the *First Amendment* freedoms since the Supreme Judicial Court of Massachusetts would interpret the statute as being limited to acts which affect the physical integrity of the flag so that the statute validly prohibited the impairment of the physical integrity of a unique national symbol.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

STATUTES §18

flag misuse -- vagueness --

Headnote:[1]

A state statute imposing criminal liability on one who publicly "treats contemptuously" the United States flag is violative of the *Fourteenth Amendment's* due process doctrine of vagueness because such provision does not adequately give notice of what acts are criminal and does not set reasonable standards to guide law enforcement officers and juries.

[***LEdHN2]

STATUTES §17

vagueness -- notice -- enforcement guidelines --

Headnote:[2]

The *Fourteenth Amendment's* due process doctrine concerning vagueness of statutes incorporates notions of fair notice or warning and requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement.

[***LEdHN3]

STATUTES §18

flag misuse -- vagueness -- protected expression --

Headnote:[3]

A state statute which imposes criminal liability on one who publicly "treats contemptuously" the flag of the United States has a scope which, if unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the *First Amendment*, so that the *Fourteenth Amendments'* due process doctrine of vagueness demands a greater degree of specificity than in other contexts.

[***LEdHN4]

STATUTES §18

flag misuse -- vagueness -- standards --

Headnote:[4]

In light of present tendencies to treat the flag unceremoniously, a state statute imposing criminal liability on one who publicly "treats contemptuously" the flag of the United States, fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not and thereby fails to satisfy the notice standards of due process which require that all persons be informed as to what the state commands or forbids and that men of common intelligence not be forced to guess at the meaning of the criminal law.

[***LEdHN5]

STATUTES §107

interpretation -- avoiding constitutional question --

Headnote:[5]

The United States Supreme Court is without authority to provide a narrowing interpretation of a state statute concerning flag misuse so as to avoid violation of the vagueness doctrine of the *due process clause of the Fourteenth Amendment.*

[***LEdHN6]

STATUTES §18

flag misuse -- vagueness -- enforcement standards --

Headnote:[6]

Legislatures may not abdicate their responsibilities for setting the standards of the criminal law as by enacting a provision imposing criminal liability on one who publicly "treats contemptuously" the flag of the United States, since such language is sufficiently unbounded to prohibit any public deviation from formal flag etiquette and allows policemen, prosecutors, and juries to pursue their personal predilections.

[***LEdHN7]

STATUTES §17

vagueness -- selective enforcement --

Headnote:[7]

There is a denial of due process where inherently vague statutory language permits selective law enforcement.

[***LEdHN8]

HABEAS CORPUS §14.5

exhaustion of remedies --

Headnote:[8A][8B]

The substance of a federal habeas corpus petitioner's claim concerning a state statute's facial vagueness is without doubt fairly presented to state courts so as to satisfy the standards of exhaustion of remedies where the petitioner, before a state Superior Court, files a motion to dismiss the complaint in which he cites the *Fourteenth Amendment* and alleges that the statute under which he was charged is impermissibly vague and incapable of fair and reasonable interpretation by public officials, which motion was incorporated in petitioner's bill of exceptions presented to the state Supreme Judicial Court, and where, additionally, the petitioner raises vagueness points and cites vagueness cases in his brief before the state Supreme Judicial Court.

[***LEdHN9]

STATUTES §18

vagueness -- hardcore violation --

Headnote:[9]

Although there are statutes that by their terms or as authoritatively construed apply without question to cer-

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

[***LEdHN10]

STATUTES §18

vagueness --

Headnote:[10]

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

[***LEdHN11]

STATUTES §18

vagueness --

Headnote:[11]

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

SYLLABUS

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

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

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

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

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

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

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

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

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

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

OPINION BY: POWELL

OPINION

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

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

I

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

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

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

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

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

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

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

"*§ 5.* Flag; penalty for misuse

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

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

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

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

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

5 App. 4.

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

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

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

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

II

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

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

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

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

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

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

11 See n. 6, *supra.*

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

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

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

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

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

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

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

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

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

15 See n. 3, *supra.*

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

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

III

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

18 Reply Brief for Appellant 4.

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

20 [***LEdHR8B] [8B]

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

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

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

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

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

22 *Ibid.*

23 *Ibid.*

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

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

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

25 Tr. of Oral Arg. 48.

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

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

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

28 Brief for Appellant 22.

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

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

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

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

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

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

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

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

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

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

It is so ordered.

CONCUR BY: WHITE

CONCUR

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

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

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

[*584] I

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

DISSENT BY: BLACKMUN; REHNQUIST

DISSENT

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

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

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

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

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

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

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

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

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

I

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"By the rude bridge that arched the flood

Their flag to April's breeze unfurled

Here once the embattled farmers stood

And fired the shot heard 'round the world."

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

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

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

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

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

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

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

REFERENCES

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

US L Ed Digest, Statutes 18

ALR Digests, Statutes 29

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

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

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

Annotation References:

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

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

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

EXHIBIT "12"

1 of 1 DOCUMENT

UNITED STATES v. HARRISS ET AL.

No. 32

SUPREME COURT OF THE UNITED STATES

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

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

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

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

SUMMARY:

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

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

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

Clark, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

APPEAL AND ERROR §103

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

Headnote:[1]

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

[***LEdHN2]

STATUTES §18

indefiniteness -- criminal statute. --

Headnote:[2]

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

[***LEdHN3]

STATUTES §18

indefiniteness -- criminal statute. --

Headnote:[3]

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

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

[***LEdHN4]

STATUTES §106

construction -- f voring constitutionality. --

Headnote:[4]

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

[***LEdHN5]

STATUTES §107

construction -- favoring constitutionality. --

Headnote:[5]

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

[***LEdHN6]

UNITED STATES §13.5

Lobbying Act -- construction. --

Headnote:[6]

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

[***LEdHN7]

STATUTES §81

construction -- impairing effectiveness. --

Headnote:[7]

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

[***LEdHN8]

UNITED STATES §13.5

Lobbying Act -- persons covered. --

Headnote:[8]

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

[***LEdHN9]

STATUTES §18

indefiniteness -- Lobbying Act. --

Headnote:[9]

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

[***LEdHN10]

CONSTITUTIONAL LAW §925

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

Headnote:[10]

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

[***LEdHN11]

UNITED STATES §13.5

Lobbying Act -- purpose. --

Headnote:[11]

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

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

[***LEdHN12]

CONSTITUTIONAL LAW §925

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

Headnote:[12]

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

[***LEdHN13]

COURTS §95.3

avoiding review of constitutionality -- Lobbying Act. --

Headnote:[13]

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

[***LEdHN14]

STATUTES §58

separability -- Lobbying Act. --

Headnote:[14]

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

[***LEdHN15]

STATUTES §18

indefiniteness. --

Headnote:[15]

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

SYLLABUS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OPINION BY: WARREN

OPINION

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

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

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

1 Section 305 provides:

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

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

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

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

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

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

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

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

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

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

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

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

2 Section 308 provides:

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

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

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

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

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

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

I.

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

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

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

[5]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[*625] II.

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

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

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

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

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

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

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

[**817] III.

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

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

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

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

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

18 60 Stat. 812, 814:

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

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

Reversed.

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

DISSENT BY: DOUGLAS; JACKSON

DISSENT

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

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

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

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

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

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

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

It is contended that the Act plainly applies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. JUSTICE JACKSON, dissenting.

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

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

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

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

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

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

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

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

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

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

EXHIBIT "13"

LEXSEE 481 U.S. 739

UNITED STATES v. SALERNO ET AL.

No. 86-87

SUPREME COURT OF THE UNITED STATES

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

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

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

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

DECISION:

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

SUMMARY:

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

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

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

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

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

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

RECOGNIZANCE §7

LAW §853.4

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

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

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

[***LEdHN2]

RECOGNIZANCE §7

LAW §831.5

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

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

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

[***LEdHN3]

RECOGNIZANCE §7

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

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

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

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

[***LEdHN4]

APPEAL §1659

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

Headnote:[4A][4B]

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

[***LEdHN5]

RECOGNIZANCE §6

LAW §930

STATUTES §13

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

Headnote:[5]

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

[***LEdHN6]

LAW §514

substantive and procedural due process --

Headnote:[6]

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

[***LEdHN7]

RECOGNIZANCE §7

LAW §853.4

STATUTES §145.4

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

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

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

[***LEdHN8]

LAW §848

STATUTES §91

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

Headnote:[8]

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

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

[***LEdHN9]

LAW §528.3

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

Headnote:[9A][9B]

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

[***LEdHN10]

RECOGNIZANCE §7

LAW §853.4

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

Headnote:[10A][10B]

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

[***LEdHN11]

RECOGNIZANCE §7

criminal case -- exceptions --

Headnote:[11]

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

[***LEdHN12]

RECOGNIZANCE §6

criminal case -- function --

Headnote:[12]

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

[***LEdHN13]

RECOGNIZANCE §7.5

excessive amount --

Headnote:[13]

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

[***LEdHN14]

RECOGNIZANCE §7

pretrial detention -- criminal case --

Headnote:[14]

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

SYLLABUS

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

Held:

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

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

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

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

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

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

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

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

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

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

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

OPINION BY: REHNQUIST

OPINION

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

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

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

[*742] I

Responding to "the alarming problem of crimes committed by persons on release," S. Rep. No. 98-225, p. 3 (1983), Congress formulated the Bail Reform Act of sponse to numerous perceived deficiencies in the [**2099] federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. No. 98-225, at 3.

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

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

Respondents Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, after being charged in a 29-count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations. The RICO counts alleged 35 acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder. At respondents' arraignment, the Government moved to have Salerno and Cafaro detained pursuant to *§ 3142(e)*, on the ground that no condition of release would assure the safety of the community or any person. The District

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

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

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

2 [***LEdHR4B] [4B]

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

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

II

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

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

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

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on *Stack v. Boyle, 342 U.S. 1, 5 (1951)*, in which the Court stated that "bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the *Eighth Amendment*." In respondents' view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it [*753] violates the *Excessive Bail Clause*. Respondents concede that the right to bail they have discovered in the *Eighth Amendment* is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses. Brief for Respondents 21-22. Respondents characterize these exceptions as consistent with what they claim to be the sole purpose of bail -- to ensure the integrity of the judicial process.

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

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

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

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

III

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

The judgment of the Court of Appeals is therefore

Reversed.

DISSENT BY: MARSHALL; STEVENS

DISSENT

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

[***719] III

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

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

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

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

I dissent.

JUSTICE STEVENS, dissenting.

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

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

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

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

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

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

REFERENCES

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

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

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

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

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

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

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

Annotation References:

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

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

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

EXHIBIT "14"

LEXSEE 128 S.CT. 2783

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

No. 07-290

SUPREME COURT OF THE UNITED STATES

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

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

NOTICE:

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

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

PRIOR HISTORY: [***1]

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

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

DISPOSITION: Affirmed.

DECISION:

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

SUMMARY:

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

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

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

LAWYERS' EDITION HEADNOTES:

[**LEdHN1]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- INTERPRETATION

Headnote:[1]

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

[**LEdHN2]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- INTERPRETATION

Headnote:[2]

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

[**LEdHN3]

STATUTES §119

PREAMBLE -- LIMITS

Headnote:[3]

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

[**LEdHN4]

CONSTITUTIONAL LAW §27 WEAPONS AND FIREARMS §1

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

Headnote:[4]

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

[**LEdHN5]

WEAPONS AND FIREARMS §1

ARMS -- MEANING

Headnote:[5]

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

[**LEdHN6]

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

MODERN FORMS

Headnote:[6]

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

[**LEdHN7]

WEAPONS AND FIREARMS §1

KEEP ARMS -- MEANING

Headnote:[7]

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

[**LEdHN8]

WEAPONS AND FIREARMS §1

BEAR ARMS -- MEANING

Headnote:[8]

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

[**LEdHN9]

WEAPONS AND FIREARMS §1

BEAR ARMS -- MEANING

Headnote:[9]

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

[**LEdHN10]

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

INDIVIDUAL RIGHT -- PRE-EXISTENCE

Headnote:[10]

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

[**LEdHN11]

CONSTITUTIONAL LAW §927 WEAPONS AND FIREARMS §1

INDIVIDUAL RIGHT -- LIMIT

Headnote:[11]

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

[**LEdHN12]

MILITIA §1

[**641] DEFINITION

Headnote:[12]

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

[**LEdHN13]

MILITIA §1 MILITIA §2 MILITIA §3

DEFINITION -- ORGANIZATION -- CALLING FORTH

Headnote:[13]

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

[**LEdHN14]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- IMPLICATION

Headnote:[14]

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

[**LEdHN15]

CONSTITUTIONAL LAW §27 MILITIA §1

SECOND AMENDMENT -- MEANING -- REPEATED TERM

Headnote:[15]

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

[**LEdHN16]

WEAPONS AND FIREARMS §1

[**642] SECOND AMENDMENT -- INTERPRETATION

Headnote:[16]

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

[**LEdHN17]

CONSTITUTIONAL LAW §15 STATUTES §143 STATUTES §151.5

LEGISLATIVE HISTORY -- PUBLIC UNDERSTANDING

Headnote:[17]

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

[**LEdHN18]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- INTERPRETATION

Headnote:[18]

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

[**LEdHN19]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- TYPES OF WEAPONS

Headnote:[19]

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

[**LEdHN20]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- LIMITS ON RIGHT

Headnote:[20]

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

[** LEdHN21]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- TYPES OF WEAPONS

Headnote:[21]

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

[**LEdHN22]

WEAPONS AND FIREARMS §1

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

Headnote:[22]

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

[**LEdHN23]

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

RATIONAL-BASIS SCRUTINY -- WHEN USED

Headnote:[23]

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

[**LEdHN24]

WEAPONS AND FIREARMS §1

HANDGUNS -- PROHIBITION

Headnote:[24]

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

[**LEdHN25]

WEAPONS AND FIREARMS §1

SECOND AMENDMENT -- INOPERABLE FIREARMS

Headnote:[25]

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

[**LEdHN26]

WEAPONS AND FIREARMS §1

HANDGUNS -- REGULATION

Headnote:[26]

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

SYLLABUS

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

Held:

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

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

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

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

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

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

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

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

3. The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the *Second Amendment*. The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purposes of self-defense. Under any of the

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

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

COUNSEL: Walter Dellinger argued the cause for petitioners.

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

Alan Gura argued the cause for respondent

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

OPINION BY: SCALIA

OPINION

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

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

I

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

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

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

2 That construction has not been challenged here.

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

II

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

A

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

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

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

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

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

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

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

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

1. Operative Clause.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13, 171 L. Ed. 2d, at 693. We have never heard of the proposition that omitting repetition of the "to" causes two verbs with different meanings to become one. A promise "to support and to defend the Constitution of the United States" is not a whit different from a promise "to support and defend the Constitution of the United States."

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

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

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

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in [***38] using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. See J. Malcolm, To Keep and Bear Arms

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

By the time of the founding, the right to have arms had become fundamental for English subjects. See Malcolm 122-134. Blackstone, whose works, we have said, "constituted the preeminent authority on English law for the founding generation," *Alden v. Maine, 527*

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

[**LEdHR11] [11] There seems to us no doubt, on the basis of both text and history, that the *Second Amendment* [***42] conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the *First Amendment's* right of free speech was not, see, *e.g.*, *United States v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)*. Th

U.S. 706, 715, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), cited the arms provision of the *Bill of Rights* as one of the [***40] fundamental rights of Englishmen. See 1 Blackstone 136, 139-140 (1765). His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation," *id.*, at 139, and "the right of having and using arms for self-preservation and defence," *id.*, at 140; see also 3 *id.*, at 2-4 (1768). Other contemporary authorities concurred. See G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of

we do not read the *Second Amendment* to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the *First Amendment* to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the *Second Amendment* comports with our interpretation of the operative clause.

2. Prefatory Clause.

The prefatory clause reads: "A well regulated Mili-

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

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

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

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

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

3. Relationship Between Prefatory Clause and Operative Clause.

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

C

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

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

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

post, at ____, n 28, 171 L. Ed. 2d, at 699. [**LEdHR17] [17] "'[L]egislative history,'" of course, refers to the preenactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. *Ibid.* "[P]ostenactment legislative history," *ibid.*, a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. As we will show, virtually all interpreters of the *Second Amendment* in the century after its enactment interpreted the Amendment as we do.

1. Postratification Commentary.

Three important founding-era legal scholars inter-

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

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

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

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

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

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

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

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

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

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

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

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

2. Pre-Civil War Case Law.

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

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

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

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

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

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

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

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

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

3. Post-Civil War Legislation.

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

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

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

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

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

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

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

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

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

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

4. Post-Civil War Commentators.

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

> "Among the other defences to personal liberty should be mentioned the right of
>
> plained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly [**673] is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables government [***80] to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their [*2812] efficient use; in other words, it implies the right to meet for vo-

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

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

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

E

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III

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

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

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

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

IV

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

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

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

Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down. In *Nunn* v. *State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). See *1 Ga., at 251.* In *Andrews* v. *State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly [**680] or privately, without regard to time or place, or circumstances," *50 Tenn., at 187*, violated the state constitutional provision (which the court equated with the *Second Amendment*). That was so even though the statute did not restrict the carrying of long guns. *Ibid.* See also handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, [**LEdHR24] [24] handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

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

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

400. It then ordered the District Court to enter summary judgment "consistent with [**681] [respondent's] prayer for relief." *Id., at 401.* Before this Court petitioners have stated that "if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified," by which they apparently mean if he is not a felon and is not insane. Brief for Petitioners 58. Respondent conceded at oral argument that he does not "have a problem with . . . licensing" and that the District's law is permissible so long as it is "not enforced in an arbitrary and capricious manner." Tr. of Oral Arg. 74-75. We therefore assume that petitioners' issuance [***103] of a license will satisfy respondent's prayer for relief and do not address the licensing requirement.

Justice Breyer has devoted most of his separate dissent to the handgun ban. He says that, even assuming the *Second Amendment* is a personal guarantee of the right to bear arms, the District's prohibition is valid. He first tries to establish this by founding-era historical precedent, pointing to various restrictive laws in the colonial period. These demonstrate, in his view, that the District's law "imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the *Second Amendment* was adopted." *Post, at ____, 171 L. Ed. 2d, at 711.* Of the laws he cites, only one offers even marginal support for his assertion. A 1783 Massachusetts law forbade the residents of Boston to "take into" or "receive into" "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building" loaded firearms, and permitted the seizure of any loaded firearms that "shall be found" there. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts p 218. That statute's text and its prologue, which makes clear that the purpose of the prohibition was to eliminate the danger to firefighters [***104] posed by the "depositing of loaded Arms" in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law's application in that case). In any case, we would not stake our interpretation of the *Second Amendment* upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home. The other laws Justice Breyer cites are gunpowder-storage laws that he concedes did not clearly prohibit loaded weapons, but required only that excess gunpowder be kept in a special container or on the top floor of the home. *Post, at ____ - ____, 171 L. Ed. 2d, at 713.* Nothing about those fire-safety laws undermines [*2820] our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.

Justice Breyer points to other founding-era laws that he says "restricted the firing of guns within the city limits to at least some degree" in Boston, Philadelphia, [***105] and New York. *Post, at ____, 171 L. Ed. 2d, at 712* (citing Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America, *25 Law & Hist. Rev. 139, 162 (2007)*). Those laws provide no support for the severe restriction in the present case. The New York law levied a fine of 20 shillings on anyone who fired a gun in certain places (including houses) on [**682] New Year's Eve and the first two days of January, and was aimed at preventing the "great Damages . . . frequently done on [those days] by persons going House to House, with Guns and other Fire Arms and being often intoxicated with Liquor." Ch. 1501, 5 Colonial Laws of New York 244-246 (1894). It is inconceivable that this law would have been enforced against a person exercising his right to self-defense on New Year's Day against such drunken hooligans. The Pennsylvania law to which Justice Breyer refers levied a fine of five shillings on one who fired a gun or set off fireworks in Philadelphia without first obtaining a license from the Governor. See Act of Aug. 26, 1721, ch. CCXLV, §IV, in 3 Stat. at Large of Pa. 253-254 (1896). Given Justice Wilson's explanation that the right to self-defense with arms was protected by the Pennsylvania Constitution, it is unlikely that this [***106] law (which in any event amounted to at most a licensing regime) would have been enforced against a person who used firearms for self-defense. Justice Breyer cites a Rhode Island law that simply levied a five-shilling fine on those who fired guns in *streets* and *taverns*, a law obviously inapplicable to this case. See An Act for preventing Mischief being done in the town of *Newport*, or in any other Town in this Government, 1731 Rhode Island Session Laws pp. 240-241. Finally, Justice Breyer points to a Massachusetts law similar to the Pennsylvania law, prohibiting "discharg[ing] any Gun or Pistol charged with Shot or Ball in the Town of *Boston.*" Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay p. 208. It is again implausible that this would have been enforced against a citizen acting in self-defense, particularly given its preambulatory reference to "the *indiscreet* firing of Guns." *Ibid.* (preamble) (emphasis added).

A broader point about the laws that Justice Breyer cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties.[29] They are akin to modern [***107] penalties for minor public-safety infractions like speeding or jaywalking. And although such public-safety laws may not contain exceptions for

self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a "Do Not Walk" sign in order to flee an attacker, or that the government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a [*2821] gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place. See *D. C. Code § 7-2507.06.*

> 29 The Supreme Court of Pennsylvania described the amount of five shillings in a contract matter in 1792 as "nominal consideration." *Morris's Lessee v. Smith, 4 U.S. 119, 4 Dall. 119, 120, 1 L. Ed. 766 (Pa. 1792).* Many of the laws cited punished violation with fine in a similar amount; the 1783 Massachusetts gunpowder-storage law carried a somewhat larger fine of 10 [***108] (200 shillings) and forfeiture of the weapon.

Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating *Second Amendment* restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict [**683] scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Post, at ____, 171 L. Ed. 2d, at 716.* After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-balanced answer: Because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very [***109] enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America v. Skokie, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977) (per curiam).* The *First Amendment* contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The *Second Amendment* is no different. Like the First, it is the very *product* of an interest balancing by the people--which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above [***110] all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. See *post, at ____ - ____, 171 L. Ed. 2d, at 735.* But since this case represents this Court's first in-depth examination of the *Second Amendment*, one should not expect it to clarify the entire field, any more than *Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1879)*, our first in-depth *Free Exercise Clause* case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

In sum, we hold that the District's ban on handgun possession in the home violates the *Second Amendment*, as [*2822] does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of *Second Amendment* rights, the District must permit him to register [**684] his handgun and must issue [***111] him a license to carry it in the home.

* * *

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. [**LEdHR26] [26] The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra, at ___ - ___, 171 L. Ed. 2d, at 678, and n 26.* But the enshrinement of con-

stitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the *Second Amendment* is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the *Second Amendment* extinct.

We affirm the judgment of the Court of Appeals.

It is so ordered.

DISSENT BY: STEVENS; BREYER

DISSENT

Justice **Stevens,** with whom Justice **Souter,** Justice **Ginsburg,** and Justice **Breyer** join, dissenting.

The question presented by this case is not whether the [***112] *Second Amendment* protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the *Second Amendment* protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The *Second Amendment* plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)*, provide a clear answer to that question.

The *Second Amendment* was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable [***113] threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major [**685] federal firearms law.[1] Sustaining an indictment under [*2823] the Act, this Court held that, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the *Second Amendment* guarantees the right to keep and bear such an instrument." *Miller, 307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206.* The view of the Amendment we took in *Miller*--that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons--is both the most natural reading of [***114] the Amendment's text and the interpretation most faithful to the history of its adoption.

1 There was some limited congressional activity earlier: A 10% federal excise tax on firearms was passed as part of the Revenue Act of 1918, 40 Stat. 1057, and in 1927 a statute was enacted prohibiting the shipment of handguns, revolvers, and other concealable weapons through the United States mails. Ch. 75, 44 Stat. 1059-1060 (hereinafter 1927 Act).

Since our decision in *Miller,* hundreds of judges have relied on the view of the Amendment we endorsed there;[2] we ourselves affirmed it in 1980. See *Lewis v. United States, 445 U.S. 55, 65-66, n 8, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980).*[3] No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons. Indeed, a review of the drafting history of the Amendment demonstrates that its Framers *rejected* proposals that would have broadened its coverage to include such uses.

2 Until the Fifth Circuit's decision in *United States v. Emerson, 270 F.3d 203 (2001),* every Court of Appeals to consider the question had understood *Miller* to hold that the *Second Amendment* does not protect the right [***115] to possess and use guns for purely private, civilian purposes. See, *e.g., United States v. Haney, 264 F.3d 1161, 1164-1166 (CA10 2001); United States v. Napier, 233 F.3d 394, 402-404 (CA6 2000); Gillespie v. Indianapolis, 185 F.3d 693, 710-711 (CA7 1999); United States v. Scanio, 165 F.3d 15, 1998 WL 802060, *2 (CA2 1998)* (unpublished opinion); *United States v. Wright, 117 F.3d 1265, 1271-1274 (CA11 1997); United States v. Rybar, 103 F.3d 273, 285-286 (CA3 1996); Hickman v. Block, 81 F.3d 98, 100-103 (CA9 1996); United States v. Hale, 978 F.2d 1016, 1018-1020 (CA8 1992); Thomas v. City*

Council of Portland, 730 F.2d 41, 42 (CA1 1984) (per curiam); *United States v. Johnson, 497 F.2d 548, 550 (CA4 1974) (per curiam)*; *United States v. Johnson, 441 F.2d 1134, 1136 (CA5 1971)*; see also *Sandidge v. United States, 520 A.2d 1057, 1058-1059 (DC App. 1987)*. And a number of courts have remained firm in their prior positions, even after considering *Emerson*. See, *e.g., United States v. Lippman, 369 F.3d 1039, 1043-1045 (CA8 2004)*; *United States v. Parker, 362 F.3d 1279, 1282-1284 (CA10 2004)*; *United States v. Jackubowski, 63 Fed. Appx. 959, 961 (CA7 2003)* (unpublished opinion); *Silveira v. Lockyer, 312 F.3d 1052, 1060-1066 (CA9 2002)*; [***116] *United States v. Milheron, 231 F. Supp. 2d 376, 378 (Me. 2002)*; *Bach v. Pataki, 289 F. Supp. 2d 217, 224-226 (NDNY 2003)*; *United States v. Smith, 56 M. J. 711, 716 (Air Force Ct. Crim. App. 2001)*.

3 Our discussion in *Lewis* was brief but significant. Upholding a conviction for receipt of a firearm by a felon, we wrote: "These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller, 307 U.S. 174, 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)* (the *Second Amendment* guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia')." *445 U.S., at 65-66, n 8, 100 S. Ct. 915, 63 L. Ed. 2d 198.*

The opinion the Court announces today fails to identify any new evidence supporting the view that the [**686] Amendment was intended to limit the power of Congress to regulate civilian uses of weapons. Unable to point to any such evidence, the Court stakes its holding on a strained and unpersuasive reading of the Amendment's text; significantly different provisions in the [*2824] 1689 English *Bill of Rights*, and in various 19th-century State Constitutions; postenactment [***117] commentary that was available to the Court when it decided *Miller;* and, ultimately, a feeble attempt to distinguish *Miller* that places more emphasis on the Court's decisional process than on the reasoning in the opinion itself.

Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, see *Mitchell v. W. T. Grant Co., 416 U.S. 600, 636, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974)* (Stewart, J., dissenting), would prevent most jurists from endorsing such a dramatic upheaval in the law.[4] As Justice Cardozo observed years ago, the "labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." The Nature of the Judicial Process 149 (1921).

4 See *Vasquez v. Hillery, 474 U.S. 254, 265-266, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)* ("*[Stare decisis]* permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system [***118] of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932)* (Brandeis, J., dissenting)"); *Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 652, 15 S. Ct. 673, 39 L. Ed. 759 (1895)* (White, J., dissenting) ("The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people").

In this dissent I shall first explain why our decision in *Miller* [***119] was faithful to the text of the *Second Amendment* and the purposes revealed in its drafting history. I shall then comment on the postratification history of the Amendment, which makes abundantly clear that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes.

I

The text of the *Second Amendment* is brief. It 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."

Three portions of that text merit special focus: the introductory language defining the Amendment's purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects.

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

The preamble to the *Second Amendment* [**687] makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be "well regulated." In all three respects it is comparable to provisions in several State Declarations [***120] of Rights that were adopted roughly contemporaneously [*2825] with the Declaration of Independence.[5] Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies.[6] While the need for state militias has not been a matter of significant public interest for almost two centuries, that fact should not obscure the contemporary concerns that animated the Framers.

5 The *Virginia Declaration of Rights P13 (1776)* provided: "That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power." 1 B. Schwartz, The *Bill of Rights* 235 (1971) (hereinafter Schwartz).

Maryland's Declaration of Rights, Arts. XXV-XXVII (1776), provided: "That a well-regulated militia is the proper and natural defence of a free government"; "That standing armies are dangerous to liberty, and [***121] ought not to be raised or kept up, without consent of the Legislature"; "That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power." 1 Schwartz 282.

Delaware's Declaration of Rights §§ 18-20 (1776) provided: "That a well regulated militia is the proper, natural, and safe defence of a free government"; "That standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the Legislature"; "That in all cases and at all times the military ought to be under strict subordination to and governed by the civil power." 1 Schwartz 278.

Finally, New Hampshire's Bill of Rights, Arts. XXIV-XXVI (1783), read: "A well regulated militia is the proper, natural, and sure defence of a state"; "Standing armies are dangerous to liberty, and ought not to be raised or kept up without consent of the legislature"; "In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power." 1 Schwartz 378. It elsewhere provided: "No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an [***122] equivalent." Id., at 377 (Art. XIII).

6 The language of the Amendment's preamble also closely tracks the language of a number of contemporaneous state militia statutes, many of which began with nearly identical statements. Georgia's 1778 militia statute, for example, began, "[w]hereas a well ordered and disciplined Militia, is essentially necessary, to the Safety, peace and prosperity, of this State." Act of Nov. 15, 1778, 19 Colonial Records of the State of Georgia 103 (Candler ed. 1911 (pt. 2)). North Carolina's 1777 militia statute started with this language: "[w]hereas a well regulated Militia is absolutely necessary for the defending and securing the Liberties of a free State." N. C. Sess. Laws ch. 1, § I, p 1. And Connecticut's 1782 "Acts and Laws Regulating the Militia" began, "[w]hereas the Defence and Security of all free States depends (under God) upon the Exertions of a well regulated Militia, and the Laws heretofore enacted have proved inadequate to the End designed." Conn. Acts and Laws p 585 (hereinafter 1782 Conn. Acts).

These state militia statutes give content to the notion of a "well-regulated militia." They identify those persons who compose the State's militia; they [***123] create regiments, brigades, and divisions; they set forth command structures and provide for the appointment of officers; they describe how the militia will be assembled when necessary and provide for training; and they prescribe penalties for nonappearance, delinquency, and failure to keep the required weapons, ammunition, and other necessary equipment. The obligation of militia members to "keep" certain specified arms is detailed further, *n. 12, infra*, and accompanying text.

The parallels between the *Second Amendment* and these state declarations, and the *Second Amendment's* omission of any statement of purpose related to the right to use firearms for [**688] hunting or personal

self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. Article XIII of Pennsylvania's 1776 Declaration of Rights announced that "the people have a right to bear arms for the [*2826] defence *of themselves* and the state," 1 Schwartz 266 (emphasis added); § 43 of the Declaration assured that "[t]he inhabitants of this state shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on [***124] all other lands therein not inclosed," *id.*, at 274. And Article XV of the 1777 Vermont Declaration of Rights guaranteed "[t]hat the people have a right to bear arms for the defence *of themselves* and the State." *Id.*, at 324 (emphasis added). The contrast between those two declarations and the *Second Amendment* reinforces the clear statement of purpose announced in the Amendment's preamble. It confirms that the Framers' single-minded focus in crafting the constitutional guarantee "to keep and bear Arms" was on military uses of firearms, which they viewed in the context of service in state militias.

The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 174, 2 L. Ed. 60 (1803).*

The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment's operative provision and returning to the preamble merely "to ensure that our reading of the operative clause is consistent with the announced purpose." *Ante, at ____, 171 L. Ed. 2d, at 649* [***125] . That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted. While the Court makes the novel suggestion that it need only find some "logical connection" between the preamble and the operative provision, it does acknowledge that a prefatory clause may resolve an ambiguity in the text. *Ante, at ____, 171 L. Ed. 2d, at 649.*[7] Without identifying any language in the text that even mentions civilian uses of firearms, the Court proceeds to "find" its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court's approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.

> 7 The sources the Court cites simply do not support the proposition that some "logical connection" between the two clauses is all that is required. The Dwarris treatise, for example, merely explains that "[t]he general purview of a statute is not . . . *necessarily* to be restrained by any words introductory to the enacting clauses." F. Dwarris, A General Treatise on Statutes 268 (P. Potter ed. 1871) (emphasis added). The treatise proceeds [***126] to caution that "the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet, if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it." *Id.*, at 269. Sutherland makes the same point. Explaining that "[i]n the United States preambles are not as important as they are in England," the treatise notes that in the United States "the settled principle of law is that the preamble cannot control the enacting part of the statute *in cases where the enacting part is expressed in clear, unambiguous terms.*" 2A N. Singer, Sutherland on Statutory Construction § 47.04, p 146 (rev. 5th ed. 1992) (emphasis added). Surely not even the Court believes that the Amendment's operative provision, which, though only 14 words in length, takes the Court the better part of 18 pages to parse, is perfectly "clear and unambiguous."

[**689] *"[T]he right of the people"*

The centerpiece of the Court's textual argument is its insistence that the words "the people" as used in the *Second Amendment* must have the same meaning, and protect the same class of individuals, as when they are used in the *First* and *Fourth Amendments*. According [***127] to the Court, in all three provisions--as well as [*2827] the Constitution's preamble, § 2 of Article I, and the *Tenth Amendment*--"the term unambiguously refers to all members of the political community, not an unspecified subset." *Ante, at ____, 171 L. Ed. 2d, at 650.* But the Court *itself* reads the *Second Amendment* to protect a "subset" significantly narrower than the class of persons protected by the *First* and *Fourth Amendments*; when it finally drills down on the substantive meaning of the *Second Amendment*, the Court limits the protected class to "law-abiding, responsible citizens," *ante, at ____, 171 L. Ed. 2d, at 683.* But the class of persons protected by the *First* and *Fourth Amendments* is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting pronouncements.

The Court also overlooks the significance of the way the Framers used the phrase "the people" in these constitutional provisions. In the *First Amendment*, no words define the class of individuals entitled to speak, to publish, or to worship; in that Amendment it is only the right peaceably to assemble, and to petition the Government

for [***128] a redress of grievances, that is described as a right of "the people." These rights contemplate collective action. While the right peaceably to assemble protects the individual rights of those persons participating in the assembly, its concern is with action engaged in by members of a group, rather than any single individual. Likewise, although the act of petitioning the Government is a right that can be exercised by individuals, it is primarily collective in nature. For if they are to be effective, petitions must involve groups of individuals acting in concert.

Similarly, the words "the people" in the *Second Amendment* refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.

As used in the *Fourth Amendment*, "the people" describes the class of persons protected from unreasonable searches and seizures by Government officials.

It is true that the *Fourth Amendment* describes a right that need [***129] not be exercised in any collective sense. But that observation does not settle the meaning of the phrase "the people" when used in the *Second Amendment*. For, as we have seen, the phrase means something quite different in the Petition and Assembly Clauses of the *First Amendment*. Although the abstract definition of the phrase "the people" could carry the same meaning in the *Second Amendment* as in the *Fourth Amendment*, the preamble of the *Second Amendment* suggests that the uses of the phrase in the *First* and *Second Amendments* are the same in referring [**690] to a collective activity. By way of contrast, the *Fourth Amendment* describes a right *against* governmental interference rather than an affirmative right *to* engage in protected conduct, and so refers to a right to protect a purely individual interest. As used in the *Second Amendment*, the words "the people" do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.

"[T]o keep and bear Arms"

Although the Court's discussion of these words treats them as two "phrases"--as if they read "to keep" and "to bear"--they describe a unitary right: to possess arms if needed [***130] for military purposes and to use them in conjunction with military activities.

[*2828] As a threshold matter, it is worth pausing to note an oddity in the Court's interpretation of "to keep and bear Arms." Unlike the Court of Appeals, the Court does not read that phrase to create a right to possess arms for "lawful, private purposes." *Parker v. District of Columbia, 375 U.S. App. D.C. 140, 478 F.3d 370, 382 (CADC 2007)*. Instead, the Court limits the Amendment's protection to the right "to possess and carry weapons in case of confrontation." *Ante, at ____, 171 L. Ed. 2d, at 657*. No party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth. But although this novel limitation lacks support in the text of the Amendment, the Amendment's text *does* justify a different limitation: the "right to keep and bear Arms" protects only a right to possess and use firearms in connection with service in a state-organized militia.

The term "bear arms" is a familiar idiom; when used unadorned by any additional words, its meaning is "to serve as a soldier, do military service, fight." 1 Oxford English Dictionary 634 (2d ed. 1989). It is derived from the Latin *arma ferre*, which, translated literally, means "to bear *[ferre]* [***131] war equipment *[arma]*." Brief for Professors of Linguistics and English as *Amici Curiae* 19. One 18th-century dictionary defined "arms" as "[w]eapons of offence, or armour of defence," 1 S. Johnson, A Dictionary of the English Language (1755), and another contemporaneous source explained that "[b]y *arms*, we understand those instruments of offence generally made use of in war; such as firearms, swords, &c. By *weapons*, we more particularly mean instruments of other kinds (exclusive of fire-arms), made use of as offensive, on special occasions." 1 J. Trusler, The Distinction Between Words Esteemed Synonymous in the English Language 37 (3d ed. 1794).[8] Had the Framers wished to expand the meaning of the phrase "bear arms" to encompass civilian possession and use, they could have done so by the addition of phrases such as "for the defense of themselves," as was done in the Pennsylvania and Vermont Declarations of Rights. The *unmodified* use of "bear [**691] arms," by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts.[9] The absence of any reference [*2829] to civilian uses of weapons tailors the text of the Amendment to the purpose identified in [***132] its preamble. [10] But when discussing these words, the Court simply ignores the preamble.

8 The Court's repeated citation to the dissenting opinion in *Muscarello v. United States, 524 U.S. 125, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998)*, *ante, at ____, ____, 171 L. Ed. 2d, at 652, 654*, as illuminating the meaning of "bear arms," borders on the risible. At issue in *Muscarello* was the proper construction of the word "carries" in *18 U.S.C. § 924(c) (1994 ed.)*; the dissent in that case made passing reference to the *Second Amendment* only in the course of observ-

ing that both the Constitution and Black's Law Dictionary suggested that something more active than placement of a gun in a glove compartment might be meant by the phrase "'carries a firearm.'" *524 U.S., at 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111.*

9 *Amici* professors of Linguistics and English reviewed uses of the term "bear arms" in a compilation of books, pamphlets, and other sources disseminated in the period between the Declaration of Independence and the adoption of the *Second Amendment.* See Brief for Professors of Linguistics and English as *Amici Curiae* 23-25. *Amici* determined that of 115 texts that employed the term, all but five usages were in a clearly military context, and in four of the remaining five instances, further [***133] qualifying language conveyed a different meaning.

The Court allows that the phrase "bear Arms" did have as an idiomatic meaning, "'to serve as a soldier, do military service, fight,'" *ante, at ____, 171 L. Ed. 2d, at 654*, but asserts that it "unequivocally bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities," *ante, at ____ - ____, 171 L. Ed. 2d, at 654.* But contemporary sources make clear that the phrase "bear arms" was often used to convey a military meaning without those additional words. See, e.g., To The Printer, Providence Gazette (May 27, 1775) ("By the common estimate of three millions of people in America, allowing one in five to bear arms, there will be found 600,000 fighting men"); Letter of Henry Laurens to the Mass. Council (Jan. 21, 1778), in Letters of Delegates to Congress 1774-1789, p 622 (P. Smith ed. 1981) ("Congress were yesterday informed . . . that those Canadians who returned from Saratoga . . . had been compelled by Sir Guy Carleton to bear Arms"); Of the Manner of Making War among the Indians of North-America, Connecticut Courant (May 23, 1785) ("The Indians begin to bear arms at the age of fifteen, and lay them aside when they [***134] arrive at the age of sixty. Some nations to the southward, I have been informed, do not continue their military exercises after they are fifty"); 28 Journals of the Continental Congress 1030 (G. Hunt ed. 1910) ("That hostages be mutually given as a security that the Convention troops and those received in exchange for them do not bear arms prior to the first day of May next"); H. R. J., 9th Cong., 1st Sess., 217 (Feb. 12, 1806) ("Whereas the commanders of British armed vessels have impressed many American seamen, and compelled them to bear arms on board said vessels, and assist in fighting their battles with nations in amity and peace with the United States"); H. R. J., 15th Cong., 2d Sess., 182-183 (Jan. 14, 1819) ("[The petitioners] state that they were residing in the British province of Canada, at the commencement of the late war, and that owing to their attachment to the United States, they refused to bear arms, when called upon by the British authorities . . .").

10 *Aymette v. State, 21 Tenn. 154, 156 (1840)*, a case we cited in *Miller,* further confirms this reading of the phrase. In *Aymette*, the Tennessee Supreme Court construed the guarantee in Tennessee's 1834 Constitution that [***135] "'the free white men of this State, have a right to keep and bear arms for their common defence.'" Explaining that the provision was adopted with the same goals as the *Federal Constitution's Second Amendment*, the court wrote: "The words 'bear arms' . . . have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms,* the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." *21 Tenn., at 158.* The court elaborated: "[W]e may remark, that the phrase, *'bear arms,'* is used in the Kentucky Constitution as well as our own, and implies, as has already been suggested, their military use. . . . A man in the pursuit of deer, elk, and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms,* much less could it be said, that a private citizen *bears arms,* because he has a dirk or pistol concealed under his clothes, [***136] or a spear in a cane." *Id., at 161.*

The Court argues that a "qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass." *Ante, at ____, 171 L. Ed. 2d, at 655.* But this fundamentally fails to grasp the point. The stand-alone phrase "bear arms" most naturally conveys a military meaning *unless* the addition of a qualifying phrase signals that a different meaning is intended. When, as in this case, there is no such qualifier, [**692] the most natural meaning is the military one; and, in the absence of any qualifier, it is all the more appropriate to look to the preamble to confirm the natural meaning of the text.[11] The Court's [*2830] objection is particularly puzzling in light of its own contention that the addition of the modifier "against" changes the meaning of "bear

arms." Compare *ante, at ____, 171 L. Ed. 2d, at 652* (defining "bear arms" to mean "carrying [a weapon] for a particular purpose--confrontation"), with *ante, at ____, 171 L. Ed. 2d, at 654* ("The phrase 'bear Arms' also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: to serve as a soldier, do military service, fight or to wage war. But it unequivocally bore that idiomatic meaning only when followed [***137] by the preposition 'against'" (emphasis deleted; citations and some internal quotation marks omitted)).

> 11 As lucidly explained in the context of a statute mandating a sentencing enhancement for any person who "uses" a firearm during a crime of violence or drug trafficking crime:
>
> > "To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of 'using a firearm' is to speak of using it for its distinctive purpose, i.e., as a weapon. To be sure, one can use a firearm in a number of ways, including as an article of exchange, just as one can 'use' a cane as a hall decoration--but that is not the ordinary meaning of 'using' the one or the other. The Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used." *Smith v. United States, 508 U.S. 223, 242, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993)* (Scalia, J., dissenting) (some internal quotation marks, footnotes, and citations omitted).

The Amendment's use of the term "keep" in no way contradicts the military meaning conveyed by [***138] the phrase "bear arms" and the Amendment's preamble. To the contrary, a number of state militia laws in effect at the time of the *Second Amendment's* drafting used the term "keep" to describe the requirement that militia members store their arms at their homes, ready to be used for service when necessary. The Virginia military law, for example, ordered that "every one of the said officers, non-commissioned officers, and privates, shall constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer." Act . . . for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § III, p 2 (emphasis added).[12] "[K]eep and bear arms" thus perfectly describes the responsibilities of a framing-era militia member.

> 12 See also Act for the regulating, training, and arraying of the Militia, . . . of the State, 1781 N. J. Laws, ch. XIII, § 12, p 43 ("And be it Enacted, That each Person enrolled as aforesaid, shall also *keep* at his Place of Abode one Pound of good merchantable Gunpowder and three Pounds of Ball sized to his Musket or Rifle" (emphasis added)); An Act for establishing a Militia, 1785 Del. Laws § 7, p 59 ("*And* [***139] *be it enacted,* That every person between the ages of eighteen and fifty . . . shall at his own expence, provide himself . . . with a musket or firelock, with a bayonet, a cartouch box to contain twenty three cartridges, a priming wire, a brush and six flints, all in good order, on or before the first day of April next, under the penalty of forty shillings, and shall *keep* the same by him at all times, ready and fit for service, under the penalty of two shillings and six pence for each neglect or default thereof on every muster day" (second emphasis added)); 1782 Conn. Acts p. 590 ("And it shall be the duty of the Regional Quarter-Master to provide and *keep* a sufficient quantity of Ammunition and warlike stores for the use of their respective Regiments, to be *kept* in such Place or Places as shall be ordered by the Field Officers" (emphasis added)).

This reading is confirmed by the fact that the clause protects only one right, rather than two. It does not describe a right "to keep . . . Arms" and a [**693] separate right "to bear . . . Arms." Rather, the single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when [***140] necessary. [13] Different language surely would have been used to protect nonmilitary use and possession of weapons from regulation if such an intent had played any role in the drafting of the Amendment.

> 13 The Court notes that the *First Amendment* protects two separate rights with the phrase "the 'right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances.'" *Ante, at ____, 171 L. Ed. 2d, at 657.* But this only proves the point: In contrast to the language quoted by the Court, the

Second Amendment does not protect a "right to keep *and to* bear Arms," but rather a "right to keep and bear arms." The State Constitutions cited by the Court are distinguishable on the same ground.

* [*2831] * *

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms. Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble [***141] and from settled law to come forward with persuasive new arguments or evidence. The textual analysis offered by respondent and embraced by the Court falls far short of sustaining that heavy burden.[14] And the Court's emphatic reliance on the claim "that the *Second Amendment* . . . codified a *pre-existing* right," *ante, at ____, 171 L. Ed. 2d, at 657*, is of course beside the point because the right to keep and bear arms for service in a state militia was also a pre-existing right.

14 The Court's atomistic, word-by-word approach to construing the Amendment calls to mind the parable of the six blind men and the elephant, famously set in verse by John Godfrey Saxe. The Poems of John Godfrey Saxe 135-136 (1873). In the parable, each blind man approaches a single elephant; touching a different part of the elephant's body in isolation, each concludes that he has learned its true nature. One touches the animal's leg, and concludes that the elephant is like a tree; another touches the trunk and decides that the elephant is like a snake; and so on. Each of them, of course, has fundamentally failed to grasp the nature of the creature.

Indeed, not a word in the constitutional text even arguably supports the Court's overwrought [***142] and novel description of the *Second Amendment* as "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Ante, at ____, 171 L. Ed. 2d, at 683.*

II

The proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached, reflected in Article I's Militia Clauses and the *Second Amendment*, represent quintessential examples of the Framers' "split[ting] the atom of sovereignty."[15]

15 By "'split[ting] the atom of sovereignty,'" the Framers created "'two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Saenz v. Roe, 526 U.S. 489, 504, n 17, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999)* (quoting *U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995)* (Kennedy, J., concurring)).

Two themes relevant to our current interpretive task ran through the debates on the original Constitution. [**694] "On the [***143] one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States." *Perpich v. Department of Defense, 496 U.S. 334, 340, 110 S. Ct. 2418, 110 L. Ed. 2d 312 (1990).*[16] Governor Edmund Randolph, reporting on the Constitutional Convention to the Virginia Ratification Convention, explained: "With respect to a standing army, I believe there was not a member in the federal Convention, who did not feel indignation at such an institution." 3 J. Elliot, [*2832] Debates in the Several State Conventions on the Adoption of the Federal Constitution 401 (2d ed. 1863) (hereinafter Elliot). On the other hand, the Framers recognized the dangers inherent in relying on inadequately trained militia members "as the primary means of providing for the common defense," *Perpich, 496 U.S., at 340, 110 S. Ct. 2418, 110 L. Ed. 2d 312*; during the Revolutionary War, "[t]his force, though armed, was largely untrained, and its deficiencies were the subject of bitter complaint." Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 182 (1940).[17] In order to respond to those twin concerns, a compromise was reached: Congress would be authorized to raise and support a national Army[18] [***144] and Navy, and also to organize, arm, discipline, and provide for the calling forth of "the Militia." *U.S. Const., Art. I, § 8, cls. 12-16.* The President, at the same time, was empowered as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Art. II, § 2. But, with respect to the militia, a significant reservation was made to the States: Although Congress would have the power to call forth,[19] organize, arm, and discipline the militia, as well as to govern "such Part of them as may be employed in the

Service of the United States," the States respectively would retain the right to appoint the officers and to train the [**695] militia in accordance with the discipline prescribed by Congress. Art. I, § 8, cl. 16.[20]

16 Indeed, this was one of the grievances voiced by the colonists: Paragraph 13 of the Declaration of Independence charged of King George, "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures."

17 George Washington, writing to Congress on September 24, 1776, warned that for Congress "[t]o place any dependance upon Militia, is, [***145] assuredly, resting upon a broken staff." 6 Writings of George Washington 106, 110 (J. Fitzpatrick ed. 1932). Several years later he reiterated this view in another letter to Congress: "Regular Troops alone are equal to the exigencies of modern war, as well for defence as offence . . . . *No Militia* will ever acquire the habits necessary to resist a regular force. . . . The firmness requisite for the real business of fighting is only to be attained by a constant course of discipline and service." 20 *id.*, at 49, 49-50 (Sept. 15, 1780). And Alexander Hamilton argued this view in many debates. In 1787, he wrote:

> "Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independence. . . . War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice." The Federalist No. 25, p 166 (C. Rossiter ed. 1961).

18 "[B]ut no Appropriation of Money to that Use [raising and supporting Armies] shall be for a longer Term than two Years." *U.S. Const., Art I, § 8, cl. 12*

19 This "calling forth" power [***146] was only permitted in order for the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions." Art. I, § 8, cl. 15.

20 The Court assumes--incorrectly, in my view--that even when a state militia was not called into service, Congress would have had the power to exclude individuals from enlistment in that state militia. See *ante, at ____, 171 L. Ed. 2d, at 662*. That assumption is not supported by the text of the Militia Clauses of the original Constitution, which confer upon Congress the power to "organiz[e], ar[m], and disciplin[e], the Militia," Art. I, § 8, cl. 16, but not the power to say who will be members of a state militia. It is also flatly inconsistent with the *Second Amendment*. The States' power to create their own militias provides an easy answer to the Court's complaint that the right as I have described it is empty because it merely guarantees "citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them." *Ante, at ____, 171 L. Ed. 2d, at 662*.

But the original Constitution's retention of the militia and its creation of divided authority over that body did not prove sufficient to allay fears about the dangers posed by a standing army. For it was [***147] perceived by some that Article I contained a significant gap: While it empowered [*2833] Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia's *dis*armament. As George Mason argued during the debates in Virginia on the ratification of the original Constitution:

> "The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless--by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has the exclusive right to arm them." 3 Elliot 379.

This sentiment was echoed at a number of state ratification conventions; indeed, it was one of the primary objections to the original Constitution voiced by its opponents. The Antifederalists were ultimately unsuccessful in persuading state ratification conventions to condition their approval of the Constitution upon the eventual inclusion of any particular amendment. But a number of States did propose to the first Federal Congress amendments reflecting a desire to ensure that the institution of the militia would remain [***148] protected under the new Government. The proposed amendments sent by the States of Virginia, North Carolina, and New York focused on the importance of preserving the state militias and reiterated the dangers posed by standing armies. New Hampshire sent a proposal that differed significantly from the others; while also

invoking the dangers of a standing army, it suggested that the Constitution should more broadly protect the use and possession of weapons, without tying such a guarantee expressly to the maintenance of the militia. The States of Maryland, Pennsylvania, and Massachusetts sent no relevant proposed amendments to Congress, but in each of those States a minority of the delegates advocated related amendments. While the Maryland minority proposals were exclusively concerned with standing armies and conscientious objectors, the unsuccessful proposals in both Massachusetts and Pennsylvania would have protected a more broadly worded right, less clearly tied to service in a state militia. Faced with all of these options, it is telling that James Madison chose to craft the *Second Amendment* as he did.

The relevant proposals sent by the [**696] Virginia Ratifying Convention read as follows:

> "17th. [***149] That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and be governed by the civil power." *Id.*, at Elliot 659.
>
> "19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead." *Ibid.*

North Carolina adopted Virginia's proposals and sent them to Congress as its own, although it did not actually ratify the original Constitution until Congress had sent the proposed *Bill of Rights* to the States for ratification. 2 Schwartz 932-933; see The Complete *Bill of Rights* 182-183 (N. Cogan ed. 1997) (hereinafter Cogan).

New York produced a proposal with nearly identical language. It read:

> "That the people have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, [*2834] natural and safe [***150] defence of a free State. . . . That standing Armies, in time of Peace, are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be kept under strict Subordination to the civil Power." 2 Schwartz 912.

Notably, each of these proposals used the phrase "keep and bear arms," which was eventually adopted by Madison. And each proposal embedded the phrase within a group of principles that are distinctly military in meaning.[21]

> 21 In addition to the cautionary references to standing armies and to the importance of civil authority over the military, each of the proposals contained a guarantee that closely resembled the language of what later became the *Third Amendment*. The 18th proposal from Virginia and North Carolina read: "That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the law directs." 3 Elliot 659. And New York's language read: "That in time of Peace no Soldier ought to be quartered in any House without the consent of the Owner, and in time of War only by the Civil Magistrate in such manner as the Laws may direct." 2 Schwartz [***151] 912.

By contrast, New Hampshire's proposal, although it followed another proposed amendment that echoed the familiar concern about standing armies, [22] described the protection involved in more clearly personal terms. Its proposal read:

> 22 *"Tenth,* That no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress, nor shall Soldiers in Time of Peace be quartered upon private Houses with out the consent of the Owners." *Id.*, at 761.
>
> *"Twelfth,* Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *Id.*, at 758, 761.

The proposals considered in the other three States, although ultimately rejected by their respective ratification conventions, are also relevant to our historical inquiry. First, the Maryland proposal, endorsed by a mi-

nority of the delegates and later circulated in pamphlet form, read:

> [**697] "4. That no standing army shall be kept up in time of peace, unless with the consent of two thirds of the members present of each branch of Congress.
>
> . . . . .
>
> "10. That no person conscientiously scrupulous of bearing arms, in any case, shall be compelled personally to serve as a soldier." *Id.*, at 729, 735.

The [***152] rejected Pennsylvania proposal, which was later incorporated into a critique of the Constitution titled "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787," signed by a minority of the State's delegates (those who had voted against ratification of the Constitution), *id.*, at 628, 662, read:

> "7. That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to, and be governed by the civil powers." *Id.*, at 665.

Finally, after the delegates at the Massachusetts Ratification Convention had compiled a list of proposed amendments and alterations, a motion was made to add to the list the following language: "that [*2835] the said Constitution be never construed to authorize Congress to . . . prevent the people of the United [***153] States, who are peaceable citizens, from keeping their own arms." Cogan 181. This motion, however, failed to achieve the necessary support, and the proposal was excluded from the list of amendments the State sent to Congress. 2 Schwartz 674-675.

Madison, charged with the task of assembling the proposals for amendments sent by the ratifying States, was the principal draftsman of the *Second Amendment*.[23] He had before him, or at the very least would have been aware of, all of these proposed formulations. In addition, Madison had been a member, some years earlier, of the committee tasked with drafting the Virginia Declaration of Rights. That committee considered a proposal by Thomas Jefferson that would have included within the Virginia Declaration the following language: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]." 1 Papers of Thomas Jefferson 363 (J. Boyd ed. 1950). But the committee rejected that language, adopting instead the provision drafted by George Mason.[24]

> 23 Madison explained in a letter to Richard Peters, Aug. 19, 1789, the paramount importance of preparing a list of amendments to placate those States that had ratified the Constitution [***154] in reliance on a commitment that amendments would follow: "In many States the [Constitution] was adopted under a tacit compact in [favor] of some subsequent provisions on this head. In [Virginia]. It would have been *certainly* rejected, had no assurances been given by its advocates that such provisions would be pursued. As an honest man *I feel* my self bound by this consideration." Creating the *Bill of Rights* 281, 282 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit).
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> 24 The adopted language, *Virginia Declaration of Rights P13 (1776)*, read as follows: "That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power." 1 Schwartz 235.

With all of these sources upon [**698] which to draw, it is strikingly significant that Madison's first draft omitted any mention of nonmilitary use or possession of weapons. Rather, his original draft repeated the essence of the two proposed amendments sent by Virginia, combining the [***155] substance of the two provisions succinctly into one, which read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Cogan 169.

Madison's decision to model the *Second Amendment* on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When Madison prepared his

first draft, and when that draft was debated and modified, it is reasonable to assume that all participants in the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.

Madison's initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. It confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military [***156] character of both. The objections voiced to the conscientious-objector clause only confirm the central [*2836] meaning of the text. Although records of the debate in the Senate, which is where the conscientious-objector clause was removed, do not survive, the arguments raised in the House illuminate the perceived problems with the clause: Specifically, there was concern that Congress "can declare who are those religiously scrupulous, and prevent them from bearing arms."[25] The ultimate removal of the clause, therefore, only serves to confirm the purpose of the Amendment--to protect against congressional disarmament, by whatever means, of the States' militias.

> 25 Veit 182. This was the objection voiced by Elbridge Gerry, who went on to remark, in the next breath: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. . . . Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins." *Ibid.*

The Court also contends that because "Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever," *ante, at ____, 171 L. Ed. 2d, at 656* [***157] , the inclusion of a conscientious-objector clause in the original draft of the Amendment does not support the conclusion that the phrase "bear Arms" was military in meaning. But that claim cannot be squared with the record. In the proposals cited *supra, at ____ - ____, 171 L. Ed. 2d, at 696*, both Virginia and North Carolina included the following language: "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent *to employ another to bear* [**699] *arms in his stead*" (emphasis added).[26] There is no plausible argument that the use of "bear arms" in those provisions was not unequivocally and exclusively military: The State simply does not compel its citizens to carry arms for the purpose of private "confrontation," *ante, at ____, 171 L. Ed. 2d, at 652*, or for self-defense.

> 26 The failed Maryland proposals contained similar language. See *supra, at ____, 171 L. Ed. 2d, at 696.*

The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger. But state militias could not effectively check the prospect of a federal standing [***158] army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed.[27] As we explained in *Miller:* "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the *Second Amendment* were made. It must be interpreted and applied with that end in view." *307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206.* The evidence plainly refutes the claim that the Amendment was motivated by the Framers' fears that Congress might act to regulate any civilian uses of weapons. And even if the historical record were genuinely ambiguous, the burden would remain on the parties advocating a change in the law to introduce facts or arguments "'newly ascertained,'" *Vasquez, 474 U.S., at 266, 106 S. Ct. 617, 88 L. Ed. 2d 598*; the Court is unable to identify any such facts or arguments.

> 27 The Court suggests that this historical analysis casts the *Second Amendment* as an "odd outlier," *ante, at ____, 171 L. Ed. 2d, at 664*; if by "outlier," the Court means that the *Second Amendment* was enacted in a unique and novel context, and responded to the particular challenges presented by the Framers' federalism experiment, I have no quarrel with the Court's characterization.

III

Although it gives [***159] short shrift to the drafting history of the *Second Amendment*, [*2837] the Court dwells at length on four other sources: the 17th-century English *Bill of Rights*; Blackstone's Commentaries on the Laws of England; postenactment commentary on the *Second Amendment*; and post-Civil War legislative history.[28] All of these sources shed only indirect light on the question before us, and in any [**700] event offer little support for the Court's conclusion. [29]

> 28 The Court's fixation on the last two types of sources is particularly puzzling, since both have the same characteristics as postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining

the intent of any provision's drafters. As has been explained:

> "The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history'--which presumably means the post-enactment history of a statute's consideration and enactment--is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expression not of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they [***160] were voting for), but of what a law previously enacted means. . . . In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed." *Sullivan v. Finkelstein, 496 U.S. 617, 631-632, 110 S. Ct. 2658, 110 L. Ed. 2d 563 (1990)* (Scalia, J., concurring in part).

29 The Court stretches to derive additional support from scattered state-court cases primarily concerned with state constitutional provisions. See *ante, at ____ - ____, 171 L. Ed. 2d, at 669-670.* To the extent that those state courts assumed that the *Second Amendment* was coterminous with their differently worded state constitutional arms provisions, their discussions were of course dicta. Moreover, the cases on which the Court relies were decided between 30 and 60 years after the ratification of the *Second Amendment*, and there is no indication that any of them engaged in a careful textual or historical analysis of the federal constitutional provision. Finally, the interpretation of the *Second Amendment* advanced in those cases is not as clear as the Court apparently believes. In *Aldridge v. Commonwealth, 4 Va. 447, 2 Va. Cas. 447 (Gen. Ct. 1824)*, for example, a Virginia court pointed to the restriction on [***161] free blacks' "right to bear arms" as evidence that the protections of the State and Federal Constitutions did not extend to free blacks. The Court asserts that "[t]he claim was obviously not that blacks were prevented from carrying guns in the militia." *Ante, at ____, 171 L. Ed. 2d, at 669.* But it is not obvious at all. For in many States, including Virginia, free blacks during the colonial period were prohibited from carrying guns in the militia, instead being required to "muste[r] without arms"; they were later barred from serving in the militia altogether. See Siegel, The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry, *92 Nw. U. L. Rev. 477, 497-498, and n 120 (1998).* But my point is not that the *Aldridge* court endorsed my view of the Amendment--plainly it did not, as the premise of the relevant passage was that the *Second Amendment* applied to the States. Rather, my point is simply that the court could have understood the *Second Amendment* to protect a militia-focused right, and thus that its passing mention of the right to bear arms provides scant support for the Court's position.

The English Bill of Rights

The Court's reliance on Article VII of the 1689 English *Bill of Rights*--which, [***162] like most of the evidence offered by the Court today, was considered in *Miller*[10] -- [*2838] is misguided both because Article VII was enacted in response to different concerns from those that motivated the Framers of the *Second Amendment*, and because the guarantees of the two provisions were by no means coextensive. Moreover, the English text contained no preamble or other provision identifying a narrow, militia-related purpose.

30 The Government argued in its brief:

> "[I]t would seem that the early English law did not guarantee an unrestricted right to bear arms. Such recognition as existed of a right in the people to keep and bear arms appears to have resulted from oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people. This right, however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense." Brief for United States in United States

v. Miller, O. T. 1938, No. 696, pp 11-12 (citations omitted). The Government then cited at length the Tennessee [***163] Supreme Court's opinion in *Aymette, 21 Tenn. 154*, which further situated the English *Bill of Rights* in its historical context. See *n 10, supra.*

The English *Bill of Rights* responded to abuses by the Stuart monarchs; among the grievances set forth in the *Bill of Rights* was that the King had violated the law "[b]y causing several good Subjects being Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law." L. Schwoerer, The Declaration of Rights, 1689, App. 1, p. 295 (1981). Article VII of the *Bill of Rights* was a response to that selective disarmament; it guaranteed that "the Subjects which are Protestants may have Armes for their defence Suitable to their condition and as allowed by Law." *Id.*, at 297. This grant did not establish a general right of all persons, or even of all Protestants, to possess weapons. Rather, the right was qualified in two distinct ways: First, it was restricted [**701] to those of adequate social and economic status ("suitable to their Condition"); second, it was only available subject to regulation by Parliament ("as allowed by Law"). [31]

31 Moreover, it was the Crown, not Parliament, that was bound by the English provision; [***164] indeed, according to some prominent historians, Article VII is best understood not as announcing any individual right to unregulated firearm ownership (after all, such a reading would fly in the face of the text), but as an assertion of the concept of parliamentary supremacy. See Brief for Jack N. Rakove et al. as *Amici Curiae* 6-9.

The Court may well be correct that the English *Bill of Rights* protected the right of *some* English subjects to use *some* arms for personal self-defense free from restrictions by the Crown (but not Parliament). But that right--adopted in a different historical and political context and framed in markedly different language--tells us little about the meaning of the *Second Amendment*.

Blackstone's Commentaries

The Court's reliance on Blackstone's Commentaries on the Laws of England is unpersuasive for the same reason as its reliance on the English *Bill of Rights*. Blackstone's invocation of "'the natural right of resistance and self-preservation,'" *ante, at ____, 171 L. Ed. 2d, at 658*, and "'the right of having and using arms for self-preservation and defence,'" *ibid.*, referred specifically to Article VII in the English *Bill of Rights*. The excerpt from Blackstone offered by the Court, therefore, [***165] is, like Article VII itself, of limited use in interpreting the very differently worded, and differently historically situated, *Second Amendment*.

What *is* important about Blackstone is the instruction he provided on reading the sort of text before us today. Blackstone described an interpretive approach that gave far more weight to preambles than the Court allows. Counseling that "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable," Blackstone explained: "[I]f words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus, the proeme, or preamble, is often called in to help the construction of an act of parliament." 1 Commentaries on the Laws of England 59-60 (1765). In light of the Court's invocation of Blackstone as "'the preeminent authority on English law for the founding [*2839] generation,'" *ante, at ____, 171 L. Ed. 2d, at 658* (quoting *Alden v. Maine, 527 U.S. 706, 715, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)*), its disregard for his guidance [***166] on matters of interpretation is striking.

Postenactment Commentary

The Court also excerpts, without any real analysis, commentary by a number of additional scholars, some near in time to the framing and others postdating it by close to a century. Those scholars are for the most part of limited relevance in construing the guarantee of the *Second Amendment*: Their views are not altogether clear,[32] they tended to collapse the *Second Amendment* with Article VII of the [**702] English *Bill of Rights*, and they appear to have been unfamiliar with the drafting history of the *Second Amendment*.[33]

32 For example, St. George Tucker, on whom the Court relies heavily, did not consistently adhere to the position that the Amendment was designed to protect the "Blackstonian" self-defense right, *ante, at ____, 171 L. Ed. 2d, at 666*. In a series of unpublished lectures, Tucker suggested that the Amendment should be understood in the context of the compromise over military power represented by the original Constitution and the *Second* and *Tenth Amendments*:

"If a State chooses to incur the expense of putting arms into the Hands of its own Citizens for their

defense, it would require no small ingenuity to prove that they have no right to do [***167] it, or that it could by any means contravene the Authority of the federal Govt. It may be alleged indeed that this might be done for the purpose of resisting the laws of the federal Government, or of shaking off the Union: to which the plainest answer seems to be, that whenever the States think proper to adopt either of these measures, they will not be with-held by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above mentioned, would be subversive of every principle of Freedom in our Government; of which the first Congress appears to have been sensible by proposing an Amendment to the Constitution, which has since been ratified and has become part of it, viz., 'That a well regulated militia being necessary to the Security of a free State, the right of the people to keep & bear arms shall not be infringed.' To this we may add that this power of arming the militia, is not one of those prohibited to the States by the Constitution, and, consequently, is reserved to them under the twelfth Article of the ratified aments." 4 S. Tucker, Ten Notebooks of Law Lectures, 1790s, pp. 127-128, in Tucker-Coleman Papers [***168] (College of William and Mary).

See also Cornell, St. George Tucker and the *Second Amendment*: Original Understandings and Modern Misunderstandings, *47 Wm. & Mary L. Rev. 1123 (2006).*

33 The Court does acknowledge that at least one early commentator described the *Second Amendment* as creating a right conditioned upon [illegible] militia. See *ante*, at

appears to have inquired into the intent of the drafters of the Amendment, what is striking about the Court's discussion is its failure to refute Oliver's description of the meaning of the Amendment or the intent of its drafters; rather, the Court adverts to simple nosecounting to dismiss his view.

The most significant of these commentators was Joseph Story. Contrary to the Court's assertions, however, Story actually supports the view that the Amendment was designed to protect the right of each of the States to maintain a well-regulated militia. When Story used the term "palladium" in discussions of the *Second Amendment*, he merely echoed the concerns that animated the Framers of the Amendment and [***169] led to its adoption. An excerpt from his 1833 Commentaries on the Constitution of the United States--the same passage cited by the Court in *Miller*[34]--merits reproducing at some length:

"The importance of [the *Second Amendment*] will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural [*2840] defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, [**703] though this truth would seem so clear, and the importance [***170] of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of mi-

171 L. Ed. 2d at 668-669 (citing B. Oliver

litia discipline, and a strong disposition,

> ganization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by the clause of our national *bill of rights*." 2 J. Story, Commentaries on the Constitution of the United States § 1897, pp 620-621 (4th ed. 1873) (footnote omitted).

34 *Miller, 307 U.S., at 182, n 3, 59 S. Ct. 816, 83 L. Ed. 1206.*

Story thus began by tying the significance of the Amendment directly to the paramount importance of the militia. He then invoked the fear that drove the Framers of the *Second Amendment* --specifically, the threat to liberty posed by a standing army. An important check on that danger, he suggested, was a "well-regulated militia," *id.*, at 621, for which he assumed that arms would have to be kept and, when necessary, borne. There is not so much as a whisper in the passage above [***171] that Story believed that the right secured by the Amendment bore any relation to private use or possession of weapons for activities like hunting or personal self-defense.

After extolling the virtues of the militia as a bulwark against tyranny, Story went on to decry the "growing indifference to any system of militia discipline." *Ibid.* When he wrote, "[h]ow it is practicable to keep the people duly armed without some organization it is difficult to see," *ibid.*, he underscored the degree to which he viewed the arming of the people and the militia as indissolubly linked. Story warned that the "growing indifference" he perceived would "gradually undermine all the protection intended by this clause of our national *bill of rights*," *ibid.* In his view, the importance of the Amendment was directly related to the continuing vitality of an institution in the process of apparently becoming obsolete.

In an attempt to downplay the absence of any reference to nonmilitary uses of weapons in Story's commentary, the Court relies on the fact that Story characterized Article VII of the English Declaration of Rights as a "'similar provision,'" *ante, at ____, 171 L. Ed. 2d, at 667.* The two provisions were indeed similar, in that [***172] both protected some uses of firearms. But Story's characterization in no way suggests that he believed that the provisions had the same scope. To the contrary, Story's exclusive focus on the militia in his discussion of the *Second Amendment* confirms his understanding of the right protected by the *Second Amendment* as limited to military uses of arms.

[*2841] Story's writings as a Justice of this Court, to the extent that they shed light on this question, only confirm that Justice Story did not view the Amendment as conferring upon individuals any "self-defense" right disconnected from service in a state militia. Justice Story dissented from the Court's decision in *Houston v. Moore, 18 U.S. 1, 5 Wheat. 1, 24, 5 L. Ed. 19 (1820)*, which held that a state court "had a concurrent jurisdiction" with the federal courts "to try a militia man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent." *Id., at 32, 5 L. Ed. 19.* Justice Story believed [**704] that Congress' power to provide for the organizing, arming, and disciplining of the militia was, when Congress acted, plenary; but he explained that in the absence of congressional action, "I am certainly not prepared to deny the legitimacy of [***173] such an exercise of [state] authority." *Id., at 52, 5 L. Ed. 19.* As to the *Second Amendment*, he wrote that it "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id., at 52-53, 5 L. Ed. 19.* The Court contends that had Justice Story understood the Amendment to have a militia purpose, the Amendment would have had "enormous and obvious bearing on the point." *Ante, at ____, 171 L. Ed. 2d, at 668.* But the Court has it quite backwards: If Story had believed that the purpose of the Amendment was to permit civilians to keep firearms for activities like personal self-defense, what "confirm[ation] and illustrat[ion]," *Houston, 5 Wheat., at 53, 5 L. Ed. 19*, could the Amendment possibly have provided for the point that States retained the power to organize, arm, and discipline their own militias?

Post-Civil War Legislative History

The Court suggests that by the post-Civil War period, the *Second Amendment* was understood to secure a right to firearm use and ownership for purely private purposes like personal self-defense. While it is true that some of the legislative history on which the Court relies supports that contention, see *ante, at ____ - ____, 171 L. Ed. 2d, at 670-672,* [***174] such sources are entitled to limited, if any, weight. All of the statements the Court cites were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation.

What is more, much of the evidence the Court offers is decidedly less clear than its discussion allows. The

Court notes: "[B]lacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms." *Ante, at ____, 171 L. Ed. 2d, at 671.* The Court hastily concludes that "[n]eedless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia," *ibid.* But some of the claims of the sort the Court cites may have been just that. In some Southern States, Reconstruction-era Republican governments created state militias in which both blacks and whites were permitted to serve. Because "[t]he decision to allow blacks to serve alongside whites meant that most southerners refused to [***175] join the new militia," the bodies were dubbed "'Negro militia[s].'" S. Cornell, A Well-Regulated Militia 177 (2006). The "arming of the Negro militias met with especially fierce resistance in South Carolina. . . . The sight of organized, armed freedmen incensed opponents of Reconstruction and led to an intensified campaign of Klan terror. Leading members of the Negro militia were beaten or lynched and their weapons stolen." *Id.*, at 176-177.

[*2842] One particularly chilling account of Reconstruction-era Klan violence directed at a black militia member is recounted in the memoir of Louis F. Post, A "Carpetbagger" in South [**705] Carolina, 10 Journal of Negro History 10 (1925). Post describes the murder by local Klan members of Jim Williams, the captain of a "Negro militia company," *id.*, at 59, this way:

> "[A] cavalcade of sixty cowardly white men, completely disguised with face masks and body gowns, rode up one night in March, 1871, to the house of Captain Williams . . . in the wood [they] hanged [and shot] him . . . [and on his body they] then pinned a slip of paper inscribed, as I remember it, with these grim words: 'Jim Williams gone to his last muster.'" *Id.*, at 61.

In light of this evidence, it is [***176] quite possible that at least some of the statements on which the Court relies actually did mean to refer to the disarmament of black militia members.

IV

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

In 1792, the year after the Amendment was ratified, Congress passed a statute that purported to establish "an Uniform Militia throughout the United States." 1 Stat. 271. The statute commanded every able-bodied white male citizen between the ages of 18 and 45 to be enrolled therein and to "provide himself with a good musket or firelock" and other specified weaponry. [35] *Ibid.* The statute is significant, for it confirmed the way those in the founding generation viewed firearm ownership: as a duty linked to military service. The statute they enacted, however, "was virtually ignored for more than a century," and was finally repealed in 1901. See *Perpich, 496 U.S., at 341, 110 S. Ct. 2418, 110 L. Ed. 2d 312.*

> 35 The additional specified weaponry included: "a sufficient bayonet and belt, [***177] two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle and a quarter of a pound of powder." 1 Stat. 271.

The postratification history of the *Second Amendment* is strikingly similar. The Amendment played little role in any legislative debate about the civilian use of firearms for most of the 19th century, and it made few appearances in the decisions of this Court. Two 19th-century cases, however, bear mentioning.

In *United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1876)*, the Court sustained a challenge to respondents' convictions under the Enforcement Act of 1870 for conspiring to deprive any individual of "'any right or privilege granted or secured to him by the constitution or laws of the United States.'" *Id., at 548, 23 L. Ed. 588.* The Court wrote, as to counts 2 and 10 of respondents' indictment:

> "The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any [***178] manner dependent on that instrument for its existence. The *second amendment* declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than [**706] to restrict the powers of the national government." *Id., at 553, 23 L. Ed. 588.*

[*2843] The majority's assertion that the Court in *Cruikshank* "described the right protected by the *Second Amendment* as '"bearing arms for a lawful purpose,"'" *ante, at ____, 171 L. Ed. 2d, at 674* (quoting *Cruikshank, 92 U.S., at 553, 23 L. Ed. 588*), is not accurate. The *Cruikshank* Court explained that the defective *indictment* contained such language, but the Court did not itself describe the right, or endorse the indictment's description of the right.

Moreover, it is entirely possible that the basis for the indictment's counts 2 and 10, which charged respondents with depriving the victims of rights secured by the *Second Amendment*, was the prosecutor's belief that the victims--members of a group of citizens, mostly black but also white, who were rounded up by the sheriff, sworn in as a posse to defend the local courthouse, and attacked by a white mob--bore sufficient resemblance to members of a state militia [***179] that they were brought within the reach of the *Second Amendment*. See generally C. Lane, The Day Freedom Died: The Colfax Massacre, The Supreme Court, and the Betrayal of Reconstruction (2008).

Only one other 19th-century case in this Court, *Presser v. Illinois, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615 (1886)*, engaged in any significant discussion of the *Second Amendment*. The petitioner in *Presser* was convicted of violating a state statute that prohibited organizations other than the Illinois National Guard from associating together as military companies or parading with arms. Presser challenged his conviction, asserting, as relevant, that the statute violated both the Second and the *Fourteenth Amendments*. With respect to the *Second Amendment*, the Court wrote:

> "We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress [***180] and the National government, and not upon that of the States." *Id., at 264-265, 6 S. Ct. 580, 29 L. Ed. 615.*

And in discussing the *Fourteenth Amendment*, the Court explained:

> "The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offence for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred." [**707] *Id., at 266, 6 S. Ct. 580, 29 L. Ed. 615.*

Presser, therefore, both affirmed *Cruikshank*'s holding that the *Second Amendment* posed no obstacle to regulation by state governments, and suggested that in any event nothing in the Constitution protected the use of arms outside the context [***181] of a militia "authorized by law" and organized by the State or Federal Government.[36]

> 36 In another case the Court endorsed, albeit indirectly, the reading of *Miller* that has been well settled until today. In *Burton v. Sills, 394 U.S. 812, 89 S. Ct. 1486, 22 L. Ed. 2d 748 (1969)(per curiam)*, the Court dismissed for want of a substantial federal question an appeal from a decision of the New Jersey Supreme Court upholding, against a *Second Amendment* challenge, New Jersey's gun-control law. Although much of the analysis in the New Jersey court's opinion turned on the inapplicability of the *Second Amendment* as a constraint on the States, the court also quite correctly read *Miller* to hold that "Congress, though admittedly governed by the *second amendment*, may regulate interstate firearms so long as the regulation does not impair the maintenance of the active, organized militia of the states." *Burton v. Sills, 53 N. J. 86, 99, 248 A.2d 521, 527 (1968).*

[*2844] In 1901 the President revitalized the militia by creating "'the National Guard of the several States,'" *Perpich, 496 U.S., at 341, 110 S. Ct. 2418, 110 L. Ed. 2d 312*, and nn 9-10; meanwhile, the dominant understanding of the *Second Amendment's* inapplicability to private gun ownership continued well into the [***182] 20th century. The first two federal laws directly restricting civilian use and possession of firearms--the 1927 Act prohibiting mail delivery of "pistols, revolvers, and other firearms capable of being concealed on the person," ch. 75, 44 Stat. 1059, and the 1934 Act prohibiting the possession of sawed-off shotguns and machineguns--were enacted over minor *Second Amendment* objections dismissed by the vast majority of the legislators who participated in the debates.[37] Members of Congress clashed over the wisdom and efficacy of such laws as crime-control measures. But since the statutes did not infringe upon the military use or possession of weapons, for most legislators they did not even raise the specter of possible conflict with the *Second Amendment.*

> 37 The 1927 Act was enacted with no mention of the *Second Amendment* as a potential obstacle, although an earlier version of the bill had generated some limited objections on *Second Amendment* grounds; see 66 Cong. Rec. 725-735 (1924). And the 1934 Act featured just one colloquy, during the course of lengthy Committee debates, on whether the *Second Amendment* constrained Congress' ability to legislate in this sphere; see Hearings on H. R. 9006, before the House [***183] Committee on Ways and Means, 73d Cong., 2d Sess., p 19 (1934).

Thus, for most of our history, the invalidity of *Second-Amendment*-based objections to firearms regulations has been well settled and uncontroversial.[38] Indeed, the *Second Amendment* was not even mentioned [*2845] [**708] in either full House of Congress during the legislative proceedings that led to the passage of the 1934 Act. Yet enforcement of that law produced the judicial decision that confirmed the status of the Amendment as limited in reach to military usage. After reviewing many of the same sources that are discussed at greater length by the Court today, the *Miller* Court unanimously concluded that the *Second Amendment* did not apply to the possession of a firearm that did not have "some reasonable relationship to the preservation or efficiency of a well regulated militia." *307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206.*

> 38 The majority appears to suggest that even if the meaning of the *Second Amendment* has been considered settled by courts and legislatures for over two centuries, that settled meaning is overcome by the "reliance of millions of Americans" "upon the true meaning of the right to keep and bear arms." *Ante, at ____, n 24, 171 L. Ed. 2d, at 677.* Presumably [***184] by this the Court means that many Americans own guns for self-defense, recreation, and other lawful purposes, and object to government interference with their gun ownership. I do not dispute the correctness of this observation. But it is hard to see how Americans have "relied," in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question. Rather, gun owners have "relied" on the laws passed by democratically elected legislatures, which have generally adopted only limited gun-control measures.
>
> Indeed, reliance interests surely cut the other way: Even apart from the reliance of judges and legislators who properly believed, until today, that the *Second Amendment* did not reach possession of firearms for purely private activities, "millions of Americans" have relied on the power of government to protect their safety and well-being, and that of their families. With respect to the case before us, the legislature of the District of Columbia has relied on its ability to act to "reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia," Firearm Control Regulations Act of 1975 (Council Act No. 1-142), Hearing and Disposition before the House Committee on the District of Columbia, 94th Congr., 2d Sess., on H. [***185] Con. Res. 694, Ser. No. 94-24, p. 25 (1976); see *post, at ____ - ____, 171 L. Ed. 2d, at 718* (Breyer, J., dissenting); so, too, have the residents of the District.

The key to that decision did not, as the Court belatedly suggests, *ante, at ____ - ____, 171 L. Ed. 2d, at 675-676*, turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the *Second Amendment* were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for *Second Amendment* protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?

Perhaps in recognition of the weakness of its attempt to distinguish *Miller*, the Court argues in the alternative that *Miller* should be discounted because of its decisional history. It is true that the appellees in *Miller* did not file a brief or make an appearance, although the court below

had held that the relevant provision of the National Firearms Act violated the *Second Amendment* (albeit without any reasoned opinion). But, as our decision [***186] in *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60*, in which only one side appeared and presented arguments, demonstrates, the absence of adversarial presentation alone is not a basis for refusing to accord *stare decisis* effect to a decision of this Court. See Bloch, *Marbury* Redux, in Arguing *Marbury* v. *Madison* 59, 63 (M. Tushnet ed. 2005). Of course, if it can be demonstrated that new evidence or arguments were genuinely not available to an earlier Court, that fact should be given special weight as we consider whether to overrule a prior case. But the Court does not make that claim, because it cannot. Although it is true that the drafting history of the Amendment was not discussed in the Government's brief, see *ante, at ____, 171 L. Ed. 2d, at 676*, it is certainly not the drafting history that the Court's decision today turns on. And those sources upon which the Court today relies most heavily *were* available to the *Miller* Court. The Government cited the English *Bill of Rights* and quoted a lengthy passage from *Aymette* v. *State*, 21 Tenn. 154 (1840), detailing the history leading to the English guarantee, Brief for United States in *United States* v. *Miller*, O. T. 1938, No. 696, pp 12-13; it also cited Blackstone, *id.*, at 9, n 2, Cooley, *id.*, at 12, 15, [***187] and Story, *id.*, at 15. The Court is reduced to critiquing the number of *pages* the Government devoted to exploring [**709] the English legal sources. Only two (in a brief 21 pages in length)! Would the Court be satisfied with four? Ten?

The Court is simply wrong when it intones that *Miller* contained "*not a word*" about the Amendment's history. *Ante, at ____, 171 L. Ed. 2d, at 676*. The Court plainly looked to history to construe the term "Militia," and, on the best reading of *Miller*, the entire guarantee of the *Second Amendment*. After noting the original Constitution's grant of power to Congress and to the States over the militia, the Court explained:

> "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the *Second Amendment* [*2846] were made. It must be interpreted and applied with that end in view.
>
> "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia --civilians primarily, soldiers [***188] on occasion.
>
> "The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators." *Miller, 307 U.S., at 178-179, 59 S. Ct. 816, 83 L. Ed. 1206.*

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

V

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights "enshrine[d]" in the Constitution. *Ante, at ____, 171 L. Ed. 2d, at 684*. But the right the Court announces was not "enshrined" in the *Second Amendment* by the Framers; it is the product of today's law-changing decision. The majority's exegesis has utterly failed to establish that as a matter of text or history, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" is "elevate[d] above all other interests" by the *Second Amendment*. *Ante, at ____, 171 L. Ed. 2d, at 684*.

Until [***189] today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a "law-abiding, responsible citize[n]" the right to keep and use weapons in the home for self-defense is "off the table." *Ante, at ____, 171 L. Ed. 2d, at 684*. Given the presumption that most citizens are law abiding, and the [**710] reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.[39]

> 39 It was just a few years after the decision in *Miller* that Justice Frankfurter (by any measure a true judicial conservative) warned of the perils

> that would attend this Court's entry into the "political thicket" of legislative districting. *Colegrove v. Green, 328 U.S. 549, 556, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946)* [***190] (plurality opinion). The equally controversial political thicket that the Court has decided to enter today is qualitatively different from the one that concerned Justice Frankfurter: While our entry into that thicket was justified because the political process was manifestly unable to solve the problem of unequal districts, no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control. What impact the Court's unjustified entry into *this* thicket will have on that ongoing debate--or indeed on the Court itself--is a matter that future historians will no doubt discuss at length. It is, however, clear to me that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today.

I do not know whether today's decision will increase the labor of federal judges to [*2847] the "breaking point" envisioned by Justice Cardozo, but it will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries.

The Court properly disclaims any interest in evaluating the wisdom [***191] of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice--the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun-control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

For these reasons, I respectfully dissent.

Justice **Breyer,** with whom Justice **Stevens,** Justice **Souter,** and Justice **Ginsburg** join, dissenting.

We must decide whether a District of Columbia law that prohibits the possession of handguns in the home violates the *Second Amendment.* The Court, relying upon its view that the *Second Amendment* seeks to protect a right of personal self-defense, holds that this law violates that Amendment. In my view, it does not.

I

The majority's conclusion is wrong for two independent reasons. The first reason is that set forth by Justice [***192] Stevens--namely, that the *Second Amendment* protects militia-related, not self-defense-related, interests. These two interests are sometimes intertwined. To assure 18th-century citizens that they could keep arms for militia purposes would necessarily have allowed them to keep arms that they could have used for self-defense as well. But self-defense alone, detached from any militia-related objective, is not the Amendment's concern.

The second independent reason is that the protection the Amendment provides is not absolute. The Amendment permits government to regulate [**711] the interests that it serves. Thus, irrespective of what those interests are--whether they do or do not include an independent interest in self-defense--the majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in *Second Amendment* terms. This the majority cannot do.

In respect to the first independent reason, I agree with Justice Stevens, and I join his opinion. In this opinion I shall focus upon the second reason. I shall show that the District's law is consistent with the *Second Amendment* even if that Amendment is interpreted as protecting a wholly separate [***193] interest in individual self-defense. That is so because the District's regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem.

Thus I here assume that one objective (but, as the majority concedes, *ante, at ____, 171 L. Ed. 2d, at 661-662,* not the *primary* objective) of those who wrote the *Second Amendment* was to help assure citizens that they would have arms available for purposes of self-defense. Even so, a legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope [*2848] and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the *Second Amendment* was adopted. In these circumstances, the District's law falls [***194] within the zone that the *Second Amendment* leaves open to regulation by legislatures.

II

The *Second Amendment* says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In interpreting and applying this Amendment, I take as a starting point the following four propositions, based on our precedent and today's opinions, to which I believe the entire Court subscribes:

(1) The Amendment protects an "individual" right--*i.e.*, one that is separately possessed, and may be separately enforced, by each person on whom it is conferred. See, *e.g.*, *ante, at ____, 171 L. Ed. 2d, at 659* (opinion of the Court); *ante, at ____, 171 L. Ed. 2d, at 684* (Stevens, J., dissenting).

(2) As evidenced by its preamble, the Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces." *United States v. Miller, 307 U.S. 174, 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)*; see *ante, at ____, 171 L. Ed. 2d, at 661* (opinion of the Court); *ante, at ____, 171 L. Ed. 2d, at 684* (Stevens, J., dissenting).

(3) The Amendment "must be interpreted and applied with that end in view." *Miller, supra, at 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373*

(4) The right protected by the *Second Amendment* is not absolute, but instead is subject to government [***195] regulation. [**712] See *Robertson v. Baldwin, 165 U.S. 275, 281-282, 17 S. Ct. 326, 41 L. Ed. 715 (1897)*; *ante, at ____, ____, 171 L. Ed. 2d, at 659, 678* (opinion of the Court).

My approach to this case, while involving the first three points, primarily concerns the fourth. I shall, as I said, assume with the majority that the Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense, at least to some degree. And I shall then ask whether the Amendment nevertheless permits the District handgun restriction at issue here.

Although I adopt for present purposes the majority's position that the *Second Amendment* embodies a general concern about self-defense, I shall not assume that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars. The majority, which presents evidence in favor of the former proposition, does not, because it cannot, convincingly show that the *Second Amendment* seeks to maintain the latter in pristine, unregulated form.

To the contrary, colonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the "right to keep and bear arms," whether embodied in [***196] Federal or State Constitutions, or the background common law. And those examples include substantial regulation of firearms in urban areas, including regulations that imposed obstacles to the use of firearms for the protection of the home.

Boston, Philadelphia, and New York City, the three largest cities in America during that period, all restricted the firing of guns within city limits to at least some degree. See Churchill, Gun Regulation, the Police Power, and the Right to Keep [*2849] Arms in Early America, *25 Law & Hist. Rev. 139, 162 (2007)*; Dept. of Commerce, Bureau of Census, C. Gibson, Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990 (1998) (Table 2), online at http://www.census.gov/population/documentation/twps0027/tab02.txt (all Internet materials as visited June 19, 2008, and available in Clerk of Court's case file). Boston in 1746 had a law prohibiting the "discharge" of "any Gun or Pistol charged with Shot or Ball in the Town" on penalty of 40 shillings, a law that was later revived in 1778. See Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay, p. 208; An Act for Reviving and Continuing Sundry Laws that are Expired, and Near Expiring, 1778 Mass. Sess., [***197] Laws, ch. V, pp 193, 194. Philadelphia prohibited, on penalty of five shillings (or two days in jail if the fine were not paid), firing a gun or setting off fireworks in Philadelphia without a "governor's special license." See Act of Aug. 26, 1721, § IV, in 3 Stat. at Large of Pa. 253-254 (J. Mitchell & H. Flanders Comm'rs. 1896). And New York City banned, on penalty of a 20-shilling fine, the firing of guns (even in houses) for the three days surrounding New Year's Day. 5 Colonial Laws of New York, ch. 1501, pp 244-246 (1894); see also An Act to Suppress the Disorderly Practice of Firing Guns, & c., on the Times Therein Mentioned (1774), in 8 Stat. at Large of Pa. 410-412 (1902) (similar law for all "inhabited parts" of Pennsylvania). See also An Act for preventing Mischief being done in the Town of *Newport*, or in any other Town in this Government, 1731 Rhode Island Session Laws [**713] pp. 240-241 (prohibiting, on penalty of five shillings for a first offense and more for subsequent offenses, the firing of "any Gun or Pistol . . . in the Streets of any of the Towns of this Government, or in any Tavern of the same, after dark, on any Night whatsoever").

Furthermore, several towns and cities (including Philadelphia, [***198] New York, and Boston) regulated, for fire-safety reasons, the storage of gunpowder, a necessary component of an operational firearm. See Cornell & DeDino, A Well Regulated Right, *73 Ford. L. Rev. 487, 510-512 (2004)*. Boston's law in particular impacted the use of firearms in the home very much as the District's law does today. Boston's gunpowder law imposed a £10 fine upon "any Person" who "shall take into any Dwelling-House, Stable, Barn, Out-house,

Ware-house, Store, Shop, or other Building, within the Town of *Boston*, any . . . Fire-Arm, loaded with, or having Gun-Powder." An Act in Addition to the several Acts already made for the prudent Storage of Gun-Powder within the Town of *Boston*, ch. XIII, 1783 Mass. Acts pp. 218-219; see also 1 S. Johnson, A Dictionary of the English Language 751 (4th ed. 1773) (defining "firearms" as "[a]rms which owe their efficacy to fire; guns"). Even assuming, as the majority does, see *ante, at* ____ - ____, *171 L. Ed. 2d, at 681*, that this law included an implicit self-defense exception, it would nevertheless have prevented a homeowner from keeping in his home a gun that he could immediately pick up and use against an intruder. Rather, the homeowner would have had to get the gunpowder [***199] and load it into the gun, an operation that would have taken a fair amount of time to perform. See Hicks, United States Military Shoulder Arms, 1795-1935, 1 Journal of Am. Military Hist. Foundation 23, 30 (1937) (experienced soldier could, with specially prepared cartridges as opposed to plain gunpowder and ball, load and fire musket 3-to-4 times per minute); *id.*, at 26-30 (describing the loading process); see also Grancsay, The Craft of the Early American Gunsmith, 6 Metropolitan Museum of Art Bulletin 54, 60 (1947) (noting that rifles were slower to load and fire than muskets).

[*2850] Moreover, the law would, as a practical matter, have prohibited the carrying of loaded firearms anywhere in the city, unless the carrier had no plans to enter any building or was willing to unload or discard his weapons before going inside. And Massachusetts residents must have believed this kind of law compatible with the provision in the Massachusetts Constitution that granted "[t]he people . . . a right to keep and to bear arms for the common defence"--a provision that the majority says was interpreted as "secur[ing] an individual right to bear arms for defensive purposes." Art. XVII (1780), in 3 The Federal and State [***200] Constitutions, Colonial Charters, and Other Organic Laws 1888, 1892 (F. Thorpe ed. 1909) (hereinafter Thorpe); *ante, at* ____ - ____, *171 L. Ed. 2d, at 663* (opinion of the Court).

The New York City law, which required that gunpowder in the home be stored in certain sorts of containers, and laws in certain Pennsylvania towns, which required that gunpowder be stored on the highest story of the home, could well have presented similar obstacles to in-home use of firearms. See Act of Apr. 13, 1784, ch. 28, 1784 N. Y. Laws p 627; An Act for Erecting the Town of Carlisle, in the County of Cumberland, into a Borough, ch. XIV, § XLII, 1782 Pa. Laws p 49; An Act for Erecting the Town of [**714] Reading, in the County of Berks, into a Borough, ch. LXXVI, § XLII, 1783 Pa. Laws p 211. Although it is unclear whether these laws, like the Boston law, would have prohibited the storage of gunpowder inside a firearm, they would at the very least have made it difficult to reload the gun to fire a second shot unless the homeowner happened to be in the portion of the house where the extra gunpowder was required to be kept. See 7 United States Encyclopedia of History 1297 (P. Oehser ed. 1967) ("Until 1835 all small arms [were] single-shot [***201] weapons, requiring reloading by hand after every shot"). And Pennsylvania, like Massachusetts, had at the time one of the self-defense-guaranteeing state constitutional provisions on which the majority relies. See *ante, at* ____, *171 L. Ed. 2d, at 663* (citing *Pa. Declaration of Rights, § XIII (1776)*, in 5 Thorpe 3083).

The majority criticizes my citation of these colonial laws. See *ante, at* ____ - ____, *171 L. Ed. 2d, at 681-682*. But, as much as it tries, it cannot ignore their existence. I suppose it is possible that, as the majority suggests, see *ante, at* ____ - ____, *171 L. Ed. 2d, at 681-682*, they all in practice contained self-defense exceptions. But none of them expressly provided one, and the majority's assumption that such exceptions existed relies largely on the preambles to these acts--an interpretive methodology that it elsewhere roundly derides. Compare *ibid.* (interpreting 18th-century statutes in light of their preambles), with *ante, at* ____ - ____, *171 L. Ed. 2d, at 649, and n 3* (contending that the operative language of an 18th-century enactment may extend beyond its preamble). And in any event, as I have shown, the gunpowder-storage laws would have *burdened* armed self-defense, even if they did not completely *prohibit* it.

This historical evidence demonstrates that a self-defense assumption [***202] is the *beginning*, rather than the *end*, of any constitutional inquiry. That the District law impacts self-defense merely raises *questions* about the law's constitutionality. But to answer the questions that are raised (that is, to see whether the statute is unconstitutional) requires us to focus on practicalities, the statute's rationale, the problems that called it into being, its relation to those objectives--in a word, the details. There are no purely logical or conceptual answers to such questions. All of which to say that to raise a self-defense question is not to answer it.

III

I therefore begin by asking a process-based question: How is a court to determine [*2851] whether a particular firearm regulation (here, the District's restriction on handguns) is consistent with the *Second Amendment*? What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect?

The question matters. The majority is wrong when it says that the District's law is unconstitutional "[u]nder any of the standards of scrutiny that we have applied to

enumerated constitutional rights." *Ante, at ____, 171 L. Ed. 2d, at 679.* How could that be? It certainly would not be unconstitutional under, for example, [***203] a "rational-basis" standard, which requires a court to uphold regulation so long as it bears a "rational relationship" to a "legitimate governmental purpose." *Heller v. Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).* [**715] The law at issue here, which in part seeks to prevent gun-related accidents, at least bears a "rational relationship" to that "legitimate" life-saving objective. And nothing in the three 19th-century state cases to which the majority turns for support mandates the conclusion that the present District law must fall. See *Andrews v. State, 50 Tenn. 165, 177, 186-187, 192 (1871)* (striking down, as violating a *state* constitutional provision adopted in 1870, a *statewide* ban on carrying a broad class of weapons, insofar as it applied to revolvers); *Nunn v. State, 1 Ga. 243, 246, 250-251 (1846)* (striking down similarly broad ban on openly carrying weapons, based on erroneous view that the Federal *Second Amendment* applied to the States); *State v. Reid, 1 Ala. 612, 614-615, 622 (1840)* (*upholding* a concealed-weapon ban against a *state* constitutional challenge). These cases were decided well (80, 55, and 49 years, respectively) after the framing; they neither claim nor provide any special insight [***204] into the intent of the Framers; they involve laws much less narrowly tailored that the one before us; and state cases in any event are not determinative of federal constitutional questions, see, *e.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)* (citing *Martin v. Hunter's Lessee, 14 U.S. 304, 1 Wheat. 304, 4 L. Ed. 97 (1816)).*

Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." *Abrams v. Johnson, 521 U.S. 74, 82, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997)*; see Brief for Respondent 54-62. But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws--prohibitions on concealed weapons, forfeiture by criminals of the *Second Amendment* right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales--whose constitutionality under a strict scrutiny standard would be far from clear. See *ante, at ____, 171 L. Ed. 2d, at 678.*

Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. That is because almost every gun-control regulation will seek to advance [***205] (as the one here does) a "primary concern of every government--a concern for the safety and indeed the lives of its citizens." *United States v. Salerno, 481 U.S. 739, 755, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).* The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," see *id., at 750, 754, 107 S. Ct. 2095, 95 L. Ed. 2d 697*, and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, see, *e.g., Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam)* (*First Amendment* [*2852] free speech rights); *Sherbert v. Verner, 374 U.S. 398, 403, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)* (*First Amendment* religious rights); *Brigham City v. Stuart, 547 U.S. 398, 403-404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)* (*Fourth Amendment* protection of the home); *New York v. Quarles, 467 U.S. 649, 655, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984)* (*Fifth Amendment* rights under *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966))*; *Salerno, supra, at 755, 107 S.* [**716] *Ct. 2095, 95 L. Ed. 2d 697* (*Eighth Amendment* bail rights). Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the *Second Amendment* on one side and the governmental public-safety concerns on the other, [***206] the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. See *Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 402, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000)* (Breyer, J., concurring). Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. See *ibid.* Contrary to the majority's unsupported suggestion that this sort of "proportionality" approach is unprecedented, see *ante, at ____, 171 L. Ed. 2d, at 682,* [***207] the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases. See *528 U.S., at 403, 120 S. Ct. 897, 145 L. Ed. 2d 886* (citing examples where the Court has taken such an approach); see also, *e.g., Thompson v. Western States Medical Center, 535 U.S. 357, 388, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002)* (Breyer, J., dissenting) (commercial speech);

Burdick v. Takushi, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (election regulation); *Mathews v. Eldridge, 424 U.S. 319, 339-349, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)* (procedural due process); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)* (government employee speech).

In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. See *Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195-196, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997)*; see also *Nixon, supra, at 403, 120 S. Ct. 897, 145 L. Ed. 2d 886* (Breyer, J., concurring). Nonetheless, a court, not a legislature, must make the ultimate constitutional conclusion, exercising its "independent judicial judgment" in light of the whole record to determine whether a law exceeds constitutional boundaries. *Randall v. Sorrell, 548 U.S. 230, 249, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006)* [***208] (opinion of Breyer, J.) (citing *Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).*

The above-described approach seems preferable to a more rigid approach here for a further reason. Experience as much as logic has led the Court to decide that in one area of constitutional law or another [*2853] the interests [**717] are likely to prove stronger on one side of a typical constitutional case than on the other. See, *e.g., United States v. Virginia, 518 U.S. 515, 531-534, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)* (applying heightened scrutiny to gender-based classifications, based upon experience with prior cases); *Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955)* (applying rational-basis scrutiny to economic legislation, based upon experience with prior cases). Here, we have little prior experience. Courts that *do* have experience in these matters have uniformly taken an approach that treats empirically based legislative judgment with a degree of deference. See Winkler, Scrutinizing the *Second Amendment, 105 Mich. L. Rev. 683, 687, 716-718 (2007)* (describing hundreds of gun-law decisions issued in the last half century by Supreme Courts in 42 States, which courts with "surprisingly little variation" [***209] have adopted a standard more deferential than strict scrutiny). While these state cases obviously are not controlling, they are instructive. Cf., *e.g., Bartkus v. Illinois, 359 U.S. 121, 134, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959)* (looking to the "experience of state courts" as informative of a constitutional question). And they thus provide some comfort regarding the practical wisdom of following the approach that I believe our constitutional precedent would in any event suggest.

IV

The present suit involves challenges to three separate District firearm restrictions. The first requires a license from the District's Chief of Police in order to carry a "pistol," *i.e.*, a handgun, anywhere in the District. See *D. C. Code § 22-4504(a)* (2001); see also *§§ 22-4501(a), 22-4506.* Because the District assures us that respondent could obtain such a license so long as he meets the statutory eligibility criteria, and because respondent concedes that those criteria are facially constitutional, I, like the majority, see no need to address the constitutionality of the licensing requirement. See *ante, at ____ - ____, 171 L. Ed. 2d, at 680-681.*

The second District restriction requires that the lawful owner of a firearm keep his weapon "unloaded and disassembled or bound [***210] by a trigger lock or similar device" unless it is kept at his place of business or being used for lawful recreational purposes. See *§ 7-2507.02.* The only dispute regarding this provision appears to be whether the Constitution requires an exception that would allow someone to render a firearm operational when necessary for self-defense (*i.e.*, that the firearm may be operated under circumstances where the common law would normally permit a self-defense justification in defense against a criminal charge). See *Parker v. District of Columbia, 375 U.S. App. D.C. 140, 478 F.3d 370, 401 (2007)* (case below); *ante, at ____ - ____, 171 L. Ed. 2d, at 680* (opinion of the Court); Brief for Respondent 52-54. The District concedes that such an exception exists. See Brief for Petitioners 56-57. This Court has final authority (albeit not often used) to definitively interpret District law, which is, after all, simply a species of federal law. See, *e.g., Whalen v. United States, 445 U.S. 684, 687-688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)*; see also *Griffin v. United States, 336 U.S. 704, 716-718, 69 S. Ct. 814, 93 L. Ed. 993 (1949).* And because I see nothing in the District law that would *preclude* the [**718] existence of a background common-law self-defense exception, I would avoid the constitutional question by interpreting [***211] the statute to include it. See *Ashwander v. TVA, 297 U.S. 288, 348, 56 S. Ct. 466, 80 L. Ed. 688 (1936)* (Brandeis, J., concurring).

I am puzzled by the majority's unwillingness to adopt a similar approach. It readily reads unspoken self-defense exceptions into every colonial law, but it refuses [*2854] to accept the District's concession that this law has one. Compare *ante, at ____ - ____, 171 L. Ed. 2d, at 681-682*, with *ante, at ____ - ____, 171 L. Ed. 2d, at 680.* The one District case it cites to support that refusal, *McIntosh v. Washington, 395 A.2d 744, 755-756 (1978)*, merely concludes that the District Legislature had a rational basis for applying the trigger-lock law in homes but not in places of business. Nowhere does that

case say that the statute precludes a self-defense exception of the sort that I have just described. And even if it did, we are not bound by a lower court's interpretation of federal law.

The third District restriction prohibits (in most cases) the registration of a handgun within the District. See *§ 7-2502.02(a)(4)*. Because registration is a prerequisite to firearm possession, see *§ 7-2502.01(a)*, the effect of this provision is generally to prevent people in the District from possessing handguns. In determining whether this regulation violates the *Second Amendment*, [***212] I shall ask how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the *Second Amendment* seeks to protect, and whether there are practical less burdensome ways of furthering those interests. The ultimate question is whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate. See *Nixon, 528 U.S., at 402, 120 S. Ct. 897, 145 L. Ed. 2d 886* (Breyer, J., concurring).

A

No one doubts the constitutional importance of the statute's basic objective, saving lives. See, *e.g., Salerno, 481 U.S., at 755, 107 S. Ct. 2095, 95 L. Ed. 2d 697*. But there is considerable debate about whether the District's statute helps to achieve that objective. I begin by reviewing the statute's tendency to secure that objective from the perspective of (1) the legislature (namely, the Council of the District of Columbia (hereinafter Council)) that enacted the statute in 1976, and (2) a court that seeks to evaluate the Council's decision today.

1

First, consider the facts as the legislature saw them when it adopted the District statute. As stated by the local council committee that recommended its adoption, the major substantive goal of the District's handgun restriction is "to reduce [***213] the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia." Firearm Control Regulations Act of 1975 (Council Act No. 1-142), Hearing and Disposition before the House Committee on the District of Columbia, 94th Cong., 2d Sess., on H. Con. Res. 694, Ser. No. 94-24, p 25 (1976) (herinafter DC Rep.) (reproducing, *inter alia,* the Council committee report). The committee concluded, on the basis of "extensive public hearings" and "lengthy research," that "[t]he easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 [**719] years." *Id.*, at 24, 25. It reported to the Council "startling statistics," *id.*, at 26, regarding gun-related crime, accidents, and deaths, focusing particularly on the relation between handguns and crime and the proliferation of handguns within the District. See *id.*, at 25-26.

The committee informed the Council that guns were "responsible for 69 deaths in this country each day," for a total of "[a]pproximately 25,000 gun-deaths . . . each year," along with an additional 200,000 gun-related injuries. *Id.*, at 25. Three thousand of these deaths, the report stated, were accidental. *Ibid.* [***214] A quarter of the victims in those accidental deaths were children under the age of 14. *Ibid.* And according to the committee, "[f]or every [*2855] intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home." *Ibid.*

In respect to local crime, the committee observed that there were 285 murders in the District during 1974--a record number. *Id.*, at 26. The committee also stated that, "[c]ontrary to popular opinion on the subject, firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities." *Ibid.* Citing an article from the American Journal of Psychiatry, the committee reported that "[m]ost murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion or intoxication, and where the killer and victim are acquainted." *Ibid.* "Twenty-five percent of these murders," the committee informed the Council, "occur within families." *Ibid.*

The committee report furthermore presented statistics strongly correlating handguns with crime. Of the 285 murders in the District in 1974, 155 were committed with handguns. *Ibid.* This did not appear [***215] to be an aberration, as the report revealed that "handguns [had been] used in roughly 54% of all murders" (and 87% of murders of law enforcement officers) nationwide over the preceding several years. *Ibid.* Nor were handguns only linked to murders, as statistics showed that they were used in roughly 60% of robberies and 26% of assaults. *Ibid.* "A crime committed with a pistol," the committee reported, "is 7 times more likely to be lethal than a crime committed with any other weapon." *Id.*, at 25. The committee furthermore presented statistics regarding the availability of handguns in the United States, *ibid.*, and noted that they had "become easy for juveniles to obtain," even despite then-current District laws prohibiting juveniles from possessing them, *id.*, at 26.

In the committee's view, the current District firearms laws were unable "to reduce the potentiality for gun-related violence," or to "cope with the problems of gun control in the District" more generally. *Ibid.* In the absence of adequate federal gun legislation, the committee concluded, it "becomes necessary for local governments to act to protect their citizens, and certainly the

District of Columbia as the only totally urban [***216] statelike jurisdiction should be strong in its approach." *Id.*, at 27. It recommended that the Council adopt a restriction on handgun registration to reflect "a legislative decision that, at this point in time and due to the gun-control tragedies and horrors enumerated previously" in the committee report, "pistols . . . are no longer justified in this [**720] jurisdiction." *Id.*, at 31; see also *ibid.* (handgun restriction "denotes a policy decision that handguns . . . have no legitimate use in the purely urban environment of the District").

The District's special focus on handguns thus reflects the fact that the committee report found them to have a particularly strong link to undesirable activities in the District's exclusively urban environment. See *id.*, at 25-26. The District did not seek to prohibit possession of other sorts of weapons deemed more suitable for an "urban area." See *id.*, at 25. Indeed, an original draft of the bill, and the original committee recommendations, had sought to prohibit registration of shotguns as well as handguns, but the Council as a whole decided to narrow the prohibition. Compare *id.*, at 30 (describing early version of the bill), with *D. C. Code § 7-2502.02*).

2

Next, [***217] consider the facts as a court must consider them looking at the matter as of today. See, *e.g., Turner, 520 U.S., at 195, 117 S. Ct. 1174, 137 L. Ed. 2d 369* (discussing role of court as [*2856] fact-finder in a constitutional case). Petitioners, and their *amici,* have presented us with more recent statistics that tell much the same story that the committee report told 30 years ago. At the least, they present nothing that would permit us to second-guess the Council in respect to the numbers of gun crimes, injuries, and deaths, or the role of handguns.

From 1993 to 1997, there were 180,533 firearm-related deaths in the United States, an average of over 36,000 per year. Dept. of Justice, Bureau of Justice Statistics, M. Zawitz & K. Strom, Firearm Injury and Death from Crime, 1993-97, p 2 (Oct. 2000), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/fidc9397.pdf (hereinafter Firearm Injury and Death from Crime). Fifty-one percent were suicides, 44% were homicides, 1% were legal interventions, 3% were unintentional accidents, and 1% were of undetermined causes. See *ibid.* Over that same period there were an additional 411,800 nonfatal firearm-related injuries treated in U. S. hospitals, an average of over 82,000 per year. *Ibid.* Of these, [***218] 62% resulted from assaults, 17% were unintentional, 6% were suicide attempts, 1% were legal interventions, and 13% were of unknown causes. *Ibid.*

The statistics are particularly striking in respect to children and adolescents. In over one in every eight firearm-related deaths in 1997, the victim was someone under the age of 20. American Academy of Pediatrics, Firearm-Related Injuries Affecting the Pediatric Population, 105 Pediatrics 888 (2000) (hereinafter Firearm-Related Injuries). Firearm-related deaths account for 22.5% of all injury deaths between the ages of 1 and 19. *Ibid.* More male teenagers die from firearms than from all natural causes combined. Dresang, Gun Deaths in Rural and Urban Settings, 14 J. Am. Bd. Family Practice 107 (2001). Persons under 25 accounted for 47% of hospital-treated firearm injuries between June 1, 1992, and May 31, 1993. Firearm-Related Injuries 891.

Handguns are involved in a majority of firearm deaths and injuries in the United States. *Id.*, at 888. From 1993 to 1997, 81% of firearm-homicide victims were killed by handgun. Firearm Injury and Death from Crime 4; see also Dept. of Justice, Bureau of Justice Statistics, C. Perkins, Weapon Use and Violent [***219] Crime 8 (Sept. 2003) (Table 10), http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf [**721] (hereinafter Weapon Use and Violent Crime) (statistics indicating roughly the same rate for 1993-2001). In the same period, for the 41% of firearm injuries for which the weapon type is known, 82% of them were from handguns. Firearm Injury and Death from Crime 4. And among children under the age of 20, handguns account for approximately 70% of all unintentional firearm-related injuries and deaths. Firearm-Related Injuries 890. In particular, 70% of all firearm-related teenage suicides in 1996 involved a handgun. *Id.*, at 889; see also Zwerling, Lynch, Burmeister, & Goertz, The Choice of Weapons in Firearm Suicides in Iowa, 83 Am. J. Pub. Health 1630, 1631 (1993) (Table 1) (handguns used in 36.6% of all firearm suicides in Iowa from 1980-1984 and 43.8% from 1990-1991).

Handguns also appear to be a very popular weapon among criminals. In a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun. See Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Firearm Use by Offenders [***220] 3 (Nov. 2001), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/fuo.pdf; see also Weapon Use and Violent Crime 2 (Table 2) (statistics indicating that handguns were used in over [*2857] 84% of nonlethal violent crimes involving firearms from 1993 to 2001). And handguns are not only popular tools for crime, but popular objects of it as well: the Federal Bureau of Investigation received on average over 274,000 reports of stolen guns for each year between 1985 and 1994, and almost 60% of stolen guns are handguns. Dept. of Justice, Bureau of Justice Statistics, M. Zawitz, Guns Used in Crime 3 (July 1995), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf.

Department of Justice studies have concluded that stolen handguns in particular are an important source of weapons for both adult and juvenile offenders. *Ibid.*

Statistics further suggest that urban areas, such as the District, have different experiences with gun-related death, injury, and crime than do less densely populated rural areas. A disproportionate amount of violent and property crimes occur in urban areas, and urban criminals are more likely than other offenders to use a firearm during the commission of a violent crime. See Dept. of Justice, Bureau [***221] of Justice Statistics, D. Duhart, Urban, Suburban, and Rural Victimization, 1993-98, pp 1, 9 (Oct. 2000), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/usrv98.pdf. Homicide appears to be a much greater issue in urban areas; from 1985 to 1993, for example, "half of all homicides occurred in 63 cities with 16% of the nation's population." Wintemute, The Future of Firearm Violence Prevention, 282 JAMA 475 (1999). One study concluded that although the overall rate of gun death between 1989 and 1999 was roughly the same in urban and rural areas, the urban homicide rate was three times as high; even after adjusting for other variables, it was still twice as high. Branas, Nance, Elliott, Richmond, & Schwab, Urban-Rural Shifts in Intentional Firearm Death, 94 Am. J. Pub. Health 1750, 1752 (2004); see also *ibid.* (noting that rural areas appear to have a higher rate of firearm suicide). And a study of firearm injuries to children and adolescents in Pennsylvania between 1987 and 2000 showed an injury rate in urban counties 10 times higher than in nonurban [**722] counties. Nance et al., The Rural-Urban Continuum, 156 Archives of Pediatrics & Adolescent Medicine 781, 782 (2002).

Finally, the linkage [***222] of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas. "[S]tudies to date generally support the hypothesis that the greater number of rural gun deaths are from rifles or shotguns, whereas the greater number of urban gun deaths are from handguns." Dresang, *supra*, at 108. And the Pennsylvania study reached a similar conclusion with respect to firearm injuries--they are much more likely to be caused by handguns in urban areas than in rural areas. See Nance et al., *supra*, at 784.

3

Respondent and his many *amici* for the most part do not disagree about the *figures* set forth in the preceding subsection, but they do disagree strongly with the District's *predictive judgment* that a ban on handguns will help solve the crime and accident problems that those figures disclose. In particular, they disagree with the District Council's assessment that "freezing the pistol . . . population within the District," DC Rep., at 26, will reduce crime, accidents, and deaths related to guns. And they provide facts and figures designed to show that it has not done so in the past, and hence will not do so in the future.

First, they point out that, since the ban [***223] took effect, violent crime in the District has increased, not decreased. See Brief for Criminologists et al. as *Amici Curiae* 4-8, 3a (hereinafter Criminologists' Brief); Brief for Congress of Racial Equality as [*2858] *Amicus Curiae* 35-36; Brief for National Rifle Assn. et al. as *Amici Curiae* 28-30 (hereinafter NRA Brief). Indeed, a comparison with 49 other major cities reveals that the District's homicide rate is actually substantially *higher* relative to these other cities than it was before the handgun restriction went into effect. See Brief for Academics et al. as *Amici Curiae* 7-10 (hereinafter Academics' Brief); see also Criminologists' Brief 6-9, 3a-4a, 7a. Respondent's *amici* report similar results in comparing the District's homicide rates during that period to that of the neighboring States of Maryland and Virginia (neither of which restricts handguns to the same degree), and to the homicide rate of the Nation as a whole. See Academics' Brief 11-17; Criminologists' Brief 6a, 8a.

Second, respondent's *amici* point to a statistical analysis that regresses murder rates against the presence or absence of strict gun laws in 20 European nations. See Criminologists' Brief 23 (citing Kates & Mauser, [***224] Would Banning Firearms Reduce Murder and Suicide? *30 Harv. J. L. & Pub. Pol'y 649, 651-694 (2007)*). That analysis concludes that strict gun laws are correlated with *more* murders, not fewer. See Criminologists' Brief 23; see also *id.*, at 25-28. They also cite domestic studies, based on data from various cities, States, and the Nation as a whole, suggesting that a reduction in the number of guns does not lead to a reduction in the amount of violent crime. See *id.*, at 17-20. They further argue that handgun bans do not reduce suicide rates, see *id.*, at 28-31, 9a, or rates of accidents, even those involving children, see Brief for International Law Enforcement Educators and Trainers Assn. et al. as *Amici Curiae* App. 7-15 (hereinafter ILEETA Brief).

[**723] Third, they point to evidence indicating that firearm ownership does have a beneficial self-defense effect. Based on a 1993 survey, the authors of one study estimated that there were 2.2-to-2.5 million defensive uses of guns (mostly brandishing, about a quarter involving the actual firing of a gun) annually. See Kleck & Gertz, Armed Resistance to Crime, 86 J. Crim. L. & C. 150, 164 (1995); see also ILEETA Brief App. 1-6 (summarizing studies regarding [***225] defensive uses of guns). Another study estimated that for a period of 12 months ending in 1994, there were 503,481 incidents in which a burglar found himself confronted by an armed homeowner, and that in 497,646

(98.8%) of them, the intruder was successfully scared away. See Ikeda, Dahlberg, Sacks, Mercy, & Powell, Estimating Intruder-Related Firearms Retrievals in U. S. Households, 12 Violence & Victims 363 (1997). A third study suggests that gun-armed victims are substantially less likely than non-gun-armed victims to be injured in resisting robbery or assault. Barnett & Kates, Under Fire, *45 Emory L. J. 1139, 1243-1244, n 478 (1996)*. And additional evidence suggests that criminals are likely to be deterred from burglary and other crimes if they know the victim is likely to have a gun. See Kleck, Crime Control Through the Private Use of Armed Force, 35 Social Problems 1, 15 (1988) (reporting a substantial drop in the burglary rate in an Atlanta suburb that required heads of households to own guns); see also ILEETA Brief 17-18 (describing decrease in sexual assaults in Orlando when women were trained in the use of guns).

Fourth, respondent's *amici* argue that laws criminalizing gun [***226] possession are self-defeating, as evidence suggests that they will have the effect only of restricting law-abiding citizens, but not criminals, from acquiring guns. See, *e.g.*, Brief for President *Pro Tempore* of Senate of Pennsylvania as *Amicus Curiae* 35, 36, and n 15. That effect, they argue, will be especially pronounced in the District, whose proximity [*2859] to Virginia and Maryland will provide criminals with a steady supply of guns. See Brief for Heartland Institute as *Amicus Curiae* 20.

In the view of respondent's *amici*, this evidence shows that other remedies--such as *less* restriction on gun ownership, or liberal authorization of law-abiding citizens to carry concealed weapons--better fit the problem. See, *e.g.*, Criminologists' Brief 35-37 (advocating easily obtainable gun licenses); Brief for Southeastern Legal Foundation, Inc., et al. as *Amici Curiae* 15 (hereinafter SLF Brief) (advocating "widespread gun ownership" as a deterrent to crime); see also J. Lott, More Guns, Less Crime (2d ed. 2000). They further suggest that at a minimum the District fails to show that its *remedy*, the gun ban, bears a reasonable relation to the crime and accident *problems* that the District seeks to solve. [***227] See, *e.g.*, Brief for Respondent 59-61.

These empirically based arguments may have proved strong enough to convince many legislatures, as a matter of legislative policy, not to adopt total handgun bans. But the question here is whether they are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them. And that they are not. For one thing, they can lead us more deeply into the uncertainties that surround any effort to reduce crime, but they cannot prove either that handgun possession diminishes [**724] crime or that handgun bans are ineffective. The statistics do show a soaring District crime rate. And the District's crime rate went up after the District adopted its handgun ban. But, as students of elementary logic know, *after it* does not mean *because of it*. What would the District's crime rate have looked like without the ban? Higher? Lower? The same? Experts differ; and we, as judges, cannot say.

What about the fact that foreign nations with strict gun laws have higher crime rates? Which is the cause and which the effect? The proposition that strict gun laws *cause* crime is harder to accept than the proposition that strict gun laws in part grow out [***228] of the fact that a nation already has a higher crime rate. And we are then left with the same question as before: What would have happened to crime without the gun laws--a question that respondent and his *amici* do not convincingly answer.

Further, suppose that respondent's *amici* are right when they say that householders' possession of loaded handguns help to frighten away intruders. On that assumption, one must still ask whether that benefit is worth the potential death-related cost. And that is a question without a directly provable answer.

Finally, consider the claim of respondent's *amici* that handgun bans *cannot* work; there are simply too many illegal guns already in existence for a ban on legal guns to make a difference. In a word, they claim that, given the urban sea of pre-existing legal guns, criminals can readily find arms regardless. Nonetheless, a legislature might respond, we want to make an effort to try to dry up that urban sea, drop by drop. And none of the studies can show that effort is not worthwhile.

In a word, the studies to which respondent's *amici* point raise policy-related questions. They succeed in proving that the District's predictive judgments are controversial. [***229] But they do not by themselves show that those judgments are incorrect; nor do they demonstrate a consensus, academic or otherwise, supporting that conclusion.

Thus, it is not surprising that the District and its *amici* support the District's [*2860] handgun restriction with studies of their own. One in particular suggests that, statistically speaking, the District's law has indeed had positive life-saving effects. See Loftin, McDowall, Weirsema, & Cottey, Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia, 325 New England J. Med. 1615 (1991) (hereinafter Loftin study). Others suggest that firearm restrictions as a general matter reduce homicides, suicides, and accidents in the home. See, *e.g.*, Duggan, More Guns, More Crime, 109 J. Pol. Econ. 1086 (2001); Kellermann, Somes, Rivara, Lee, & Banton, Injuries and Deaths Due to Firearms in the Home, 45 J. Trauma: Injury, Infection & Critical Care 263 (1998); Miller,

Azrael, & Hemenway, Household Firearm Ownership and Suicide Rates in the United States, 13 Epidemiology 517 (2002). Still others suggest that the defensive uses of handguns are not as great in number as respondent's *amici* claim. See, *e.g.*, Brief for [***230] American Public Health Assn. et al. as *Amici Curiae* 17-19 (hereinafter APHA Brief) (citing studies).

Respondent and his *amici* reply to these responses; and in doing so, they seek to discredit as methodologically flawed the studies and evidence relied upon by the District. See, *e.g.*, Criminologists' Brief 9-17, 20-24; Brief for [**725] Assn. Am. Physicians and Surgeons, Inc., as *Amicus Curiae* 12-18; SLF Brief 17-22; Britt, Kleck, & Bordua, A Reassessment of the D.C. Gun Law, 30 Law & Soc'y Rev. 361 (1996) (criticizing the Loftin study). And, of course, the District's *amici* produce counterrejoinders, referring to articles that defend their studies. See, *e.g.*, APHA Brief 23, n 5 (citing McDowall, Loftin, & Wiersema, Using Quasi-Experiments to Evaluate Firearm Laws, 30 Law & Soc'y Rev. 381 (1996)).

The upshot is a set of studies and counterstudies that, at most, could leave a judge uncertain about the proper policy conclusion. But from respondent's perspective any such uncertainty is not good enough. That is because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact. And, given that constitutional allocation of decisionmaking responsibility, [***231] the empirical evidence presented here is sufficient to allow a judge to reach a firm *legal* conclusion.

In particular this Court, in *First Amendment* cases applying intermediate scrutiny, has said that our "sole obligation" in reviewing a legislature's "predictive judgments" is "to assure that, in formulating its judgments," the legislature "has drawn reasonable inferences based on substantial evidence." *Turner, 520 U.S., at 195, 117 S. Ct. 1174, 137 L. Ed. 2d 369* (internal quotation marks omitted). And judges, looking at the evidence before us, should agree that the District legislature's predictive judgments satisfy that legal standard. That is to say, the District's judgment, while open to question, is nevertheless supported by "substantial evidence."

There is no cause here to depart from the standard set forth in *Turner*, for the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. See *Nixon, 528 U.S., at 402, 120 S. Ct. 897, 145 L. Ed. 2d 886* (Breyer, J., concurring). In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local [***232] solutions. See *Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002)* (plurality opinion) ("[W]e must acknowledge that the Los Angeles City Council is in a better [*2861] position than the Judiciary to gather and evaluate data on local problems"); cf. DC Rep., at 67 (statement of Rep. Gude) (describing District's law as "a decision made on the local level after extensive debate and deliberations"). Different localities may seek to solve similar problems in different ways, and a "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)* (internal quotation marks omitted). "The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them." *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 575, n 8, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)* (Powell, J., dissenting) (citing The Federalist No. 17, p 107 (J. Cooke ed. 1961) (A. Hamilton)). We owe that democratic process some substantial weight in the constitutional calculus.

[**726] For these reasons, [***233] I conclude that the District's statute properly seeks to further the sort of life-preserving and public-safety interests that the Court has called "compelling." *Salerno, 481 U.S., at 750, 754, 107 S. Ct. 2095, 95 L. Ed. 2d 697.*

B

I next assess the extent to which the District's law burdens the interests that the *Second Amendment* seeks to protect. Respondent and his *amici*, as well as the majority, suggest that those interests include: (1) the preservation of a "well regulated Militia"; (2) safeguarding the use of firearms for sporting purposes, *e.g.*, hunting and marksmanship; and (3) assuring the use of firearms for self-defense. For argument's sake, I shall consider all three of those interests here.

1

The District's statute burdens the *Amendment's first* and primary objective hardly at all. As previously noted, there is general agreement among the Members of the Court that the principal (if not the only) purpose of the *Second Amendment* is found in the Amendment's text: the preservation of a "well regulated Militia." See *supra, at ____, 171 L. Ed. 2d, at 711.* What scant Court precedent there is on the *Second Amendment* teaches that the Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [***234] [militia] forces" and "must be interpreted and applied with that end in view." *Miller, 307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206.* Where

that end is implicated only minimally (or not at all), there is substantially less reason for constitutional concern. Compare *ibid.* ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the *Second Amendment* guarantees the right to keep and bear such an instrument").

To begin with, the present case has nothing to do with *actual* military service. The question presented presumes that respondent is "*not* affiliated with any state-regulated militia." *552 U.S. 1035, 128 S. Ct. 645, 169 L. Ed. 2d 417 (2007)* (emphasis added). I am aware of no indication that the District either now or in the recent past has called up its citizenry to serve in a militia, that it has any inkling of doing so anytime in the foreseeable future, or that this law must be construed to prevent the use of handguns during legitimate militia activities. Moreover, even if [*2862] the District were to call up its militia, respondent would not [***235] be among the citizens whose service would be requested. The District does not consider him, at 66 years of age, to be a member of its militia. See *D. C. Code § 49-401 (2001)* (militia includes only male residents ages 18 to 45); App. to Pet. for Cert. 120a (indicating respondent's date of birth).

Nonetheless, as some *amici* claim, the statute might interfere with training in the use of weapons, training useful for military purposes. The 19th-century constitutional scholar, Thomas Cooley, wrote that the *Second Amendment* protects "learning to handle and use [arms] in a way that makes those who keep them ready for their efficient use" during militia service. General Principles of Constitutional Law 271 (1880); *ante, at ____*, [**727] *171 L. Ed. 2d, at 673* (opinion of the Court); see also *ante, at ____ - ____, 171 L. Ed. 2d, at 673-674* (citing other scholars agreeing with Cooley on that point). And former military officers tell us that "private ownership of firearms makes for a more effective fighting force" because "[m]ilitary recruits with previous firearms experience and training are generally better marksmen, and accordingly, better soldiers." Brief for Retired Military Officers as *Amici Curiae* 1-2 (hereinafter Military Officers' Brief). An *amicus* brief [***236] filed by retired Army generals adds that a "well-regulated militia--whether *ad hoc* or as part of our organized military --depends on recruits who have familiarity and training with firearms --rifles, pistols, and shotguns." Brief for Major General John D. Altenburg, Jr., et al. as *Amici Curiae* 4 (hereinafter Generals' Brief). Both briefs point out the importance of handgun training. Military Officers' Brief 26-28; Generals' Brief 4. Handguns are used in military service, see Military Officers' Brief 26, and "civilians who are familiar with handgun marksmanship and safety are much more likely to be able to safely and accurately fire a rifle or other firearm with minimal training upon entering military service," *id.*, at 28.

Regardless, to consider the military-training objective a modern counterpart to a similar militia-related colonial objective and to treat that objective as falling within the Amendment's primary purposes makes no difference here. That is because the District's law does not seriously affect military-training interests. The law permits residents to engage in activities that will increase their familiarity with firearms. They may register (and thus possess in their homes) weapons other [***237] than handguns, such as rifles and shotguns. See *D. C. Code §§ 7-2502.01, 7-2502.02(a)* (only weapons that cannot be registered are sawed-off shotguns, machineguns, short-barreled rifles, and pistols not registered before 1976); compare Generals' Brief 4 (listing "*rifles*, pistols, and *shotguns*" as useful military weapons (emphasis added). And they may operate those weapons within the District "for lawful recreational purposes." *§ 7-2507.02*; see also *§ 7-2502.01(b)(3)* (nonresidents "participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction," may carry even weapons not registered in the District). These permissible recreations plainly include actually using and firing the weapons, as evidenced by a specific D. C. Code provision contemplating the existence of local firing ranges. See *§ 7-2507.03*.

And while the District law prevents citizens from training with handguns *within the District*, the District consists of only 61.4 square miles of urban area. See Dept. of Commerce, Bureau of Census, United States: 2000 (pt. 1), p 11 (2002) (Table 8). The adjacent States do permit the use of handguns for target [***238] practice, and those States are only a brief subway ride away. See *Md. Crim. Law Code Ann. § 4-203(b)(4)* [*2863] *(Lexis Supp. 2007)* (general handgun restriction does not apply to "the wearing, carrying, or transporting by a person of a handgun used in connection with," *inter alia*, "a target shoot, formal or informal target practice, sport shooting event, hunting, [or] a Department of Natural Resources-sponsored firearms and hunter safety class"); *Va. Code Ann. § 18.2-287.4 (Lexis Supp. 2007)* (general [**728] restriction on carrying certain loaded pistols in certain public areas does not apply "to any person actually engaged in lawful hunting or lawful recreational shooting activities at an established shooting range or shooting contest"); Washington Metropolitan Area Transit Authority, Metrorail System Map, online at http://www.wmata.com/metrorail/systemmap.cfm.

Of course, a subway rider must buy a ticket, and the ride takes time. It also costs money to store a pistol,

say, at a target range, outside the District. But given the costs already associated with gun ownership and firearms training, I cannot say that a subway ticket and a short subway ride (and storage costs) create more than a minimal burden. Compare [***239] *Crawford v. Marion County Election Bd., 553 U.S. 181, 238-239, 128 S. Ct. 1610, 170 L. Ed. 2d 574, 613 (2008)* (Breyer, J., dissenting) (acknowledging travel burdens on indigent persons in the context of voting where public transportation options were limited). Indeed, respondent and two of his coplaintiffs below may well use handguns outside the District on a regular basis, as their declarations indicate that they keep such weapons stored there. See App. to Pet. for Cert. 77a (respondent); see also *id.*, at 78a, 84a (coplaintiffs). I conclude that the District's law burdens the *Second Amendment's* primary objective little, or not at all.

2

The majority briefly suggests that the "right to keep and bear Arms" might encompass an interest in hunting. See, *e.g.*, *ante, at ____, 171 L. Ed. 2d, at 662*. But in enacting the present provisions, the District sought to "take nothing away from sportsmen." DC Rep., at 33. And any inability of District residents to hunt near where they live has much to do with the jurisdiction's exclusively urban character and little to do with the District's firearm laws. For reasons similar to those I discussed in the preceding subsection--that the District's law does not prohibit possession of rifles or shotguns, and [***240] the presence of opportunities for sporting activities in nearby States--I reach a similar conclusion, namely, that the District's law burdens any sports-related or hunting-related objectives that the Amendment may protect little, or not at all.

3

The District's law does prevent a resident from keeping a loaded handgun in his home. And it consequently makes it more difficult for the householder to use the handgun for self-defense in the home against intruders, such as burglars. As the Court of Appeals noted, statistics suggest that handguns are the most popular weapon for self defense. See *478 F.3d at 400* (citing Kleck & Gertz, 86 J. Crim. L. & C., at 182-183). And there are some legitimate reasons why that would be the case: *Amici* suggest (with some empirical support) that handguns are easier to hold and control (particularly for persons with physical infirmities), easier to carry, easier to maneuver in enclosed spaces, and that a person using one will still have a hand free to dial 911. See ILEETA Brief 37-39; NRA Brief 32-33; see also *ante, at ____, 171 L. Ed. 2d, at 679*. But see Brief for Petitioners 54-55 (citing sources preferring shotguns and rifles to handguns for purposes of self-defense). To that extent [***241] the law burdens to some [*2864] degree an interest in self-defense that for present purposes I have assumed the Amendment seeks to further.

[**729] C

In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive, alternatives. Are there *other* potential measures that might similarly promote the same goals while imposing lesser restrictions? See *Nixon, 528 U.S., at 402, 120 S. Ct. 897, 145 L. Ed. 2d 886* (Breyer, J., concurring) ("existence of a clearly superior, less restrictive alternative" can be a factor in determining whether a law is constitutionally proportionate). Here I see none.

The reason there is no clearly superior, less restrictive alternative to the District's handgun ban is that the ban's very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that *any* handgun he sees is an *illegal* handgun. And there is no plausible way to achieve that objective other than to ban the guns.

It does not help respondent's case to describe the District's objective more generally as an "effort to diminish the dangers associated with guns." That is because the very attributes that make handguns [***242] particularly useful for self-defense are also what make them particularly dangerous. That they are easy to hold and control means that they are easier for children to use. See Brief for American Academy of Pediatrics et al. as *Amici Curiae* 19 ("[C]hildren as young as three are able to pull the trigger of most handguns"). That they are maneuverable and permit a free hand likely contributes to the fact that they are by far the firearm of choice for crimes such as rape and robbery. See Weapon Use and Violent Crime 2 (Table 2). That they are small and light makes them easy to steal, see *supra, at ____, 171 L. Ed. 2d, at 721*, and concealable, cf. *ante, at ____, 171 L. Ed. 2d, at 679* (opinion of the Court) (suggesting that concealed-weapon bans are constitutional).

This symmetry suggests that any measure less restrictive in respect to the use of handguns for self-defense will, to that same extent, prove less effective in preventing the use of handguns for illicit purposes. If a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to commit suicide or engage in acts of domestic violence. See *supra, at ____, 171 L. Ed. 2d, at 721* (handguns prevalent in suicides); Brief for National Network to End Domestic [***243] Violence et al. as *Amici Curiae* 27 (handguns prevalent in domestic violence). If it is indeed the case, as the District believes, that the number of guns contributes to the number of gun-related crimes, accidents, and deaths, then, although

there may be less restrictive, *less effective* substitutes for an outright ban, there is no less restrictive *equivalent* of an outright ban.

Licensing restrictions would not similarly reduce the handgun population, and the District may reasonably fear that even if guns are initially restricted to law-abiding citizens, they might be stolen and thereby placed in the hands of criminals. See *supra, at ____, 171 L. Ed. 2d, at 721*. Permitting certain types of handguns, but not others, would affect the commercial market for handguns, but not their availability. And requiring safety devices such as trigger locks, or imposing safe-storage requirements would interfere with any self-defense interest while simultaneously leaving [**730] operable weapons in the hands of owners (or others capable of acquiring the weapon and disabling the safety device) who might use them for domestic violence or other crimes.

[redacted]

The absence of equally effective alternatives to a complete prohibition finds support in [***244] the empirical fact that other States [*2865] and urban centers prohibit particular types of weapons. Chicago has a law very similar to the District's, and many of its suburbs also ban handgun possession under most circumstances. See Chicago, Ill., Municipal Code §§ 8-20-030(k), 8-20-40, 8-20-50(c) (2008); Evanston, Ill., City Code § 9-8-2 (2007); Morton Grove, Ill., Village Code § 6-2-3(C) (2007); Oak Park, Ill., Village Code § 27-2-1 (2007); Winnetka, Ill., Village Ordinance § 9.12.020(B) (2008), online at http:// www.amlegal.com/library/il/ winnetka.shtml; Wilmette, Ill., Ordinance § 12-24(b) (2008), online at http:// www.amlegal.com/library/il/ wilmette.shtml. Toledo bans certain types of handguns. Toledo, Ohio, Municipal Code, § 549.25 (2008). And San Francisco in 2005 enacted by popular referendum a ban on most handgun possession by city residents; it has been precluded from enforcing that prohibition, however, by state-court decisions deeming it pre-empted by state law. See *Fiscal v. City and County of San Francisco, 158 Cal. App. 4th 895, 900-902, 70 Cal.Rptr. 3d 324, 326-328 (2008)*. (Indeed, the fact that as many as 41 States may pre-empt local gun regulation suggests that the absence of more regulation like the District's may perhaps have more to do with state law than with a lack of locally perceived [***245] need for them. See Legal Community Against Violence, Regulating Guns in America 14 (2006), http://www.lcav.org/Library/reports_analyses/National_Audit_Total_8.16.06.pdf.

134-8 (1993); *Md. Crim. Law Code Ann. § 4-303(a) (Lexis 2002)*; *Mass. Gen. Laws, ch. 140, § 131M (West 2006)*; *N. Y. Penal Law Ann. § 265.02(7) (West Supp. 2008)*; *25 P.R. Laws Ann. § 456m (Supp. 2006)*; see also *18 U.S.C. § 922(o)* (federal machinegun ban). And at least 14 municipalities do the same. See Albany, N. Y., Municipal Code § 193-16(A) (2005); Aurora, Ill., Ordinance § 29-49(a) (2007); Buffalo, N. Y., City Code § 180-1(F) (2000); Chicago, Ill., Municipal Code §§ 8-24-025(a), 8-20-030(h); Cincinnati, Ohio, Municipal Code § 708-37(a) (Supp. 2008); Cleveland, Ohio, Ordinance § 628.03(a) (2007); Columbus, Ohio, City Code § 2323.31 (2008); Denver, Colo., Revised Municipal Code § 38-130(e) (2008); Morton Grove, Ill., Village Code § 6-2-3(B) (2007); *N.Y. City Admin. Code § 10-303.1 (1996 and Supp. 2007)*; [***246] Oak Park, Ill., *Village Code § 27-2-1 (2007)*; Rochester, N. Y., Code § 47-5(f) (2008), online at http:// www.ci. roche-

ance §§ 13-97(b), 13-98 (2008) online at http://library2. municode.cumm// default/DocView 13974/i/2; Toledo, Ohio, Municipal Code § 549.23(a). These bans, too, suggest that there may be no substitute to an outright prohibition in cases where a governmental body has deemed a particular type of weapon especially dangerous.

D

The upshot is that the District's objectives are compelling; its predictive judgments as to its law's tendency to achieve those objectives are adequately supported; the law does impose a burden upon any self-defense interest that the Amendment seeks to secure; and there is no clear [**731] less restrictive alternative. I turn now to the final portion of the "permissible regulation" question: Does the District's law *disproportionately* burden Amendment-protected interests? Several considerations, taken together, convince me that it does not.

First, the District law is tailored to the life-threatening problems it attempts to address. The law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition. The area that falls within its scope is totally urban. Cf. *Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 563, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)* [***247] (varied [*2866] effect of statewide speech restriction in "rural, urban, or suburban" locales "demonstrates a lack of narrow tailoring"). That urban area suffers from a serious handgun-fatality problem. The

primary interest, but at most a subsidiary interest, that the *Second Amendment* seeks to serve. The *Second Amendment's* language, while speaking of a "Militia," says nothing of "self-defense." As Justice Stevens points out, the *Second Amendment's* drafting history shows that the language reflects the Framers' primary, if not exclusive, objective. See *ante, at ____ - ____, 171 L. Ed. 2d, at 693-700* (dissenting opinion). And the majority itself says that "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was *the* reason that right . . . was codified in a written Constitution." *Ante, at ____, 171 L. Ed. 2d, at 662* (emphasis added). The *way* in which the Amendment's operative clause seeks to promote that interest--by protecting a right "to keep and [***248] bear Arms"--may *in fact* help further an interest in self-defense. But a factual connection falls far short of a primary objective. The Amendment itself tells us that militia preservation was first and foremost in the Framers' minds. See *Miller, 307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206* ("With obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantee of the *Second Amendment* were made," and the Amendment "must be interpreted and applied with that end in view").

Further, any self-defense interest at the time of the framing could not have focused exclusively upon urban-crime-related dangers. Two hundred years ago, most Americans, many living on the frontier, would likely have thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways. See Dept. of Commerce, Bureau of Census, Population: 1790 to 1990 (1998) (Table 4), online at http://www.census.gov/population/censusdata/table-4.pdf (of the 3,929,214 Americans in 1790, only 201,655--about 5%--lived in urban areas). Insofar as the [***249] Framers focused at all on the tiny fraction of the population living in large cities, they would have been aware that these city dwellers were subject to firearm restrictions that their rural counterparts were not. See *supra, at ____ - ____, 171 L. Ed. 2d, at 712-713.* They are unlikely then to [**732] have thought of a right to keep loaded handguns in homes to confront intruders in urban settings as *central.* And the subsequent development of modern urban police departments, by diminishing the need to keep loaded guns nearby in case of intruders, would have moved any such right even further away from the heart of the Amendment's more basic protective ends. See, *e.g.*, Sklansky, The Private Police, *46 UCLA L. Rev. 1165, 1206-1207 (1999)* (professional urban police departments did not develop until roughly the mid-19th century).

Nor, for that matter, am I aware of any evidence that *handguns* in particular were central to the Framers' conception of the *Second Amendment.* The lists of militia-related weapons in the late-18th-century state statutes appear primarily to refer to other sorts of weapons, muskets in particular. See *Miller, supra, at 180-182, 59 S. Ct. 816, 83 L. Ed. 1206* (reproducing colonial militia laws). Respondent points out in his brief that the [***250] Federal Government and two States at the time of the founding had [*2867] enacted statutes that listed handguns as "acceptable" militia weapons. Brief for Respondent 47. But these statutes apparently found them "acceptable" only for certain special militiamen (generally, certain soldiers on horseback), while requiring muskets or rifles for the general infantry. See Act of May 8, 1792, ch. XXXIII, 1 Stat. 271; Laws of the State of North Carolina 592 (1791); First Laws of the State of Connecticut 150 (J. Cushing ed. 1982); see also 25 Journals of the Continental Congress, 1774-1789, pp. 741-742 (G. Hunt ed. 1922).

Third, irrespective of what the Framers *could have thought,* we know what they *did think.* Samuel Adams, who lived in Boston, advocated a constitutional amendment that would have precluded the Constitution from ever being "'construed'" to "'prevent the people of the United States, who are peaceable citizens, from keeping their own arms.'" 6 Documentary History of the Ratification of the Constitution 1453 (J. Kaminski & G. Saladino eds. 2000). Samuel Adams doubtless knew that the Massachusetts Constitution contained somewhat similar protection. And he doubtless knew that Massachusetts law prohibited Bostonians from keeping [***251] loaded guns in the house. So how could Samuel Adams have advocated such protection *unless* he thought that the protection was *consistent* with local regulation that seriously impeded urban residents from using their arms against intruders? It seems unlikely that he meant to deprive the Federal Government of power (to enact Boston-type weapons regulation) that he knew Boston had and (as far as we know) he would have thought constitutional under the Massachusetts Constitution. Indeed, since the District of Columbia (the subject of the Seat of Government Clause, *U.S. Const., Art. I, § 8, cl. 17*) was the only *urban* area under direct federal control, it seems unlikely that the Framers thought about *urban* gun control at all. Cf. *Palmore v. United States, 411 U.S. 389, 398, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973)* (Congress can "legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it").

Of course the District's law and the colonial Boston law are not identical. But the Boston law disabled an even wider class of weapons (indeed, all firearms). And

its existence shows at [***252] the least that local legislatures could [**733] impose (as here) serious restrictions on the right to use firearms. Moreover, as I have said, Boston's law, though highly analogous to the District's, was not the *only* colonial law that could have impeded a homeowner's ability to shoot a burglar. Pennsylvania's and New York's laws could well have had a similar effect. See *supra, at ____ - ____, 171 L. Ed. 2d, at 713.* And the Massachusetts and Pennsylvania laws were not only thought consistent with an *unwritten* common-law gun-possession right, but also consistent with *written* state constitutional provisions providing protections similar to those provided by the Federal *Second Amendment.* See *supra, at ____ - ____, 171 L. Ed. 2d, at 713.* I cannot agree with the majority that these laws are largely uninformative because the penalty for violating them was civil, rather than criminal. *Ante, at ____ - ____, 171 L. Ed. 2d, at 682.* The Court has long recognized that the exercise of a constitutional right can be burdened by penalties far short of jail time. See, *e.g., Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943)* (invalidating $7 per week solicitation fee as applied to religious group); see also *Forsyth County v. Nationalist Movement, 505 U.S. 123, 136, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992)* ("A tax based on the content of [***253] speech does not become more constitutional because it is a small tax").

[*2868] Regardless, why would the majority require a precise colonial regulatory analogue in order to save a modern gun regulation from constitutional challenge? After all, insofar as we look to history to discover how we can constitutionally regulate a right to self-defense, we must look, not to what 18th-century legislatures actually *did* enact, but to what they would have thought they *could* enact. There are innumerable policy-related reasons why a legislature might not act on a particular matter, despite having the power to do so. This Court has "frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States v. Wells, 519 U.S. 482, 496, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997)* (internal quotation marks and brackets omitted). It is similarly "treacherous" to reason from the fact that colonial legislatures *did not* enact certain kinds of legislation to a conclusion that a modern legislature *cannot* do so. The question should not be whether a modern restriction on a right to self-defense *duplicates* a past one, but whether that restriction, when compared with restrictions originally thought [***254] possible, enjoys a similarly strong justification. At a minimum that similarly strong justification is what the District's modern law, compared with Boston's colonial law, reveals.

Fourth, a contrary view, as embodied in today's decision, will have unfortunate consequences. The decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. See *ante, at ____, 171 L. Ed. 2d, at 678, and n 26.* And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time.

As important, the majority's decision threatens severely to limit the ability of more knowledgeable, democratically [**734] elected officials to deal with gun-related problems. The majority says that it leaves the District "a variety of tools for combating" such problems. *Ante, at ____, 171 L. Ed. 2d, at 684.* It fails to list even one seemingly adequate replacement for the law it strikes down. I can understand how reasonable individuals can disagree about the merits of strict gun control [***255] as a crime-control measure, even in a totally urbanized area. But I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order.

V

The majority derides my approach as "judge-empowering." *Ante, at ____, 171 L. Ed. 2d, at 683.* I take this criticism seriously, but I do not think it accurate. As I have previously explained, this is an approach that the Court has taken in other areas of constitutional law. See *supra, at ____ - ____, 171 L. Ed. 2d, at 716.* Application of such an approach, of course, requires judgment, but the very nature of the approach --requiring careful identification of the relevant interests and evaluating the law's effect upon them--limits the judge's choices; and the method's necessary transparency lays bare the judge's reasoning for all to see and to criticize.

The majority's methodology is, in my view, substantially less transparent than mine. At a minimum, I find it difficult to understand the reasoning that seems to underlie certain conclusions that it reaches.

[*2869] The majority [***256] spends the first 54 pages of its opinion attempting to rebut Justice Stevens' evidence that the Amendment was enacted with a purely militia-related purpose. In the majority's view, the Amendment also protects an interest in armed personal self-defense, at least to some degree. But the majority does not tell us precisely what that interest is. "Putting

all of [the *Second Amendment's*] textual elements together," the majority says, "we find that they guarantee the individual right to possess and carry weapons in case of confrontation." *Ante, at ____, 171 L. Ed. 2d, at 657.* Then, three pages later, it says that "we do not read the *Second Amendment* to permit citizens to carry arms for *any sort* of confrontation." *Ante, at ____, 171 L. Ed. 2d, at 659.* Yet, with one critical exception, it does not explain which confrontations count. It simply leaves that question unanswered.

The majority does, however, point to one type of confrontation that counts, for it describes the Amendment as "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Ante, at ____, 171 L. Ed. 2d, at 683.* What is its basis for finding that to be the core of the *Second Amendment* right? The only historical sources identified [***257] by the majority that even appear to touch upon that specific matter consist of an 1866 newspaper editorial discussing the Freedmen's Bureau Act, see *ante, at ____, 171 L. Ed. 2d, at 671*, two quotations from that 1866 Act's legislative history, see *ante, at ____ - ____, 171 L. Ed. 2d, at 671-672*, and a 1980 state-court opinion saying that in colonial times the same were used to defend the home as to maintain the militia, see [**735] *ante, at ____, 171 L. Ed. 2d, at 677.* How can citations such as these support the far-reaching proposition that the *Second Amendment's* primary concern is not its stated concern about the militia, but rather a right to keep loaded weapons at one's bedside to shoot intruders?

Nor is it at all clear to me how the majority decides *which* loaded "arms" a homeowner may keep. The majority says that that Amendment protects those weapons "typically possessed by law-abiding citizens for lawful purposes." *Ante, at ____, 171 L. Ed. 2d, at 677.* This definition conveniently excludes machineguns, but permits handguns, which the majority describes as "the most popular weapon chosen by Americans for self-defense in the home." *Ante, at ____, 171 L. Ed. 2d, at 680*; see also *ante, at ____ - ____, 171 L. Ed. 2d, at 677-678.* But what sense does this approach make? According to the majority's reasoning, if Congress and the States lift restrictions on [***258] the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the *Second Amendment does*, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.

I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive *Second Amendment* scrutiny. These consist of (1) "prohibitions on carrying concealed weapons"; (2) "prohibitions on the possession of firearms by felons"; (3) "prohibitions on the possession of firearms by . . . the mentally ill"; (4) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (5) government [***259] "conditions and qualifications" attached to "the commercial sale of arms." *Ante, at ____, 171 L. Ed. 2d, at 678.* Why these? Is it [*2870] that similar restrictions existed in the late-18th century? The majority fails to cite any colonial analogues. And even were it possible to find analogous colonial laws in respect to all these restrictions, why should these colonial laws count, while the Boston loaded-gun restriction (along with the other laws I have identified) apparently does not count? See *supra, at ____ - ____, ____ - ____, 171 L. Ed. 2d, at 713, 732-733.*

At the same time the majority ignores a more important question: Given the purposes for which the Framers enacted the *Second Amendment*, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pick up a loaded gun on their parents' bedside table? That they (who certainly showed concern for the risk of fire, see *supra, at ____ - ____, 171 L. Ed. 2d, at* [**736] *713*) would have lacked concern for the risk [***260] of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring? Unless we believe that they intended future generations to ignore such matters, answering questions such as the questions in this case requires judgment--judicial judgment exercised within a framework for constitutional analysis that guides that judgment and which makes its exercise transparent. One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit.*

The argument about method, however, is by far the less important argument surrounding today's decision. Far more important are the unfortunate consequences that today's decision is likely to spawn. Not least of these, as I have said, is the fact that the decision threatens to throw into doubt the constitutionality of gun laws throughout the United States. I can find no sound legal

basis for launching the courts on so formidable and potentially dangerous a mission. In my view, there simply is no untouchable constitutional right guaranteed by the *Second Amendment* to keep loaded handguns in the house in crime-ridden urban areas.

VI

For these reasons, I conclude that the District's measure is a [***261] proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it. And, for these reasons as well as the independently sufficient reasons set forth by Justice Stevens, I would find the District's measure consistent with the *Second Amendment's* demands.

With respect, I dissent.

REFERENCES

U.S.C.S., *Constitution, Amendment 2*

2 Antieau on Local Government Law § 29.24 (Matthew Bender 2d ed.)

L Ed Digest, Weapons and Firearms § 1

L Ed Index, Weapons and Firearms

Supreme Court's construction and application of Federal Constitution's militia clauses (Art. I, § 8, cl. 15 and 16), allocating power over militia between Congress and states. *110 L. Ed. 2d 738.*

Supreme Court's views on weight to be accorded to pronouncements of legislature, or members of legislature, respecting meaning or intent of previously enacted statute. *56 L. Ed. 2d 918.*

Supreme Court's views of *Fifth Amendment's double jeopardy clause* pertinent to or applied in federal criminal cases. *50 L. Ed. 2d 830.*

The Supreme Court and the right of free speech and press. *93 L. Ed. 1151, 2 L. Ed. 2d 1706, 11 L. Ed. 2d 1116, 16 L. Ed. 2d 1053, 21 L. Ed. 2d 976.*

Accused's right to counsel under the Federal Constitution--Supreme Court cases. *93 L. Ed. 137, 2 L. Ed. 2d 1644, 9 L. Ed. 2d 1260, 18 L. Ed. 2d 1420.*

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Sheriff Clay Parker, et al. v. State of California, et al.**

No.: **F062490**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On February 22, 2012, I served the attached **JOINT APPENDIX, VOLUME VI, Pages JA001478-JA001696** by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight, addressed as follows:

Carl Dawson Michel, Esq.
Clinton Barnwell Monfort. Esq.
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(Attorneys for Respondents)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 22, 2012, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

SA2011101434