

**2013 SEPARATION OF
POWERS
C.L.E. COURSE MATERIALS**

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U.S. SUPREME COURT**

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BACKGROUND

CONSTITUTION OF THE UNITED STATES OF AMERICA

PREAMBLE

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article 1

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

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

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one. Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third

Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

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

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, he appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8.

The Congress shall have Power To lay and collect Taxes. Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions;

To provide for organizing, arming, and disciplining, the Militia, 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;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof

Section 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one - State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article 2

Section 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years and, together with the Vice President, chosen for the same Term, he elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an. Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and

transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States,

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:-- "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2.

The President shall be 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; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the

Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3.

He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4.

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article 3

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation. which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases. in Law and Equity, arising under this Constitution. the Laws of the United. States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State; --between Citizens of different States; --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason. but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article 4

Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article 5

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall

call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article 6

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution: but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article 7

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

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.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

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

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one on the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

The Electors shall meet in their respective states and vote by ballot for President and Vice- President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice- President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from. the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice- President shall act as President, as in the case of the death or other constitutional disability of the President--The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII

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

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

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States. Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such. State, being twenty-one years of age, and citizens of the United States, or in any way. abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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

Amendment XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution

Amendment XVIII

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by • appropriate legislation.

Amendment XX

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them..

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

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

Amendment XXIV

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

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

Amendment XXV

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

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

Amendment XXVII

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

THE FEDERALIST NO. 48

JAMES MADISON February 1, 1788.

To the People of the State of New York:

IT WAS shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited; both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an

intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might find a witness in every citizen who has shared in, or been attentive to, the course of public administrations. I might collect vouchers in abundance from the records and archives of every State in the Union. But as a more concise, and at the same time equally satisfactory, evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The first example is that of Virginia, a State which, as we have seen, has expressly declared in its constitution, that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting *Notes on the State of Virginia*, p. 195. "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us, that they are chosen by ourselves. An ELECTIVE DESPOTISM. was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. BUT NO BARRIER WAS PROVIDED BETWEEN THESE SEVERAL POWERS. The judiciary and the executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case they may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches. They have accordingly, IN

MANY instances. DECIDED RIGHTS which should have been left to JUDICIARY CONTROVERSY. and THE DIRECTION OF THE EXECUTIVE, DURING THE WHOLE TIME OF THEIR SESSION, IS BECOMING HABITUAL AND FAMILIAR."

The other State which I shall take for an example is Pennsylvania; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the constitution, was "to inquire whether the constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution." In the execution of this trust, the council were necessarily led to a comparison of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the constitution had been flagrantly violated by the legislature in a variety of important instances.

A great number of laws had been passed, violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of legislature.

The constitutional trial by jury had been violated, and powers assumed which had not been delegated by the constitution.

Executive powers had been usurped.

The salaries of the judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department frequently drawn within legislative cognizance and determination.

Those who wish to see the several particulars falling under each of these heads, may consult the journals of the council, which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears, also, that the executive department had not been innocent of frequent breaches of the constitution. There are three observations, however, which ought to be made on this head: **FIRST**, a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief; **SECONDLY**, in most of the other instances, they conformed either to the declared or the known sentiments of the legislative department; **THIRDLY**, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded, than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient

guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

PUBLIUS.

FEDERALIST No. 78

ALEXANDER HAMILTON May 28, 1788

To the People of the State of New York:

WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and, has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm., that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a

fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution. ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

If then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of

particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually: and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established GOOD BEHAVIOR as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

PUBLIUS.

Where the line of division will some day be located, I will make no attempt to say. I feel assured, however, that its location, wherever it shall be, will be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetish of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice.

Benjamin Nathan Cardozo, The Nature of the Judicial Process

Lecture IV

I. APPOINTMENT AND REMOVAL

HUMPHREY'S EX'R
v.
UNITED STATES. RATHBUN v. SAME.

No. 667.

Argued May 1, 1935. Decided May 27, 1935.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, s 3(a), c. 229, 43 Stat. 936, 939, 28 U.S.C. s 288 (28 USCA s 288)), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years, expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection,' but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying: 'You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.'

The commissioner declined to resign; and on October 7, 1933, the President wrote him: 'Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.'

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of \$10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

'1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance

in office', restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

'If the foregoing question is answered in the affirmative, then--

'2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?'

The Federal Trade Commission Act, c. 311, 38 Stat. 717, 718, ss 1, 2, 15 U.S.C. ss 41, 42 (15 USCA ss 41, 42), creates a commission of five members to be appointed by the President' by and with the advice and consent of the Senate, and section 1 provides: 'Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act (September 26, 1914), the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. * * *'

Section 5 of the act (15 USCA s 45) in part provides that: 'Unfair methods of competition in commerce are declared unlawful.

'The commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.'

In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate Circuit Court of Appeals for its enforcement. The party subject to the order may seek and obtain a review in the Circuit Court of Appeals in a manner provided by the act.

Section 6 (15 USCA s 46), among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Section 7 (15 USCA s 47), provides that: 'In any suit in equity brought by or under the

direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.'

First. The question first to be considered is whether, by the provisions of section 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal, provision of section 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative, and judicial data bearing upon the question, beginning with what is called the decision of 1789' in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of *Cohens v. Virginia*, 6 Wheat, 264, 399, 5 L.Ed. 257, in respect of certain general expressions in the opinion in *Marbury v. Madison*, 1 Cranch, 137, 2 L.Ed. 60. Chief Justice Marshall, who delivered the opinion in the *Marbury Case*, speaking again for the court in the *Cohens Case*, said: It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible hearing on all other cases is seldom completely investigated.'

And he added that these general expressions in the case of *Marbury v. Madison* were to be understood with the limitations put upon them by the opinion in the *Cohens Case*. See, also,

Carroll v. Lessee of Carroll et al., 16 How. 275, 286--287, 14 L.Ed. 936; °Donoghue v. United States, 289 U.S. 516, 550, 53 S.Ct. 740, 77 L.Ed. 1356.

The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers Case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers Case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of 'unfair methods of competition,' that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially. In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency. Under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi legislative and quasi judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams v. United States*, 289 U.S. 553, 565--567, 53 S.Ct. 751, 77 L.Ed. 1372), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and

that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' Andrews, *The Works of James Wilson* (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution (4th Ed.) s 530, citing No. 48 of the *Federalist*, said that neither of the departments in reference to each other 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' And see *Donoghue v. United States*, supra, 289 U.S. 516, at pages 530-531, 53 S.Ct. 740, 77 L.Ed. 1356.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have re-examined the precedents referred to in the Myers Case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called 'decision of 1789' had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was 'to be removable from office by the President of the United States.' This clause was changed to read 'whenever the principal officer shall be removed from office by the President of the United States,' certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the Myers Case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the Myers Case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 *Annals of Congress*, cols. 611612.

In *Marbury v. Madison*, supra, 1 Cranch, 137, at pages 162, 165-166, 2 L.Ed. 60, it is

made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that 'their acts are his acts' and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the 'decision of 1789.'

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered:

Question No. 1, Yes.

Question No. 2, Yes.

Mr. Justice McREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in *Myers v. United States*, 272 U.S. 52, at page 178, 47 S.Ct. 21, at page 46, 71 L.Ed. 160, states his views concerning the power of the President to remove appointees.

James L. BUCKLEY et al., Appellants,
v.
Francis R. VALEO, Secretary of the United States Senate, et al. (two cases).

Nos. 75-436 and 75-437.

Supreme Court of the United States

Argued Nov. 10, 1975.

Decided Jan. 30, 1976.
Motion Granted Feb. 27, 1976.

See 424 U.S. 936, 96 S.Ct. 1153

IV. THE FEDERAL ELECTION COMMISSION

The 1974 amendments to the Act create an eight-member Federal Election Commission (Commission), and vest in it primary and substantial responsibility for administering and enforcing the Act. The question that we address in this portion of the opinion is whether, in view of the manner in which a majority of its members are appointed, the Commission may under the Constitution exercise the powers conferred upon it. We find it unnecessary to parse the complex statutory provisions in order to sketch the full sweep of the Commission's authority. It will suffice for present purposes to describe what appear to be representative examples of its various powers.

Chapter 14 of Title 2 makes the Commission the principal repository of the numerous reports and statements which are required by that chapter to be filed by those engaging in the regulated political activities. Its duties under s 438(a) with respect to these reports and statements include filing and indexing, making them available for public inspection, preservation, and auditing and field investigations. It is directed to "serve as a national clearinghouse for information in respect to the administration of elections." s 438(b).

Beyond these recordkeeping, disclosure, and investigative functions, however, the Commission is given extensive rulemaking and adjudicative powers. Its duty under s 438(a)(10) is "to prescribe suitable rules and regulations to carry out the provisions of . . . chapter (14)." Under s 437d(a)(8) the Commission is empowered to make such rules "as are necessary to carry out the provisions of this Act." Section 437d(a)(9) authorizes it to "formulate general policy with respect to the administration of this Act" and enumerated sections of Title 18's Criminal Code, as to all of which provisions the Commission "has primary jurisdiction with respect to (their) civil enforcement." s 437c(b). The Commission is authorized under s 437f(a) to render advisory opinions with respect to activities possibly violating the Act, the Title 18 sections, or the campaign funding provisions of Title 26, the effect of which is that "(n)otwithstanding any other provision of law, any person with respect to whom an advisory opinion is rendered . . . who acts

in good faith in accordance with the provisions and findings (thereof) shall be presumed to be in compliance with the (statutory provision) with respect to which such advisory opinion is rendered." s 437f(b). In the course of administering the provisions for Presidential campaign financing, the Commission may authorize convention expenditures which exceed the statutory limits. 26 U.S.C. s 9008(d)(3) (1970 ed., Supp. IV).

The Commission's enforcement power is both direct and wide ranging. It may institute a civil action for (i) injunctive or other relief against "any acts or practices which constitute or will constitute a violation of this Act," s 437g(a)(5); (ii) declaratory or injunctive relief "as may be appropriate to implement or con(s)true any provisions" of Chapter 95 of Title 26, governing administration of funds for Presidential election campaigns and national party conventions, 26 U.S.C. s 9011(b)(1) (1970 ed., Supp. IV); and (iii) "such injunctive relief as is appropriate to implement any provision" of Chapter 96 of Title 26, governing the payment of matching funds for Presidential primary campaigns, 26 U.S.C. s 9040(c) (1970 ed., Supp. IV). If after the Commission's post-disbursement audit of candidates receiving payments under Chapter 95 or 96 it finds an overpayment, it is empowered to seek repayment of all funds due the Secretary of the Treasury. 26 U.S.C. ss 9010(b), 9040(b) (1970 ed., Supp. IV). In no respect do the foregoing civil actions require the concurrence of or participation by the Attorney General; conversely, the decision not to seek judicial relief in the above respects would appear to rest solely with the Commission. With respect to the referenced Title 18 sections, s 437g(a)(7) provides that if after notice and opportunity for a hearing before it, the Commission finds an actual or threatened criminal violation, the Attorney General "upon request by the Commission ... shall institute a civil action for relief." Finally, as "(a)dditional enforcement authority," s 456(a) authorizes the Commission, after notice and opportunity for hearing, to make "a finding that a person . . . while a candidate for Federal office, failed to file" a required report of contributions or expenditures. If that finding is made within the applicable limitations period for prosecutions, the candidate is thereby "disqualified from becoming a candidate in any future election for Federal office for a period of time beginning on the date of such finding and ending one year after the expiration of the term of the Federal office for which such person was a candidate."

The body in which this authority is reposed consists of eight members. The Secretary of the Senate and the Clerk of the House of Representatives are ex officio members of the Commission without the right to vote. Two members are appointed by the President pro tempore of the Senate "upon the recommendations of the majority leader of the Senate and the minority leader of the Senate." Two more are to be appointed by the Speaker of the House of Representatives, likewise upon the recommendations of its respective majority and minority leaders. The remaining two members are appointed by the President. Each of the six voting members of the Commission must be confirmed by the majority of both Houses of Congress, and each of the three appointing authorities is forbidden to choose both of their appointees from the same political party.

B. The Merits

Appellants urge that since Congress has given the Commission wide-ranging rulemaking and enforcement powers with respect to the substantive provisions of the Act, Congress is

precluded under the principle of separation of powers from vesting in itself the authority to appoint those who will exercise such authority. Their argument is based on the language of Art. II, s 2, cl. 2, of the Constitution, which provides in pertinent part as follows:

"(The President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Appellants' argument is that this provision is the exclusive method by which those charged with executing the laws of the United States may be chosen. Congress, they assert, cannot have it both ways. If the Legislature wishes the Commission to exercise all of the conferred powers, then its members are in fact "Officers of the United States" and must be appointed under the Appointments Clause. But if Congress insists upon retaining the power to appoint, then the members of the Commission may not discharge those many functions of the Commission which can be performed only by "Officers of the United States," as that term must be construed within the doctrine of separation of powers.

Appellee Commission and amici in support of the Commission urge that the Framers of the Constitution, while mindful of the need for checks and balances among the three branches of the National Government, had no intention of denying to the Legislative Branch authority to appoint its own officers. Congress, either under the Appointments Clause or under its grants of substantive legislative authority and the Necessary and Proper Clause in Art. I, is in their view empowered to provide for the appointment to the Commission in the manner which it did because the Commission is performing "appropriate legislative functions."

The majority of the Court of Appeals recognized the importance of the doctrine of separation of powers which is at the heart of our Constitution, and also recognized the principle enunciated in *Springer v. Philippine Islands*, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845 (1928), that the Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws. But it described appellants' argument based upon Art. II, s 2, cl. 2, as "strikingly syllogistic," and concluded that Congress had sufficient authority under the Necessary and Proper Clause of Art. I of the Constitution not only to establish the Commission but to appoint the Commission's members. As we have earlier noted, it upheld the constitutional validity of congressional vesting of certain authority in the Commission, and concluded that the question of the constitutional validity of the vesting of its remaining functions was not yet ripe for review. The three dissenting judges in the Court of Appeals concluded that the method of appointment for the Commission did violate the doctrine of separation of powers.

1. Separation of Powers

We do not think appellants' arguments based upon Art. II, s 2, cl. 2, of the Constitution may be so easily dismissed as did the majority of the Court of Appeals. Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution, and all litigants and all of the courts which have addressed themselves to the matter

start on common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another.

James Madison, writing in the Federalist No. 47, defended the work of the Framers against the charge that these three governmental powers were not entirely separate from one another in the proposed Constitution. He asserted that while there was some admixture, the Constitution was nonetheless true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct:

"The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.' Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author."

Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government. The President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

Mr. Chief Justice Taft, writing for the Court in *Hampton & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928), after stating the general principle of separation of powers found in the United States Constitution, went on to observe:

"(T)he rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the state executive, the Governor, the executive power, and the courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the

extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Id.*, at 406, 48 S.Ct., at 351.

More recently, Mr. Justice Jackson, concurring in the opinion and the judgment of the Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952), succinctly characterized this understanding:

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other. As Madison put it in *Federalist No. 51*:

"This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State."

This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it. The Court has held that executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. 111 of the Constitution. *United States v. Ferreira*, 54 U.S. 40, 13 How. 40, 14 L.Ed. 42 (1852); *Hayburn's Case*, 2 U.S. 409, 2 Dall. 409, 1 L.Ed. 436 (1792). The Court has held that the President may not execute and exercise legislative authority belonging only to Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*. In the course of its opinion in that case, the Court said:

"In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States . . . ' 343 U.S., at 587-588, 72 S.Ct., at 867.

More closely in point to the facts of the present case is this Court's decision in *Springer v. Philippine Islands*, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845 (1928), where the Court held that the legislature of the Philippine Islands could not provide for legislative appointment to executive agencies.

2. The Appointments Clause

The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. Article I, s 1, declares: "All legislative Powers herein granted shall be vested in a Congress of the United States." Article II, s 1, vests the executive power "in a President of the United States of America," and Art. III, s 1, declares that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called "Ineligibility" and "Incompatibility" Clauses contained in Art. I, s 6:

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

It is in the context of these cognate provisions of the document that we must examine the language of Art. II s 2, cl. 2, which appellants contend provides the only authorization for appointment of those to whom substantial executive or administrative authority is given by statute. Because of the importance of its language, we again set out the provision:

"(The President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States," but the drafters had a less frivolous purpose in mind. This conclusion is supported by language from *United States v. Germaine*, 99 U.S. 508, 509-510, 25 L.Ed. 482 (1879):

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine*, supra, is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by s 2, cl. 2, of that Article.

If "all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment," *United States v. Germaine*, supra, it is difficult to see how the members of the Commission may escape inclusion. If a postmaster first class, *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926), and the clerk of a district court, *Ex parte Hennen*, 38 U.S. 225, 13 Pet. 230, 10 L.Ed. 138 (1839), are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely the Commissioners before us are at the very least such "inferior Officers" within the meaning of that Clause.

Although two members of the Commission are initially selected by the President, his nominations are subject to confirmation not merely by the Senate, but by the House of Representatives as well. The remaining four voting members of the Commission are appointed by the President pro tempore of the Senate and by the Speaker of the House. While the second part of the Clause authorizes Congress to vest the appointment of the officers described in that part in "the Courts of Law, or in the Heads of Departments," neither the Speaker of the House nor the President pro tempore of the Senate comes within this language.

The phrase "Heads of Departments," used as it is in conjunction with the phrase "Courts of Law," suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch. While the Clause expressly authorizes Congress to vest the appointment of certain officers in the "Courts of Law," the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language "Heads of Departments" in this part of cl. 2.

Thus with respect to four of the six voting members of the Commission, neither the President, the head of any department, nor the Judiciary has any voice in their selection.

The Appointments Clause specifies the method of appointment only for "Officers of the United States" whose appointment is not "otherwise provided for" in the Constitution. But there is no provision of the Constitution remotely providing any alternative means for the selection of the members of the Commission or for anybody like them. Appellee Commission has argued, and the Court of Appeals agreed, that the Appointments Clause of Art. II should not be read to exclude the "inherent power of Congress" to appoint its own officers to perform functions necessary to that body as an institution. But there is no need to read the Appointments Clause contrary to its plain language in order to reach the result sought by the Court of Appeals. Article I, s 3, el. 5, expressly authorizes the selection of the President pro tempore of the Senate, and s 2, cl. 5, of that Article provides for the selection of the Speaker of the House. Ranking nonmembers, such as the Clerk of the House of Representatives, are elected under the internal rules of each House and are designated by statute as "officers of the Congress." There is no

occasion for us to decide whether any of these member officers are "Officers of the United States" whose "appointment" is otherwise provided for within the meaning of the Appointments Clause, since even if they were such officers their appointees would not be. Contrary to the fears expressed by the majority of the Court of Appeals, nothing in our holding with respect to Art. II, s 2, cl. 2, will deny to Congress "all power to appoint its own inferior officers to carry out appropriate legislative functions."

Appellee Commission and amici urge that because of what they conceive to be the extraordinary authority reposed in Congress to regulate elections, this case stands on a different footing than if Congress had exercised its legislative authority in another field. There is, of course, no doubt that Congress has express authority to regulate congressional elections, . by virtue of the power conferred in Art. I, s 4. This Court has also held that it has very broad authority to prevent corruption in national Presidential elections. *Burroughs v. United States*, 290 U.S. 534, 54 S.Ct. 287, 78 L.Ed. 484 (1934). But Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 4 L.Ed. 579 (1819), so long as the exercise of that authority does not offend some other constitutional restriction. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.

The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, all Officers of the United States are to be appointed in accordance with the Clause. Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary. No class or type of officer is excluded because of its special functions. The President appoints judicial as well as executive officers. Neither has it been disputed and apparently it is not now disputed that the Clause controls the appointment of the members of a typical administrative agency even though its functions, as this Court recognized in *Humphrey's Executor v. United States*, 295 U.S. 602, 624, 55 S.Ct. 869, 872, 79 L.Ed. 1611 (1935), may be "predominantly quasijudicial and quasilegislative" rather than executive. The Court in that case carefully emphasized that although the members of such agencies were to be independent of the Executive in their day-to-day operations, the Executive was not excluded from selecting them. *Id.*, at 625-626, 55 S.Ct., at 872.

Appellees argue that the legislative authority conferred upon the Congress in Art. I, s 4, to regulate "the Times, Places and Manner of holding Elections for Senators and Representatives" is augmented by the provision in s 5 that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Section 5 confers, however, not a general legislative power upon the Congress, but rather a power "judicial in character" upon each House of the Congress. *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613, 49 S.Ct. 452, 455, 73 L.Ed. 867 (1929). The power of each House to judge whether one claiming election

as Senator or Representative has met the requisite qualifications, *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), cannot reasonably be translated into a power granted to the Congress itself to impose substantive qualifications on the right to so hold such office. Whatever power Congress may have to legislate, such qualifications must derive from s 4, rather than s 5, of Art. I.

Appellees also rely on the Twelfth Amendment to the Constitution insofar as the authority of the Commission to regulate practices in connection with the Presidential election is concerned. This Amendment provides that certificates of the votes of the electors be "sealed (and) directed to the President of the Senate," and that the "President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." The method by which Congress resolved the celebrated disputed Hayes-Tilden election of 1876, reflected in 19 Stat. 227, supports the conclusion that Congress viewed this Amendment as conferring upon its two Houses the same sort of power "judicial in character," *Barry v. United States ex rel. Cunningham*, supra, 279 U.S., at 613, 49 S.Ct., at 455, as was conferred upon each House by Art. I, s 5, with respect to elections of its own members.

We are also told by appellees and amici that Congress had good reason for not vesting in a Commission composed wholly of Presidential appointees the authority to administer the Act, since the administration of the Act would undoubtedly have a bearing on any incumbent President's campaign for re- election. While one cannot dispute the basis for this sentiment as a practical matter, it would seem that those who sought to challenge incumbent Congressmen might have equally good reason to fear a Commission which was unduly responsive to members of Congress whom they were seeking to unseat. But such fears, however rational, do not by themselves warrant a distortion of the Framers' work.

Appellee Commission and amici finally contend, and the majority of the Court of Appeals agreed with them, that whatever shortcomings the provisions for the appointment of members of the Commission might have under Art. II, Congress had ample authority under the Necessary and Proper Clause of Art. I to effectuate this result. We do not agree. The proper inquiry when considering the Necessary and Proper Clause is not the authority of Congress to create an office or a commission, which is broad indeed, but rather its authority to that its own officers may make appointments to such office or commission.

So framed, the claim that Congress may provide for this manner of appointment under the Necessary and Proper Clause of Art. I. stands on no better footing than the claim that it may provide for such manner of appointment because of its substantive authority to regulate federal elections. Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in s 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

3. The Commission's Powers

Thus, on the assumption that all of the powers granted in the statute may be exercised by an agency whose members have been appointed in accordance with the Appointments Clause, the ultimate question is which, if any, of those powers may be exercised by the present voting Commissioners, none of whom was appointed as provided by that Clause. Our previous description of the statutory provisions, see *supra*, at 677-680, disclosed that the Commission's powers fall generally into three categories: functions relating to the flow of necessary information receipt, dissemination, and investigation; functions with respect to the Commission's task of fleshing out the statute rulemaking and advisory opinions; and functions necessary to ensure compliance with the statute and rules informal procedures, administrative determinations and hearings, and civil suits.

Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them. *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881); *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). As this Court stated in *McGrain*, *supra*, 273 U.S., at 175, 47 S.Ct., at 329:

"A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information which not infrequently is true recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate, indeed, was treated as inhering in it."

But when we go beyond this type of authority to the more substantial powers exercised by the Commission, we reach a different result. The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, s 3.

Congress may undoubtedly under the Necessary and Proper Clause create "offices" in the generic sense and provide such method of appointment to those "offices" as it chooses. But Congress' power under that Clause is inevitably bounded by the express language of Art. II, s 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be "Officers of the United States." They may, therefore, properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from

the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States."

This Court observed more than a century ago with respect to litigation conducted in the courts of the United States:

"Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of the Attorney-General." *Confiscation Cases*, 74 U.S. 454, 458-459, 7 Wall. 454, 458-459, 19 L.Ed. 196 (1869).

The Court echoed similar sentiments 59 years later in *Springer v. Philippine Islands*, 277 U.S., at 202, 48 S.Ct., at 482, saying:

"Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160.

"Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection, though the case might be different if the additional duties were devolved upon an appointee of the executive."

We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, s 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.

All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress or the Executive Branch, are more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. While the President may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be

exercised only by persons who are "Officers of the United States."

It is also our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date, including its administration of those provisions, upheld today, authorizing the public financing of federal elections. The past acts of the Commission are therefore accorded de facto validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan. *Connor v. Williams*, 404 U.S. 549, 550-551, 92 S.Ct. 656, 658, 30 L.Ed.2d 704 (1972). See *Ryan v. Tinsley*, 316 F.2d 430, 431-432 (CA10 1963); *Schaefer v. Thomson*, 251 F.Supp. 450, 453 (Wyo.1965), *affd sub nom. Harrison v. Schaeffer*, 383 U.S. 269, 86 S.Ct. 929, 15 L.Ed.2d 750 (1966). Cf. *City of Richmond v. United States*, 422 U.S. 358, 379, 95 S.Ct. 2296, 2308, 45 L.Ed.2d 245 (1975) (Brennan, J., dissenting). We also draw on the Court's practice in the apportionment and voting rights cases and stay, for a period not to exceed 30 days, the Court's judgment insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act. This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act. Cf. *Georgia v. United States*, 411 U.S. 526, 541, 93 S.Ct. 1702, 1711, 36 L.Ed.2d 472 (1973); *Fortson v. Morris*, 385 U.S. 231, 235, 87 S.Ct. 446, 449, 17 L.Ed.2d 330 (1966); *Maryland Comm. v. Tawes*, 377 U.S. 656, 675- 676, 84 S.Ct. 1429, 1440, 12 L.Ed.2d 595 (1964).

CONCLUSION

In summary, we sustain the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme. We conclude, however, that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm. Finally, we hold that most of the powers conferred by the Act upon the Federal Election Commission can be exercised only by "Officers of the United States," appointed in conformity with Art. II, s 2, cl. 2, of the Constitution, and therefore cannot be exercised by the Commission as presently constituted.

In No. 75-436, the judgment of the Court of Appeals is affirmed in part and reversed in part. The judgment of the District Court in No. 75-437 is affirmed. The mandate shall issue forthwith, except that our judgment is stayed, for a period not to exceed 30 days, insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act.

So ordered.

Mr. Justice STEVENS took no part in the consideration or decision of these cases.

Charles A. BOWSHER, Comptroller General of the United States,
Appellant,

v.

Mike SYNAR, Member of Congress, et al.

No. 85-1377 to 85-1379.

Supreme Court of the United States

Argued April 23, 1986.

Decided July 7, 1986.

Chief Justice BURGER delivered the opinion of the Court.

The question presented by these appeals is whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violates the doctrine of separation of powers.

I
A

On December 12, 1985, the President signed into law the Balanced Budget and Emergency Deficit Control Act of 1985, Pub.L. 99-177, 99 Stat. 1038, 2 U.S.C. §901 et seq. (1982 ed., Supp. III), popularly known as the "Gramm- Rudman-Hollings Act." The purpose of the Act is to eliminate the federal budget deficit. To that end, the Act sets a "maximum deficit amount" for federal spending for each of fiscal years 1986 through 1991. The size of that maximum deficit amount progressively reduces to zero in fiscal year 1991. If in any fiscal year the federal budget deficit exceeds the maximum deficit amount by more than a specified sum, the Act requires across-the-board cuts in federal spending to reach the targeted deficit level, with half of the cuts made to defense programs and the other half made to nondefense programs. The Act exempts certain priority programs from these cuts. §255.

These "automatic" reductions are accomplished through a rather complicated procedure, spelled out in §251, the so-called "reporting provisions" of the Act. Each year, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) independently estimate the amount of the federal budget deficit for the upcoming fiscal year. If that deficit exceeds the maximum targeted deficit amount for that fiscal year by more than a specified amount, the Directors of OMB and CBO independently calculate, on a program-by-program basis, the budget reductions necessary to ensure that the deficit does not exceed the maximum deficit amount. The Act then requires the Directors to report jointly their deficit estimates and budget reduction calculations to the Comptroller General.

The Comptroller General, after reviewing the Directors' reports, then reports his conclusions to the President. §251(b). The President in turn must issue a "sequestration" order

mandating the spending reductions specified by the Comptroller General. §252. There follows a period during which Congress may by legislation reduce spending to obviate, in whole or in part, the need for the sequestration order. If such reductions are not enacted, the sequestration order becomes effective and the spending reductions included in that order are made.

Anticipating constitutional challenge to these procedures, the Act also contains a "fallback" deficit reduction process to take effect "Nil the event that any of the reporting procedures described in section 251 are invalidated." §274(f). Under these provisions, the report prepared by the Directors of OMB and the CBO is submitted directly to a specially created Temporary Joint Committee on Deficit Reduction, which must report in five days to both Houses a joint resolution setting forth the content of the Directors' report. Congress then must vote on the resolution under special rules, which render amendments out of order. If the resolution is passed and signed by the President, it then serves as the basis for a Presidential sequestration order.

B

Within hours of the President's signing of the Act, Congressman Synar, who had voted against the Act, filed a complaint seeking declaratory relief that the Act was unconstitutional. Eleven other Members later joined Congressman Synar's suit. A virtually identical lawsuit was also filed by the National Treasury Employees Union. The Union alleged that its members had been injured as a result of the Act's automatic spending reduction provisions, which have suspended certain cost-of-living benefit increases to the Union's members.

A three-judge District Court, appointed pursuant to 2 U.S.C. §922(a)(5) (1982 ed., Supp. III), invalidated the reporting provisions. *Synar v. United States*, 626 F.Supp. 1374 (DC 1986) {Scalia, Johnson and Gasch, JJ.}. The District Court concluded that the Union had standing to challenge the Act since the members of the Union had suffered actual injury by suspension of certain benefit increases. The District Court also concluded that Congressman Synar and his fellow Members had standing under the so-called "congressional standing" doctrine. See *Barnes v. Kline*, 245 U.S.App.D.C. 1, 21, 759 F.2d 21, 41 {1985}, cert. granted sub nom. *Burke v. Barnes*, 475 U.S. 1044, 106 S.Ct. 1258, 89 L.Ed.2d 569 (1986).

Although the District Court concluded that the Act survived a delegation doctrine challenge, it held that the role of . the Comptroller General in the deficit reduction process violated the constitutionally imposed separation of powers.

Appeals were taken directly to this Court pursuant to §274(b) of the Act. We noted probable jurisdiction and expedited consideration of the appeals. 475 U.S. 1009, 106 S.Ct. 1181, 89 L.Ed.2d 298 (1986). We affirm.

II

A threshold issue is whether the Members of Congress, members of the National

Treasury Employees Union, or the Union itself have standing to challenge the constitutionality of the Act in question. It is clear that members of the Union, one of whom is an appellee here, will sustain injury by not receiving a scheduled increase in benefits. See §252(a)(6)(C)(i); 626 F.Supp., at 1381. This is sufficient to confer standing under §274(a)(2) and Article III. We therefore need not consider the standing issue as to the Union or Members of Congress. See *Secretary of Interior v. California*, 464 U.S. 312, 319, n. 3, 104 S.Ct. 656, 660, n. 3, 78 L.Ed.2d 496 (1984). Cf. *Automobile Workers v. Brock*, 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986); *Barnes v. Kline*, supra. Accordingly, we turn to the merits of the case.

III

We noted recently that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983). The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Justice Jackson's words echo the famous warning of Montesquieu, quoted by James Madison in *The Federalist No. 47*, that " 'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates'...." *The Federalist No. 47*, p. 325 (J. Cooke ed. 1961).

Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent with "[t]he judicial Power ... extending] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States." Art. III, §2.

Other, more subtle, examples of separated powers are evident as well. Unlike parliamentary systems such as that of Great Britain, no person who is an officer of the United States may serve as a Member of the Congress. Art. I, §6. Moreover, unlike parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people. Art. II, §4. And even in the impeachment of a President the presiding officer of the ultimate tribunal is not a member of the Legislative Branch, but the Chief Justice of the United States. Art. I, §3.

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints "Officers of the United States" with the "Advice and Consent of the Senate...." Art. II, §2. Once the appointment

has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on "Treason, Bribery or other high Crimes and Misdemeanors." Article II, §4. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.

This was made clear in debate in the First Congress in 1789. When Congress considered an amendment to a bill establishing the Department of Foreign Affairs, the debate centered around whether the Congress "should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate." *Myers*, 272 U.S., at 114, 47 S.Ct., at 24. James Madison urged rejection of a congressional role in the removal of Executive Branch officers, other than by impeachment, saying in debate:

"Perhaps there was no argument urged with more success, or more plausibly grounded against the Constitution, under which we are now deliberating, than that founded on the mingling of the Executive and Legislative branches of the Government in one body. It has been objected, that the Senate have too much of the Executive power even, by having a control over the President in the appointment to office. Now, shall we extend this connexion between the Legislative and Executive departments, which will strengthen the objection, and diminish the responsibility we have in the head of the Executive?" I Annals of Cong. 380 (1789).

Madison's position ultimately prevailed, and a congressional role in the removal process was rejected. This "Decision of 1789" provides "contemporaneous and weighty evidence" of the Constitution's meaning since many of the Members of the First Congress "had taken part in framing that instrument." *Marsh v. Chambers*, 463 U.S. 783, 790, 103 S.Ct. 3330, 3335, 77 L.Ed.2d 1019 (1983).

This Court first directly addressed this issue in *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1925). At issue in *Myers* was a statute providing that certain postmasters could be removed only "by and with the advice and consent of the Senate." The President removed one such Postmaster without Senate approval, and a lawsuit ensued. Chief Justice Taft, writing for the Court, declared the statute unconstitutional on the ground that for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power ... would be ... to infringe the constitutional principle of the separation of governmental powers." *Id.*, at 161, 47 S.Ct., at 40.

A decade later, in *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), relied upon heavily by appellants, a Federal Trade Commissioner who had been removed by the President sought backpay. *Humphrey's Executor* involved an issue not presented either in the *Myers* case or in this case--i.e., the power of Congress to limit the President's powers of removal of a Federal Trade Commissioner. 295 U.S., at 630, 55 S.Ct., at 874-875. The relevant statute permitted removal "by the President," but only "for inefficiency, neglect of duty, or malfeasance in office." Justice Sutherland, speaking for the Court, upheld the

statute, holding that "illimitable power of removal is not possessed by the President [with respect to Federal Trade Commissioners]." *Id.*, at 628-629, 55 S.Ct., at 874. The Court distinguished *Myers*, reaffirming its holding that congressional participation in the removal of executive officers is unconstitutional. Justice Sutherland's opinion for the Court also underscored the crucial role of separated powers in our system:

"The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality." 295 U.S., at 629-630, 55 S.Ct., at 874.

The Court reached a similar result in *Wiener v. United States*, 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958), concluding that, under *Humphrey's Executor*, the President did not have unrestrained removal authority over a member of the War Claims Commission.

In light of these precedents, we conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. As the District Court observed: "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." 626 F.Supp., at 1401. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

Our decision in *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), supports this conclusion. In *Chadha*, we struck down a one- House "legislative veto" provision by which each House of Congress retained the power to reverse a decision Congress had expressly authorized the Attorney General to make:

"Disagreement with the Attorney General's decision on Chadha's deportation--that is, Congress' decision to deport Chadha--no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.*, at 954-955, 103 S.Ct., at 2786.

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, *Chadha* makes clear, is constitutionally impermissible.

The dangers of congressional usurpation of Executive Branch functions have long been

recognized. "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley v. Valeo*, 424 U.S. 1, 129, 96 S.Ct. 612, 687, 46 L.Ed.2d 659 (1976). Indeed, we also have observed only recently that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, supra, 462 U.S., at 951, 103 S.Ct., at 2784. With these principles in mind, we turn to consideration of whether the Comptroller General is controlled by Congress.

IV

Appellants urge that the Comptroller General performs his duties independently and is not subservient to Congress. We agree with the District Court that this contention does not bear close scrutiny.

Against this background, we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers in the Balanced Budget and Emergency Deficit Control Act of 1985.

V

The primary responsibility of the Comptroller General under the instant Act is the preparation of a "report." This report must contain detailed estimates of projected federal revenues and expenditures. The report must also specify the reductions, if any, necessary to reduce the deficit to the target for the appropriate fiscal year. The reductions must be set forth on a program-by-program basis.

In preparing the report, the Comptroller General is to have "due regard" for the estimates and reductions set forth in a joint report submitted to him by the Director of CBO and the Director of OMB, the President's fiscal and budgetary adviser. However, the Act plainly contemplates that the Comptroller General will exercise his independent judgment and evaluation with respect to those estimates. The Act also provides that the Comptroller General's report "shall explain fully any differences between the contents of such report and the report of the Directors." §251(b)(2).

Appellants suggest that the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical so that their performance does not constitute "execution of the law" in a meaningful sense. On the contrary, we view these functions as plainly entailing execution of the law in constitutional terms. Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under §251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with

executing a statute.

The executive nature of the Comptroller General's functions under the Act is revealed in §252(a)(3) which gives the Comptroller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation (with exceptions not relevant to the constitutional issues presented), the directive of the Comptroller General as to the budget reductions:

"The [Presidential] order must provide for reductions in the manner specified in section 251(a)(3), must incorporate the provisions of the [Comptroller General's] report submitted under section 251(b), and must be consistent with such report in all respects. The President may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account...." §252(a)(3).

See also §251(d)(3)(A).

Congress of course initially determined the content of the Balanced Budget and Emergency Deficit Control Act; and undoubtedly the content of the Act determines the nature of the executive duty. However, as Chadha makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly--by passing new legislation. Chadha, 462 U.S., at 958, 103 S.Ct., at 2787-2789. By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

VI

We now turn to the final issue of remedy. Appellants urge that rather than striking down §251 and invalidating the significant power Congress vested in the Comptroller General to meet a national fiscal emergency, we should take the lesser course of nullifying the statutory provisions of the 1921 Act that authorizes Congress to remove the Comptroller General. At oral argument, counsel for the Comptroller General suggested that this might make the Comptroller General removable by the President. All appellants urge that Congress would prefer invalidation of the removal provisions rather than invalidation of §251 of the Balanced Budget and Emergency Deficit Control Act.

Severance at this late date of the removal provisions enacted 65 years ago would significantly alter the Comptroller General's office, possibly by making him subservient to the Executive Branch. Recasting the Comptroller General as an officer of the Executive Branch would accordingly alter the balance that Congress had in mind in drafting the Budget and Accounting Act of 1921 and the Balanced Budget and Emergency Deficit Control Act, to say nothing of the wide array of other tasks and duties Congress has assigned the Comptroller

General in other statutes. Thus appellants' argument would require this Court to undertake a weighing of the importance Congress attached to the removal provisions in the Budget and Accounting Act of 1921 as well as in other subsequent enactments against the importance it placed on the Balanced Budget and Emergency Deficit Control Act of 1985.

Fortunately this is a thicket we need not enter. The language of the Balanced Budget and Emergency Deficit Control Act itself settles the issue. In §274(f), Congress has explicitly provided "fallback" provisions in the Act that take effect "if the event ... any of the reporting procedures described in section 251 are invalidated." §274(f)(1) (emphasis added). The fallback provisions are "fully operative as a law," *Buckley v. Valeo*, 424 U.S., at 108, 96 S.Ct., at 677 (quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234, 52 S.Ct. 559, 564-565, 76 L.Ed. 1062 (1932)). Assuming that appellants are correct in *urging* that this matter must be resolved on the basis of congressional intent, the intent appears to have been for §274(f) to be given effect in this situation. Indeed, striking the removal provisions would lead to a statute that Congress would probably have refused to adopt. As the District Court concluded:

"[T]he grant of authority to the Comptroller General was a carefully considered protection against what the House conceived to be the pro-executive bias of the OMB. It is doubtful that the automatic deficit reduction process would have passed without such protection, and doubtful that the protection would have been considered present if the Comptroller General were not removable by Congress itself...." 626 F.Supp., at 1394.

Accordingly, rather than perform the type of creative and imaginative statutory surgery urged by appellants, our holding simply permits the fallback provisions to come into play.

VII

No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives--or the hallmarks--of democratic government...." *Chadha*, supra, 462 U.S., at 944, 103 S.Ct., at 2781.

We conclude that the District Court correctly held that the powers vested in the Comptroller General under §251 violate the command of the Constitution that the Congress play no direct role in the execution of the laws. Accordingly, the judgment and order of the District Court are affirmed.

Our judgment is stayed for a period not to exceed 60 days to permit Congress to implement the fallback provisions.

It is so ordered.

Alexia MORRISON, Independent Counsel, Appellant,
Theodore B. OLSON, Edward C. Sehmults and Carol E. Dinkins.

No. 87-1279.

Supreme Court of the United States

Argued April 26, 1988.

Decided June 29, 1988.

[REHNQUIST, C.J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion. KENNEDY, J., took no part in the consideration or decision of the case.]

Chief Justice REHNQUIST delivered the opinion of the Court.

This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§49, 591 et seq. (1982 ed., Supp. V). We hold today that these provisions of the Act do not violate the Appointments Clause of the Constitution, Art. §2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.

I

Briefly stated, Title VI of the Ethics in Government Act (Title VI or the Act), 28 U.S.C. §§591-599 (1982 ed., Supp. V), allows for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws. The Act requires the Attorney General, upon receipt of information that he determines is "sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law," to conduct a preliminary investigation of the matter. When the Attorney General has completed this investigation, or 90 days has elapsed, he is required to report to a special court (the Special Division) created by the Act "for the purpose of appointing independent counsels." 28 U.S.C. §49 (1982 ed., Supp. V). If the Attorney General determines that "there are no reasonable grounds to believe that further investigation is warranted," then he must notify the Special Division of this result. In such a case, "the division of the court shall have no power to appoint an independent counsel." §592(b)(1). If, however, the Attorney General has determined that there are "reasonable grounds to believe that further investigation or prosecution is warranted," then he "shall apply to the division of the court for the appointment of an independent counsel." The Attorney General's application to the court "shall contain sufficient information to assist the

[court] in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction." §592(d). Upon receiving this application, the Special Division "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction." §593(b).

With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." §594(a). The functions of the independent counsel include conducting grand jury proceedings and other investigations, participating in civil and criminal court proceedings and litigation, and appealing any decision in any case in which the counsel participates in an official capacity. §§594(a)(1)-(3). Under §594(a)(9), the counsel's powers include "initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States." The counsel may appoint employees, §594(c), may request and obtain assistance from the Department of Justice, §594(d), and may accept referral of matters from the Attorney General if the matter falls within the counsel's jurisdiction as defined by the Special Division, §594(e). The Act also states that an independent counsel "shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." §594(f). In addition, whenever a matter has been referred to an independent counsel under the Act, the Attorney General and the Justice Department are required to suspend all investigations and proceedings regarding the matter. §597(a). An independent counsel has "full authority to dismiss matters within [his or her] prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent" with Department of Justice policy. § 594(g).

Two statutory provisions govern the length of an independent counsel's tenure in office. The first defines the procedure for removing an independent counsel. Section 596(a)(1) provides:

"An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

If an independent counsel is removed pursuant to this section, the Attorney General is required to submit a report to both the Special Division and the Judiciary Committees of the Senate and the House "specifying the facts found and the ultimate grounds for such removal." §596(a)(2). Under the current version of the Act, an independent counsel can obtain judicial review of the Attorney General's action by filing a civil action in the United States District Court for the District of Columbia. Members of the Special Division "may not hear or determine any such civil action or any appeal of a decision in any such civil action." The reviewing court is authorized to grant reinstatement or "other appropriate relief." §596(a)(3).

The other provision governing the tenure of the independent counsel defines the

procedures for "terminating" the counsel's office. Under §596(b)(1), the office of an independent counsel terminates when he or she notifies the Attorney General that he or she has completed or substantially completed any investigations or prosecutions undertaken pursuant to the Act. In addition, the Special Division, acting either on its own or on the suggestion of the Attorney General, may terminate the office of an independent counsel at any time if it finds that "the investigation of all matters within the prosecutorial jurisdiction of such independent counsel ... have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." §596(b)(2).

Finally, the Act provides for congressional oversight of the activities of independent counsel. An independent counsel may from time to time send Congress statements or reports on his or her activities. §595(a)(2). The "appropriate committees of the Congress" are given oversight jurisdiction in regard to the official conduct of an independent counsel, and the counsel is required by the Act to cooperate with Congress in the exercise of this jurisdiction. §595(a)(1). The counsel is required to inform the House of Representatives of "substantial and credible information which [the counsel] receives ... that may constitute grounds for an impeachment." §595(c). In addition, the Act gives certain congressional committee members the power to "request in writing that the Attorney General apply for the appointment of an independent counsel." §592(g)(1). The Attorney General is required to respond to this request within a specified time but is not required to accede to the request. §592(g)(2).

The proceedings in this case provide an example of how the Act works in practice. In 1982, two Subcommittees of the House of Representatives issued subpoenas directing the Environmental Protection Agency (EPA) to produce certain documents relating to the efforts of the EPA and the Land and Natural Resources Division of the Justice Department to enforce the "Superfund Law." At that time, appellee Olson was the Assistant Attorney General for the Office of Legal Counsel (OLC), appellee Schmults was Deputy Attorney General, and appellee Dinkins was the Assistant Attorney General for the Land and Natural Resources Division. Acting on the advice of the Justice Department, the President ordered the Administrator of EPA to invoke executive privilege to withhold certain of the documents on the ground that they contained "enforcement sensitive information." The Administrator obeyed this order and withheld the documents. In response, the House voted to hold the Administrator in contempt, after which the Administrator and the United States together filed a lawsuit against the House. The conflict abated in March 1983, when the administration agreed to give the House Subcommittees limited access to the documents.

The following year, the House Judiciary Committee began an investigation into the Justice Department's role in the controversy over the EPA documents. During this investigation, appellee Olson testified before a House Subcommittee on March 10, 1983. Both before and after that testimony, the Department complied with several Committee requests to produce certain documents. Other documents were at first withheld, although these documents were eventually disclosed by the Department after the Committee learned of their existence. In 1985, the majority members of the Judiciary Committee published a lengthy report on the Committee's investigation. Report on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83, H.R.Rep. No. 99-435 (1985). The report not only criticized various officials in the Department

of Justice for their role in the EPA executive privilege dispute, but it also suggested that appellee Olson had given false and misleading testimony to the Subcommittee on March 10, 1983, and that appellees Schmults and Dinkins had wrongfully withheld certain documents from the Committee, thus obstructing the Committee's investigation. The Chairman of the Judiciary Committee forwarded a copy of the report to the Attorney General with a request, pursuant to 28 U.S.C. §592(c), that he seek the appointment of an independent counsel to investigate the allegations against Olson, Schmults, and Dinkins.

The Attorney General directed the Public Integrity Section of the Criminal Division to conduct a preliminary investigation. The Section's report concluded that the appointment of an independent counsel was warranted to investigate the Committee's allegations with respect to all three appellees. After consulting with other Department officials, however, the Attorney General chose to apply to the Special Division for the appointment of an independent counsel solely with respect to appellee Olson. The Attorney General accordingly requested appointment of an independent counsel to investigate whether Olson's March 10, 1983, testimony "regarding the completeness of [OLC's] response to the Judiciary Committee's request for OLC documents, and regarding his knowledge of EPA's willingness to turn over certain disputed documents to Congress, violated 18 U.S.C. §1505, §1001, or any other provision of federal criminal law." Attorney General Report, at 2-3. The Attorney General also requested that the independent counsel have authority to investigate "any other matter related to that allegation." *Id.*, at 11.

On April 23, 1986, the Special Division appointed James C. McKay as independent counsel to investigate "whether the testimony of ... Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. §1505 or §1001, or any other provision of federal law." The court also ordered that the independent counsel

"shall have jurisdiction to investigate any other allegation of evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation." Order, Div. No. 86-1 (CADC Special Division, April 23, 1986).

McKay later resigned as independent counsel, and on May 29, 1986, the Division appointed appellant Morrison as his replacement, with the same jurisdiction.

In January 1987, appellant asked the Attorney General pursuant to §594(e) to refer to her as "related matters" the Committee's allegations against appellees Schmults and Dinkins. The Attorney General refused to refer the matters, concluding that his decision not to request the appointment of an independent counsel in regard to those matters was final under §592(b)(1). Appellant then asked the Special Division to order that the matters be referred to her under §594(e). On April 2, 1987, the Division ruled that the Attorney General's decision not to seek appointment of an independent counsel with respect to Schmults and Dinkins was final and unreviewable under §592(b)(1), and that therefore the court had no authority to make the requested referral. *In re Olson*, 260 U.S.App.D.C. 168, 818 F.2d 34. The court ruled, however, that its original grant of jurisdiction to appellant was broad enough to permit inquiry into whether Olson may have conspired with others, including Schmults and Dinkins, to obstruct the

Committee's investigation. *Id.*, at 181-182, 818 F.2d, at 47-48.

Following this ruling, in May and June 1987, appellant caused a grand jury to issue and serve subpoenas ad testificandum and duces tecum on appellees. All three appellees moved to quash the subpoenas, claiming, among other things, that the independent counsel provisions of the Act were unconstitutional and that appellant accordingly had no authority to proceed. On July 20, 1987, the District Court upheld the constitutionality of the Act and denied the motions to quash. *In re Sealed Case*, 665 F.Supp. 56 (DC). The court subsequently ordered that appellees be held in contempt pursuant to 28 U.S.C. § 1826(a) for continuing to refuse to comply with the subpoenas. See App. to Juris. Statement 140a, 143a, 146a. The court stayed the effect of its contempt orders pending expedited appeal.

A divided Court of Appeals reversed. *In re Sealed Case*, 267 U.S.App.D.C. 178, 838 F.2d 476 (1988). The majority ruled first that an independent counsel is not an "inferior Officer" of the United States for purposes of the Appointments Clause. Accordingly, the court found the Act invalid because it does not provide for the independent counsel to be nominated by the President and confirmed by the Senate, as the Clause requires for "principal" officers. The court then went on to consider several alternative grounds for its conclusion that the statute was unconstitutional. In the majority's view, the Act also violates the Appointments Clause insofar as it empowers a court of law to appoint an "inferior" officer who performs core executive functions; the Act's delegation of various powers to the Special Division violates the limitations of Article III; the Act's restrictions on the Attorney General's power to remove an independent counsel violate the separation of powers; and finally, the Act interferes with the Executive Branch's prerogative to "take care that the Laws be faithfully executed," Art. II, §3. The dissenting judge was of the view that the Act was constitutional. 267 U.S.App.D.C., at 238, 838 F.2d, at 536. Appellant then sought review by this Court, and we noted probable jurisdiction. 484 U.S. 1058, 108 S.Ct. 1010, 98 L.Ed.2d 976 (1988). We now reverse.

III

The Appointments Clause of Article II reads as follows:

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, §2, el. 2.

The parties do not dispute that "[t]he Constitution for purposes of appointment ... divides all its officers into two classes." *United States v. Germaine*, 99 U.S. (9 Otto) 508, 509, 25 L.Ed. 482 (1879). As we stated in *Buckley v. Valeo*, 424 U.S. 1, 132, 96 S.Ct. 612, 688, 46 L.Ed.2d 659 (1976): "[P]rincipal officers are selected by the President with the advice and consent of the

Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." The initial question is, accordingly, whether appellant is an "inferior" or a "principal" officer. If she is the latter, as the Court of Appeals concluded, then the Act is in violation of the Appointments Clause.

The line between "inferior" and "principal" officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn. See, e.g., 2 J. Story, Commentaries on the Constitution §1536, pp. 397-398 (3d ed. 1858) ("In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed inferior officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate"). We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the "inferior officer" side of that line. Several factors lead to this conclusion.

First, appellant is subject to removal by a higher Executive Branch official. Although appellant may not be "subordinate" to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree "inferior" in rank and authority. Second, appellant is empowered by the Act to perform only certain, limited duties. An independent counsel's role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. Admittedly, the Act delegates to appellant "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," §594(a), but this grant of authority does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office. The Act specifically provides that in policy matters appellant is to comply to the extent possible with the policies of the Department. §594(f).

Third, appellant's office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General. Finally, appellant's office is limited in tenure. There is concededly no time limit on the appointment of a particular counsel. Nonetheless, the office of independent counsel is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the "ideas of tenure, duration ... and duties" of the independent counsel, *Germaine*, supra, 9 Otto, at 511, are sufficient to establish that appellant is an "inferior" officer in the constitutional sense.

This conclusion is consistent with our few previous decisions that considered the question whether a particular Government official is a "principal" or an "inferior" officer. In *United States v. Eaton*, 169 U.S. 331, 18 S.Ct. 374, 42 L.Ed. 767 (1898), for example, we approved Department of State regulations that allowed executive officials to appoint a "vice-consul"

during the temporary absence of the consul, terming the "vice-consul" a "subordinate officer" notwithstanding the Appointment Clause's specific reference to "Consuls" as principal officers. As we stated: "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions he is not thereby transformed into the superior and permanent official." *Id.*, at 343, 18 S.Ct., at 379. In *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 25 L.Ed. 717 (1880), the Court found that federal "supervisor[s] of elections," who were charged with various duties involving oversight of local congressional elections, see *id.*, 10 Otto at 379-380, were inferior officers for purposes of the Clause. In *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-353, 51 S.Ct. 153, 156-157, 75 L.Ed. 374 (1931), we held that "United States commissioners are inferior officers." *Id.*, at 352, 51 S.Ct., at 156. These commissioners had various judicial and prosecutorial powers, including the power to arrest and imprison for trial, to issue warrants, and to institute prosecutions under "laws relating to the elective franchise and civil rights." *Id.*, at 353, n. 2, 51 S.Ct., at 156, n. 2. All of this is consistent with our reference in *United States v. Nixon*, 418 U.S. 683, 694, 696, 94 S.Ct. 3090, 3100, 3101, 41 L.Ed.2d 1039 (1974), to the office of Watergate Special Prosecutor--whose authority was similar to that of appellant, see *id.*, at 694, n. 8, 94 S.Ct., at 3100, n. 8--as a "subordinate officer."

This does not, however, end our inquiry under the Appointments Clause. Appellees argue that even if appellant is an "inferior" officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch. They contend that the Clause does not contemplate congressional authorization of "interbranch appointments," in which an officer of one branch is appointed by officers of another branch. The relevant language of the Appointments Clause is worth repeating. It reads: "... but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments." On its face, the language of this "excepting clause" admits of no limitation on interbranch appointments. Indeed, the inclusion of "as they think proper" seems clearly to give Congress significant discretion to determine whether it is "proper" to vest the appointment of for example, executive officials in the "courts of Law." We recognized as much in one of our few decisions in this area, *Ex parte Siebold*, *supra*, where we stated:

"It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged....

"But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise." *Id.*, 100 U.S. (10 Otto), at 397- 398.

Our only decision to suggest otherwise, *Ex parte Hennen*, 13 Pet. 230, 10 L.Ed. 138 (1839), from which the first sentence in the above quotation from *Siebold* was derived, was

discussed in *Siebold* and distinguished as "not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed." 100 U.S. (10 Otto), at 398. Outside of these two cases, there is very little, if any, express discussion of the propriety of interbranch appointments in our decisions, and we see no reason now to depart from the holding of *Siebold* that such appointments are not proscribed by the excepting clause.

We also note that the history of the Clause provides no support for appellees' position.

[...] As this discussion shows, there was little or no debate on the question whether the Clause empowers Congress to provide for interbranch appointments, and there is nothing to suggest that the Framers intended to prevent Congress from having that power.

We do not mean to say that Congress' power to provide for interbranch appointments of "inferior officers" is unlimited. In addition to separation-of-powers concerns, which would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches, *Siebold* itself suggested that Congress' decision to vest the appointment power in the courts would be improper if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint. 100 U.S. (10 Otto), at 398 ("[T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void"). In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court. We thus disagree with the Court of Appeals' conclusion that there is an inherent incongruity about a court having the power to appoint prosecutorial officers. We have recognized that courts may appoint private attorneys to act as prosecutor for judicial contempt judgments. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). In *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931), we approved court appointment of United States commissioners, who exercised certain limited prosecutorial powers. *Id.*, at 353, n. 2, 51 S.Ct., at 156, n. 2. In *Siebold*, as well, we indicated that judicial appointment of federal marshals, who are "executive officer[s]," would not be inappropriate. Lower courts have also upheld interim judicial appointments of United States Attorneys, see *United States v. Solomon*, 216 F.Supp. 835 (SDNY 1963), and Congress itself has vested the power to make these interim appointments in the district courts, see 28 U.S.C. §546(d) (1982 ed., Supp. V). Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers. If it were to remove the appointing authority from the Executive Branch, the most logical place to put it was in the Judicial Branch. In the light of the Act's provision making the judges of the Special Division ineligible to participate in any matters relating to an independent counsel they have appointed, 28 U.S.C. §49(f) (1982 ed., Supp. V) we do not think that appointment of the independent counsel by the court runs afoul of the constitutional limitation on "incongruous" interbranch appointments.

IV

Appellees next contend that the powers vested in the Special Division by the Act conflict with Article III of the Constitution. We have long recognized that by the express provision of Article III, the judicial power of the United States is limited to "Cases" and "Controversies." See *Muskrat v. United States*, 219 U.S. 346, 356, 31 S.Ct. 250, 253, 55 L.Ed. 246 (1911). As a general rule, we have broadly stated that "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution." *Buckley*, 424 U.S., at 123, 96 S.Ct., at 684 (citing *United States v. Ferreira*, 13 How. 40, 14 L.Ed. 40 (1852); *Hayburn's Case*, 2 Dall. 409 (1792)). The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches. See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208, 63 L.Ed.2d 479 (1980). With this in mind, we address in turn the various duties given to the Special Division by the Act.

Most importantly, the Act vests in the Special Division the power to choose who will serve as independent counsel and the power to define his or her jurisdiction. §593(b). Clearly, once it is accepted that the Appointments Clause gives Congress the power to vest the appointment of officials such as the independent counsel in the "courts of Law," there can be no Article III objection to the Special Division's exercise of that power, as the power itself derives from the Appointments Clause, a source of authority for judicial action that is independent of Article III. Appellees contend, however, that the Division's Appointments Clause powers do not encompass the power to define the independent counsel's jurisdiction. We disagree. In our view, Congress' power under the Clause to vest the "Appointment" of inferior officers in the courts may, in certain circumstances, allow Congress to give the courts some discretion in defining the nature and scope of the appointed official's authority. Particularly when, as here, Congress creates a temporary "office" the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place, it may vest the power to define the scope of the office in the court as an incident to the appointment of the officer pursuant to the Appointments Clause. This said, we do not think that Congress may give the Division unlimited discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.

The Act also vests in the Special Division various powers and duties in relation to the independent counsel that, because they do not involve appointing the counsel, or defining his or her jurisdiction, cannot be said to derive from the Division's Appointments Clause authority. These duties include granting extensions for the Attorney General's preliminary investigation, §592(a)(3); receiving the report of the Attorney General at the conclusion of his preliminary investigation, §§592(b)(1), 593(c)(2)(B); referring matters to the counsel upon request, §594(e); receiving reports from the counsel regarding expenses incurred, §594(h)(1)(A); receiving a report from the Attorney General following the removal of an independent counsel, §596(a)(2); granting attorney's fees upon request to individuals who were investigated but not indicted by an independent counsel, §593(f); receiving a final report from the counsel, §594(h)(1)(B); deciding

whether to release the counsel's final report to Congress or the public and determining whether any protective orders should be issued, §594(h)(2); and terminating an independent counsel when his or her task is completed, §596(b)(2).

Leaving aside for the moment the Division's power to terminate an independent counsel, we do not think that Article III absolutely prevents Congress from vesting these other miscellaneous powers in the Special Division pursuant to the Act. As we observed above, one purpose of the broad prohibition upon the courts' exercise of "executive or administrative duties of a nonjudicial nature," Buckley, 424 U.S., at 123, 96 S.Ct., at 684, is to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches. In this case, the miscellaneous powers described above do not impermissibly trespass upon the authority of the Executive Branch. Some of these allegedly "supervisory" powers conferred on the court are passive: the Division merely "receives" reports from the counsel or the Attorney General, it is not entitled to act on them or to specifically approve or disapprove of their contents. Other provisions of the Act do require the court to exercise some judgment and discretion, but the powers granted by these provisions are themselves essentially ministerial. The Act simply does not give the Division the power to "supervise" the independent counsel in the exercise of his or her investigative or prosecutorial authority. And, the functions that the Special Division is empowered to perform are not inherently "Executive"; indeed, they are directly analogous to functions that federal judges perform in other contexts, such as deciding whether to allow disclosure of matters occurring before a grand jury, see Fed. Rule Crim.Proc. 6(e), deciding to extend a grand jury investigation, Rule 6(g), or awarding attorney's fees, see, e.g., 42 U.S.C. §1988.

We are more doubtful about the Special Division's power to terminate the office of the independent counsel pursuant to §596(b)(2). As appellees suggest, the power to terminate, especially when exercised by the Division on its own motion, is "administrative" to the extent that it requires the Special Division' to monitor the progress of proceedings of the independent counsel and come to a decision as to whether the counsel's job is "completed." §596(b)(2). It also is not a power that could be considered typically "judicial," as it has few analogues among the court's more traditional powers. Nonetheless, we do not, as did the Court of Appeals, view this provision as a significant judicial encroachment upon executive power or upon the prosecutorial discretion of the independent counsel.

We think that the Court of Appeals overstated the matter when it described the power to terminate as a "broadsword and rapier" that enables the court to "control the pace and depth of the independent counsel's activities." 267 U.S.App.D.C., at 217, 838 F.2d, at 515. The provision has not been tested in practice, and we do not mean to say that an adventurous special court could not reasonably construe the provision as did the Court of Appeals; but it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities, see, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841, 106 S.Ct. 3245, 3251, 92 L.Ed.2d 675 (1986), and to that end we think a narrow construction is appropriate here. The termination provisions of the Act do not give the Special Division anything approaching the power to remove the counsel while an investigation or court proceeding is still underway--this power is vested solely in the Attorney General. As we see it, "termination" may occur only

when the duties of the counsel are truly "completed" or "so substantially completed" that there remains no need for any continuing action by the independent counsel. It is basically a device for removing from the public payroll an independent counsel who has served his or her purpose, but is unwilling to acknowledge the fact. So construed, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III.

Nor do we believe, as appellees contend, that the Special Division's exercise of the various powers specifically granted to it under the Act poses any threat to the "impartial and independent federal adjudication of claims within the judicial power of the United States." *Commodity Futures Trading Comm'n v. Schor*, supra, at 850, 106 S.Ct., at 3256. We reach this conclusion for two reasons. First, the Act as it currently stands gives the Special Division itself no power to review any of the actions of the independent counsel or any of the actions of the Attorney General with regard to the counsel. Accordingly, there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court. Second, the Act prevents members of the Special Division from participating in "any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office." 28 U.S.C. §49(f) (1982 ed., Supp. V) (emphasis added); see also §596(a)(3) (preventing members of the Special Division from participating in review of the Attorney General's decision to remove an independent counsel). We think both the special court and its judges are sufficiently isolated by these statutory provisions from the review of the activities of the independent counsel so as to avoid any taint of the independence of the Judiciary such as would render the Act invalid under Article III.

V

We now turn to consider whether the Act is invalid under the constitutional principle of separation of powers. Two related issues must be addressed: The first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel.

A

Two Terms ago we had occasion to consider whether it was consistent with the separation of powers for Congress to pass a statute that authorized a Government official who is removable only by Congress to participate in what we found to be "executive powers." *Bowsher v. Synar*, 478 U.S. 714, 730, 106 S.Ct. 3181, 3190, 92 L.Ed.2d 583 (1986). We held in *Bowsher* that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Id.*, at 726, 106 S.Ct., at 3188. A primary antecedent for this ruling was our 1926 decision in *Myers v. United States*, 272 U.S. 52, 47 S.Ct.

21, 71 L.Ed. 160 (1926). Myers had considered the propriety of a federal statute by which certain postmasters of the United States could be removed by the President only "by and with the advice and consent of the Senate." There too, Congress' attempt to involve itself in the removal of an executive official was found to be sufficient grounds to render the statute invalid. As we observed in *Bowsher*, the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from "draw[ing] to itself ... the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers." *Myers*, *supra*, at 161, 47 S.Ct., at 40.

Unlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office, "only by the personal action of the Attorney General, and only for good cause." §596(a)(1). There is no requirement of congressional approval of the Attorney General's removal decision, though the decision is subject to judicial review. §596(a)(3). In our view, the removal provisions of the Act make this case more analogous to *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1.611 (1935), and *Wiener v. United States*, 357 U.S. 349, 78 S.Ct. 1.275, 2 L.Ed.2d 1377 (1958), than to *Myers* or *Bowsher*.

In *Humphrey's Executor*, the issue was whether a statute restricting the President's power to remove the Commissioners of the Federal Trade Commission (FTC) only for "inefficiency, neglect of duty, or malfeasance in office" was consistent with the Constitution. 295 U.S., at 619, 55 S.Ct., at 870. We stated that whether Congress can "condition the [President's power of removal] by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office." *Id.*, at 631, 55 S.Ct., at 875. Contrary to the implication of some dicta in *Myers*, the President's power to remove Government officials simply was not "all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution." 295 U.S., at 629, 55 S.Ct., at 874. At least in regard to "quasi-legislative" and "quasi-judicial" agencies such as the FTC, "[t]he authority of Congress, in creating [such] agencies, to require them to act in discharge of their duties independently of executive control ... includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." *Ibid.* In *Humphrey's Executor*, we found it "plain" that the Constitution did not give the President "illimitable power of removal" over the officers of independent agencies. *Ibid.* Were the President to have the power to remove FTC Commissioners at will, the "coercive influence" of the removal power would "threate[n] the independence of [the] commission." *Id.*, at 630, 55 S.Ct., at 875.

Similarly, in *Wiener* we considered whether the President had unfettered discretion to remove a member of the War Claims Commission, which had been established by Congress in the War Claims Act of 1948, 62 Stat. 1240. The Commission's function was to receive and adjudicate certain claims for compensation from those who had suffered personal injury or property damage at the hands of the enemy during World War II. Commissioners were appointed by the President, with the advice and consent of the Senate, but the statute made no provision for the removal of officers, perhaps because the Commission itself was to have a

limited existence. As in *Humphrey's Executor*, however, the Commissioners were entrusted by Congress with adjudicatory powers that were to be exercised free from executive control. In this context, "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing." 357 U.S., at 356, 78 S.Ct., at 1279. Accordingly, we rejected the President's attempt to remove a Commissioner "merely because he wanted his own appointees on [the] Commission," stating that "no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute." *Ibid.*

Appellees contend that *Humphrey's Executor* and *Wiener* are distinguishable from this case because they did not involve officials who performed a "core executive function." They argue that our decision in *Humphrey's Executor* rests on a distinction between "purely executive" officials and officials who exercise "quasi-legislative" and "quasi-judicial" powers. In their view, when a "purely executive" official is involved, the governing precedent is *Myers*, not *Humphrey's Executor*. See *Humphrey's Executor*, *supra*, 295 U.S., at 628, 55 S.Ct., at 874. And, under *Myers*, the President must have absolute discretion to discharge "purely" executive officials at will. See *Myers*, 272 U.S. at 132-134, 47 S.Ct., at 30-31.

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some "purely executive" officials who must be removable by the President at will if he is to be able to accomplish his constitutional role. See 272 U.S., at 132- 134, 47 S.Ct., at 30-31. But as the Court noted in *Wiener*:

"The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure." 357 U.S., at 352, 78 S.Ct., at 1277.

At the other end of the spectrum from *Myers*, the characterization of the agencies in *Humphrey's Executor* and *Wiener* as "quasi-legislative" or "quasi-judicial" in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.

Considering for the moment the "good cause" removal provision in isolation from the other parts of the Act at issue in this case, we cannot say that the imposition of a "good cause" standard for removal by itself unduly trammels on executive authority. There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term "good cause" under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for "misconduct." See H.R. Conf. Rep. No. 100-452, p. 37 (1987). Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

B

The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch. Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. See, e.g., *Bowsher v. Synar*, 478 U.S., at 725, 106 S.Ct., at 3187 (citing *Humphrey's Executor*, 295 U.S., at 629-630, 55 S.Ct., at 874-875). As we stated in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.*, at 122, 96 S.Ct., at 684. We have not hesitated to invalidate provisions of law which violate this principle. See *id.*, at 123, 96 S.Ct., at 684. On the other hand, we have never held that the Constitution requires that the three branches of Government "operate with absolute independence." *United States v. Nixon*, 418 U.S., at 707, 94 S.Ct., at 3107; see also *Nixon v. Administrator of General Services*, 433 U.S.

425, 442, 97 S.Ct. 2777, 2789, 53 L.Ed.2d 867 (1977) (citing James Madison in *The Federalist* No. 47, and Joseph Story in *1 Commentaries on the Constitution* §525 (M. Bigelow, 5th ed. 1905)). In the often-quoted words of Justice Jackson:

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (concurring opinion).

We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S., at 856, 106 S.Ct., at 3259-3260. Unlike some of our previous cases, most recently *Bowsher v. Synar*, this case simply does not pose a "dange[r] of congressional usurpation of Executive Branch functions." 478 U.S., at 727, 106 S.Ct., at 3188; see also *INS v. Chadha*, 462 U.S. 919, 958, 103 S.Ct. 2764, 2777, 77 L.Ed.2d 317 (1983). Indeed, with the exception of the power of impeachment--which applies to all officers of the United States--Congress retained for itself no powers of control or supervision over an independent counsel. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit. §529(g). Other than that, Congress' role under the Act is limited to receiving reports or other information and oversight of the independent counsel's activities, §595(a), functions that we have recognized generally as being incidental to the legislative function of Congress. See *McGrain v. Daugherty*, 273 U.S. 135, 174, 47 S.Ct. 319, 328, 71 L.Ed. 580 (1927).

Similarly, we do not think that the Act works any judicial usurpation of properly executive functions. As should be apparent from our discussion of the Appointments Clause above, the power to appoint inferior officers such as independent counsel is not in itself an "executive" function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior office in the "courts of Law." We note nonetheless that under the Act the Special Division has no power to appoint an independent counsel sua sponte; it may only do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment, §592(f). In addition, once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel. As we pointed out in our discussion of the Special Division in relation to Article III, the various powers delegated by the statute to the Division are not supervisory or administrative, nor are they functions that the Constitution requires be performed by officials within the Executive Branch. The Act does give a federal court the power to review the Attorney General's decision to remove an independent counsel, but in our view this is a function that is well within the traditional power of the Judiciary.

Finally, we do not think that the Act "impermissibly undermine[s]" the powers of the Executive Branch, *Schor*, supra, 478 U.S., at 856, 106 S.Ct., at 3260, or "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from

accomplishing its constitutionally assigned functions," *Nixon v. Administrator of General Services*, supra, 433 U.S., at 443, 97 S.Ct., at 2790. It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. The Attorney General is not allowed to appoint the individual of his choice; he does not determine the counsel's jurisdiction; and his power to remove a counsel is limited. Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for "good cause," a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are "faithfully executed" by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds "no reasonable grounds to believe that further investigation is warranted" is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so. Notwithstanding the fact that the counsel is to some degree "independent" and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.

VI

In sum, we conclude today that it does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division; that the powers exercised by the Special Division under the Act do not violate Article III; and that the Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch. The decision of the Court of Appeals is therefore

Reversed.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice SCALIA, dissenting.

It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:

"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a

government of laws and not of men."

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of *The Federalist*, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." *The Federalist* No. 47, p. 301 (C. Rossiter ed. 1961) (hereinafter *Federalist*). Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.

The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. Article I, §1, provides that "1_41 legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article III, §1, provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." And the provision at issue here, Art. II, §1, cl. 1, provides that "[t]he executive Power shall be vested in a President of the United States of America."

But just as the mere words of a Bill of Rights are not self-effectuating, the Framers recognized "[t]he insufficiency of a mere parchment delineation of the boundaries" to achieve the separation of powers. *Federalist* No. 73, p. 442 (A. Hamilton). "[T]he great security," wrote Madison, "against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." *Federalist* No. 51, pp. 321-322. Madison continued:

"But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.... As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.*, at 322-323.

The major "fortification" provided, of course, was the veto power. But in addition to providing fortification, the Founders conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power. Proposals to have multiple executives, or a council of advisers with separate authority were rejected. See 1 M. Farrand, *Records of the Federal Convention of 1787*, pp. 66, 71-74, 88, 91-92 (rev. ed. 1966); 2 *id.*, at 335-337, 533, 537, 542. Thus, while legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," U.S. Const., Art. I, §1 (emphasis added), "[O]ne executive Power shall be vested in a President of the United States," Art. II, §1, cl. 1.

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish--so that "a gradual concentration of the several powers in the same department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

I

The present case began when the Legislative and Executive Branches became "embroiled in a dispute concerning the scope of the congressional investigatory power," *United States v. House of Representatives of United States*, 556 F.Supp. 150, 152 (DC 1983), which--as is often the case with such interbranch conflicts--became quite acrimonious. In the course of oversight hearings into the administration of the Superfund by the Environmental Protection Agency (EPA), two Subcommittees of the House of Representatives requested and then subpoenaed numerous internal EPA documents. The President responded by personally directing the EPA Administrator not to turn over certain of the documents, see Memorandum of November 30, 1982, from President Reagan for the Administrator, Environmental Protection Agency, reprinted in H.R.Rep. No. 99-435, pp. 1166-1167 (1985), and by having the Attorney General notify the congressional Subcommittees of this assertion of executive privilege, see Letters of November 30, 1982, from Attorney General William French Smith to Hon. John D. Dingell and Hon. Elliott H. Levitas, reprinted, *id.*, at 1168-1177. In his decision to assert executive privilege, the President was counseled by appellee Olson, who was then Assistant Attorney General of the Department of Justice for the Office of Legal Counsel, a post that has traditionally had responsibility for providing legal advice to the President (subject to approval of the Attorney General). The House's response was to pass a resolution citing the EPA Administrator, who had possession of the documents, for contempt. Contempt of Congress is a criminal offense. See 2 U.S.C. §192. The United States Attorney, however, a member of the Executive Branch, initially took no steps to prosecute the contempt citation. Instead, the Executive Branch sought the immediate assistance of the Third Branch by filing a civil action asking the District Court to declare that the EPA Administrator had acted lawfully in withholding the documents under a claim of executive privilege. See *ibid.* The District Court declined (in my view correctly) to get involved in the controversy, and urged the other two branches to try "[c]ompromise and cooperation, rather than confrontation." 556 F.Supp., at 153. After further haggling, the two branches eventually reached an agreement giving the House Subcommittees limited access to the contested documents.

Congress did not, however, leave things there. Certain Members of the House remained angered by the confrontation, particularly by the role played by the Department of Justice. Specifically, the Judiciary Committee remained disturbed by the possibility that the Department had persuaded the President to assert executive privilege despite reservations by the EPA; that the Department had "deliberately and unnecessarily precipitated a constitutional confrontation with Congress"; that the Department had not properly reviewed and selected the documents as to

which executive privilege was asserted; that the Department had directed the United States Attorney not to present the contempt certification involving the EPA Administrator to a grand jury for prosecution; that the Department had made the decision to sue the House of Representatives; and that the Department had not adequately advised and represented the President, the EPA, and the EPA Administrator. H.R.Rep. No. 99-435, p. 3 (1985) (describing unresolved "questions" that were the basis of the Judiciary Committee's investigation). Accordingly, staff counsel of the House Judiciary Committee were commissioned (apparently without the knowledge of many of the Committee's members, see *id.*, at 731) to investigate the Justice Department's role in the controversy. That investigation lasted 2 1/2 years, and produced a 3,000-page report issued by the Committee over the vigorous dissent of all but one of its minority-party members. That report, which among other charges questioned the truthfulness of certain statements made by Assistant Attorney General Olson during testimony in front of the Committee during the early stages of its investigation, was sent to the Attorney General along with a formal request that he appoint an independent counsel to investigate Mr. Olson and others.

As a general matter, the Act before us here requires the Attorney General to apply for the appointment of an independent counsel within 90 days after receiving a request to do so, unless he determines within that period that "there are no reasonable grounds to believe that further investigation or prosecution is warranted." 28 U.S.C. §592(b)(1). As a practical matter, it would be surprising if the Attorney General had any choice (assuming this statute is constitutional) but to seek appointment of an independent counsel to pursue the charges against the principal object of the congressional request, Mr. Olson. Merely the political consequences (to him and the President) of seeming to break the law by refusing to do so would have been substantial. How could it not be, the public would ask, that a 3,000-page indictment drawn by our representatives over 2 1/2 years does not even establish "reasonable grounds to believe" that further investigation or prosecution is warranted with respect to at least the principal alleged culprit? But the Act establishes more than just practical compulsion. Although the Court's opinion asserts that the Attorney General had "no duty to comply with the [congressional] request," *ante*, at 2620, that is not entirely accurate. He had a duty to comply unless he could conclude that there were "no reasonable grounds to believe," not that prosecution was warranted, but merely that "further investigation " was warranted, 28 U.S.C. §592(b)(1) (1982 ed., Supp. V) (emphasis added), after a 90-day investigation in which he was prohibited from using such routine investigative techniques as grand juries, plea bargaining, grants of immunity, or even subpoenas, see §592(a)(2). The Court also makes much of the fact that "the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment, §592(f)." *Ante*, at 2621. Yes, but Congress is not prevented from reviewing it. The context of this statute is acrid with the smell of threatened impeachment. Where, as here, a request for appointment of an independent counsel has come from the Judiciary Committee of either House of Congress, the Attorney General must, if he decides not to seek appointment, explain to that Committee why. See also 28 U.S.C. §595(c) (1982 ed., Supp. V) (independent counsel must report to the House of Representatives information "that may constitute grounds for an impeachment").

Thus, by the application of this statute in the present case, Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch. Mr. Olson may or may not be guilty of a crime; we do not know. But we do know that

the investigation of him has been commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States, in the sense that it warrants the diversion of resources from other efforts, and is worth the cost in money and in possible damage to other governmental interests; and not even, leaving aside those normally considered factors, because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worth prosecuting; but only because the Attorney General cannot affirm, as Congress demands, that there are no reasonable grounds to believe that further investigation is warranted. The decisions regarding the scope of that further investigation, its duration, and, finally, whether or not prosecution should ensue, are likewise beyond the control of the President and his subordinates.

II

If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning. The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers. As my prologue suggests, I think that has it backwards. Our opinions are full of the recognition that it is the principle of separation of powers, and the inseparable corollary that each department's "defense must ... be made commensurate to the danger of attack," Federalist No. 51, p. 322 (J. Madison), which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power. Thus, while I will subsequently discuss why our appointments and removal jurisprudence does not support today's holding, I begin with a consideration of the fountainhead of that jurisprudence, the separation and equilibration of powers.

First, however, I think it well to call to mind an important and unusual premise that underlies our deliberations, a premise not expressly contradicted by the Court's opinion, but in my view not faithfully observed. It is rare in a case dealing, as this one does, with the constitutionality of a statute passed by the Congress of the United States, not to find anywhere in the Court's opinion the usual, almost formulary caution that we owe great deference to Congress' view that what it has done is constitutional, see, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64, 101 S.Ct. 2646, 2651, 69 L.Ed.2d 478 (1981); *Fullilove v. Klutznick*, 448 U.S. 448, 472, 100 S.Ct. 2758, 2771, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102, 93 S.Ct. 2080, 2086, 36 L.Ed.2d 772 (1973); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963), and that we will decline to apply the statute only if the presumption of constitutionality can be overcome, see *Fullilove*, *supra*, 448 U.S., at 473, 100 S.Ct., at 2772; *Columbia Broadcasting*, *supra*, 412 U.S., at 103, 93 S.Ct., at 2087. That caution is not recited by the Court in the present case because it does not apply. Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres. But where the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct. The reason is stated concisely by Madison: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior

right of settling the boundaries between their respective powers...." Federalist No. 49, p. 314. The playing field for the present case, in other words, is a level one. As one of the interested and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt.

To repeat, Article II, §1, cl. 1, of the Constitution provides:

"The executive Power shall be vested in a President of the United States."

As I described at the outset of this opinion, this does not mean some of the executive power, but all of the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

The Court concedes that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive,'" though it qualifies that concession by adding "in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." Ante, at 2619. The qualifier adds nothing but atmosphere. In what other sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) except by reference to what has always and everywhere--if conducted by government at all--been conducted never by the legislature, never by the courts, and always by the executive. There is no possible doubt that the independent counsel's functions fit this description. She is vested with the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice {and} the Attorney General." 28 U.S.C. §594(a) (1982 ed., Supp. V) (emphasis added). Governmental investigation and prosecution of crimes is a quintessentially executive function. See *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138, 96 S.Ct. 612, 691, 46 L.Ed.2d 659 (1976); *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974).

As for the second question, whether the statute before us deprives the President of exclusive control over that quintessentially executive activity: The Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the statute. Instead, the Court points out that the President, through his Attorney General, has at least some control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that "some" Presidential control. "Most important[t]" among these controls, the Court asserts, is the Attorney General's "power to remove the counsel for 'good cause.'" Ante, at 2621. This is somewhat like referring to shackles as an effective means of locomotion. As we recognized in *Humphrey's Executor v. United States*, 295 U.S. 602,

55 S.Ct. 869, 79 L.Ed. 1611 (1935)--indeed, what Humphrey's Executor was all about--limiting removal power to "good cause" is an impediment to, not an effective grant of, Presidential control. We said that limitation was necessary with respect to members of the Federal Trade Commission, which we found to be "an agency of the legislative and judicial departments," and "wholly disconnected from the executive department," *id.*, at 630, 55 S.Ct., at 875, because "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.*, at 629, 55 S.Ct., at 874. What we in Humphrey's Executor found to be a means of eliminating Presidential control, the Court today considers the "most importan[t]" means of assuring Presidential control. Congress, of course, operated under no such illusion when it enacted this statute, describing the "good cause" limitation as "protecting the independent counsel's ability to act independently of the President's direct control" since it permits removal only for "misconduct." H.R.Conf.Rep. 100-452, p. 37 (1987).

Moving on to the presumably "less important" controls that the President retains, the Court notes that no independent counsel may be appointed without a specific request from the Attorney General. As I have discussed above, the condition that renders such a request mandatory (inability to find "no reasonable grounds to believe" that further investigation is warranted) is so insubstantial that the Attorney General's discretion is severely confined. And once the referral is made, it is for the Special Division to determine the scope and duration of the investigation. See 28 U.S.C. §593(b) (1982 ed., Supp. V). And in any event, the limited power over referral is irrelevant to the question whether, once appointed, the independent counsel exercises executive power free from the President's control. Finally, the Court points out that the Act directs the independent counsel to abide by general Justice Department policy, except when not "possible." See 28 U.S.C. §594(1) (1982 ed., Supp. V). The exception alone shows this to be an empty promise. Even without that, however, one would be hard put to come up with many investigative or prosecutorial "policies" (other than those imposed by the Constitution or by Congress through law) that are absolute. Almost all investigative and prosecutorial decisions including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted--involve the balancing of innumerable legal and practical considerations. Indeed, even political considerations (in the nonpartisan sense) must be considered, as exemplified by the recent decision of an independent counsel to subpoena the former Ambassador of Canada, producing considerable tension in our relations with that country. See *N.Y. Times*, May 29, 1987, p. A12, col. 1. Another pre-eminently political decision is whether getting a conviction in a particular case is worth the disclosure of national security information that would be necessary. The Justice Department and our intelligence agencies are often in disagreement on this point, and the Justice Department does not always win. The present Act even goes so far as specifically to take the resolution of that dispute away from the President and give it to the independent counsel. 28 U.S.C. §594(a)(6). In sum, the balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion. To take this away is to remove the core of the prosecutorial function, and not merely "some" Presidential control.

As I have said, however, it is ultimately irrelevant how much the statute reduces Presidential control. The case is over when the Court acknowledges, as it must, that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General

and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." Ante, at 2621. It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether "the President's need to control the exercise of [the independent counsel's] discretion is so central to the functioning of the 'Executive Branch' as to require complete control, ante, at 2619 (emphasis added), whether the conferral of his powers upon someone else "sufficiently deprives the President of control over the independent counsel to interfere impermissibly with [his] constitutional obligation to ensure the faithful execution of the laws," ante, at 2619-2620 (emphasis added), and whether "the Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties," ante, at 2621 (emphasis added). It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are.

The utter incompatibility of the Court's approach with our constitutional traditions can be made more clear, perhaps, by applying it to the powers of the other two branches. Is it conceivable that if Congress passed a statute depriving itself of less than full and entire control over some insignificant area of legislation, we would inquire whether the matter was "so central to the functioning of the Legislative Branch" as really to require complete control, or whether the statute gives Congress "sufficient control over the surrogate legislator to ensure that Congress is able to perform its constitutionally assigned duties"? Of course we would have none of that. Once we determined that a purely legislative power was at issue we would require it to be exercised, wholly and entirely, by Congress. Or to bring the point closer to home, consider a statute giving to non-Article III judges just a tiny bit of purely judicial power in a relatively insignificant field, with substantial control, though not total control, in the courts--perhaps "clear error" review, which would be a fair judicial equivalent of the Attorney General's "for cause" removal power here. Is there any doubt that we would not pause to inquire whether the matter was "so central to the functioning of the Judicial Branch" as really to require complete control, or whether we retained "sufficient control over the matters to be decided that we are able to perform our constitutionally assigned duties"? We would say that our "constitutionally assigned duties" include complete control over all exercises of the judicial power--or, as the plurality opinion said in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-59, 102 S.Ct. 2858, 2865, 73 L.Ed.2d 598 (1982): "The inexorable command of [Article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." We should say here that the President's constitutionally assigned duties include complete control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.

Is it unthinkable that the President should have such exclusive power, even when alleged crimes by him or his close associates are at issue? No more so than that Congress should have the exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws. See Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e et seq. (prohibiting "employers," not defined to include the United States, from discriminating on the

basis of race, color, religion, sex, or national origin). No more so than that this Court should have the exclusive power to pronounce the final decision on justiciable cases and controversies, even those pertaining to the constitutionality of a statute reducing the salaries of the Justices. See *United States v. Will*, 449 U.S. 200, 211-217, 101 S.Ct. 471, 478-482, 66 L.Ed.2d 392 (1980). A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. As we reiterate this very day, "[i]t is a truism that constitutional protections have costs." *Coy v. Iowa*, 487 U.S. 1012, 1020, 108 S.Ct. 2798, --, 101 L.Ed.2d 857 (1988). While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty. The checks against any branch's abuse of its exclusive powers are twofold: First, retaliation by one of the other branch's use of its exclusive powers: Congress, for example, can impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes, cf. *United States v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946); and the courts can dismiss malicious prosecutions. Second, and ultimately, there is the political check that the people will replace those in the political branches (the branches more "dangerous to the political rights of the Constitution," *Federalist No. 78*, p. 465) who are guilty of abuse. Political pressures produced special prosecutors--for Teapot Dome and for Watergate, for example--long before this statute created the independent counsel. See Act of Feb. 8, 1924, ch. 16, 43 Stat. 5-6; 38 Fed.Reg. 30738 (1973).

The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a "balancing test." What are the standards to determine how the balance is to be struck, that is, how much removal of Presidential power is too much? Many countries of the world get along with an executive that is much weaker than ours-- in fact, entirely dependent upon the continued support of the legislature. Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply announces, with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not "so central to the functioning of the Executive Branch" as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so. Having abandoned as the basis for our decision-making the text of Article II that "the executive Power" must be vested in the President, the Court does not even attempt to craft a substitute criterion--a "justiciable standard," see, e.g., *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962); *Coleman v. Miller*, 307 U.S. 433, 454-455, 59 S.Ct. 972, 982, 83 L.Ed. 1385 (1939), however remote from the Constitution--that today governs, and in the future will govern, the decision of such questions. Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.

In my view, moreover, even as an ad hoc, standardless judgment the Court's conclusion must be wrong. Before this statute was passed, the President, in taking action disagreeable to the Congress, or an executive officer giving advice to the President or testifying before Congress concerning one of those many matters on which the two branches are from time to time at odds, could be assured that his acts and motives would be adjudged--insofar as the decision whether to

conduct a criminal investigation and to prosecute is concerned--in the Executive Branch, that is, in a forum attuned to the interests and the policies of the Presidency. That was one of the natural advantages the Constitution gave to the Presidency, just as it gave Members of Congress (and their staffs) the advantage of not being prosecutable for anything said or done in their legislative capacities. See U.S. Const., Art. I, §6, cl. 1; *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). It is the very object of this legislation to eliminate that assurance of a sympathetic forum. Unless it can honestly be said that there are "no reasonable grounds to believe" that further investigation is warranted, further investigation must ensue; and the conduct of the investigation, and determination of whether to prosecute, will be given to a person neither selected by nor subject to the control of the President--who will in turn assemble a staff by finding out, presumably, who is willing to put aside whatever else they are doing, for an indeterminate period of time, in order to investigate and prosecute the President or a particular named individual in his administration. The prospect is frightening (as I will discuss at some greater length at the conclusion of this opinion) even outside the context of a bitter, interbranch political dispute. Perhaps the boldness of the President himself will not be affected--though I am not even sure of that. (How much easier it is for Congress, instead of accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds--or, for that matter, how easy it is for one of the President's political foes outside of Congress--simply to trigger a debilitating criminal investigation of the Chief Executive under this law.) But as for the President's high-level assistants, who typically have no political base of support, it is as utterly unrealistic to think that they will not be intimidated by this prospect, and that their advice to him and their advocacy of his interests before a hostile Congress will not be affected, as it would be to think that the Members of Congress and their staffs would be unaffected by replacing the Speech or Debate Clause with a similar provision. It deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff. That is the whole object of the law, of course, and I cannot imagine why the Court believes it does not succeed.

Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for, but whenever it cannot be said that there are "no reasonable grounds to believe" they are called for. The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed. Thus, in the 10 years since the institution of the independent counsel was established by law, there have been nine highly publicized investigations, a source of constant political damage to two administrations. That they could not remotely be described as merely the application of "normal" investigatory and prosecutory standards is demonstrated by; in addition to the language of the statute ("no reasonable grounds to believe"), the following facts: Congress appropriates approximately \$50 million annually for general legal activities, salaries, and expenses of the Criminal Division of the Department of Justice. See 1989 Budget Request

of the Department of Justice, Hearings before a Subcommittee of the House Committee on Appropriations, 100th Cong., 2d Sess., pt. 6, pp. 284-285 (1988) (DOJ Budget Request). This money is used to support "[f]ederal appellate activity," "[o]rganized crime prosecution," "[p]ublic integrity" and "[f]raud" matters, "[n]arcotic & dangerous drug prosecution," "[i]nternal security," "[g]eneral litigation and legal advice," "special investigations," "[p]rosecution support," "[o]rganized crime drug enforcement," and "[m]anagement & administration." *Id.*, at 284. By comparison, between May 1986 and August 1987, four independent counsel (not all of whom were operating for that entire period of time) spent almost \$5 million (1/10th of the amount annually appropriated to the entire Criminal Division), spending almost \$1 million in the month of August 1987 alone. See *Washington Post*, Oct. 21, 1987, p. A21, col. 5. For fiscal year 1989, the Department of Justice has requested \$52 million for the entire Criminal Division, DOJ Budget Request 285, and \$7 million to support the activities of independent counsel, *id.*, at 25.

In sum, this statute does deprive the President of substantial control over the prosecutory functions performed by the independent counsel, and it does substantially affect the balance of powers. That the Court could possibly conclude otherwise demonstrates both the wisdom of our former constitutional system, in which the degree of reduced control and political impairment were irrelevant, since all purely executive power had to be in the President; and the folly of the new system of standardless judicial allocation of powers we adopt today.

III

As I indicated earlier, the basic separation-of-powers principles I have discussed are what give life and content to our jurisprudence concerning the President's power to appoint and remove officers. The same result of unconstitutionality is therefore plainly indicated by our case law in these areas.

Article II, §2, cl. 2, of the Constitution provides as follows:

"[The President] shall nominate, and by and with the Advice and Consent of the the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Because appellant (who all parties and the Court agree is an officer of the United States, *ante*, at 2608, n. 12) was not appointed by the President with the advice and consent of the Senate, but rather by the Special Division of the United States Court of Appeals, her appointment is constitutional only if (1) she is an "inferior" officer within the meaning of the above Clause, and (2) Congress may vest her appointment in a court of law.

As to the first of these inquiries, the Court does not attempt to "decide exactly" what establishes the line between principal and "inferior" officers, but is confident that, whatever the line may be, appellant "clearly falls on the 'inferior officer' side" of it. *Ante*, at 2608. The Court

gives three reasons: First, she "is subject to removal by a higher Executive Branch official," namely, the Attorney General. *Ibid.* Second, she is "empowered by the Act to perform only certain, limited duties." *Ante*, at 2608. Third, her office is "limited in jurisdiction" and "limited in tenure." *Ibid.*

The first of these lends no support to the view that appellant is an inferior officer. Appellant is removable only for "good cause" or physical or mental incapacity. 28 U.S.C. §596(a)(1) (1982 ed., Supp. V). By contrast, most (if not all) principal officers in the Executive Branch may be removed by the President at will. I fail to see how the fact that appellant is more difficult to remove than most principal officers helps to establish that she is an inferior officer. And I do not see how it could possibly make any difference to her superior or inferior status that the President's limited power to remove her must be exercised through the Attorney General. If she were removable at will by the Attorney General, then she would be subordinate to him and thus properly designated as inferior; but the Court essentially admits that she is not subordinate. See *ante*, at 2608. If it were common usage to refer to someone as "inferior" who is subject to removal for cause by another, then one would say that the President is "inferior" to Congress.

The second reason offered by the Court--that appellant performs only certain, limited duties--may be relevant to whether she is an inferior officer, but it mischaracterizes the extent of her powers. As the Court states: "Admittedly, the Act delegates to appellant [the] 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.'" *Ante*, at 2608, quoting 28 U.S.C. §594(a) (1982 ed., Supp. V) (emphasis added). Moreover, in addition to this general grant of power she is given a broad range of specifically enumerated powers, including a power not even the Attorney General possesses: to "contes[t] in court ... any claim of privilege or attempt to withhold evidence on grounds of national security." §594(a)(6). Once all of this is "admitted," it seems to me impossible to maintain that appellant's authority is so "limited" as to render her an inferior officer. The Court seeks to brush this away by asserting that the independent counsel's power does not include any authority to "formulate policy for the Government or the Executive Branch." *Ante*, at 2608. But the same could be said for all officers of the Government, with the single exception of the President. All of them only formulate policy within their respective spheres of responsibility--as does the independent counsel, who must comply with the policies of the Department of Justice only to the extent possible. §594(f).

The final set of reasons given by the Court for why the independent counsel clearly is an inferior officer emphasizes the limited nature of her jurisdiction and tenure. Taking the latter first, I find nothing unusually limited about the independent counsel's tenure. To the contrary, unlike most high-ranking Executive Branch officials, she continues to serve until she (or the Special Division) decides that her work is substantially completed. See §§596(b)(1), (b)(2). This particular independent prosecutor has already served more than two years, which is at least as long as many Cabinet officials. As to the scope of her jurisdiction, there can be no doubt that is small (though far from unimportant). But within it she exercises more than the full power of the Attorney General. The Ambassador to Luxembourg is not anything less than a principal officer, simply because Luxembourg is small. And the federal judge who sits in a small district is not for that reason "inferior in rank and authority." If the mere fragmentation of executive responsibilities into small compartments suffices to render the heads of each of those

compartments inferior officers, then Congress could deprive the President of the right to appoint his chief law enforcement officer by dividing up the Attorney General's responsibilities among a number of "lesser" functionaries.

More fundamentally, however, it is not clear from the Court's opinion why the factors it discusses--even if applied correctly to the facts of this case--are determinative of the question of inferior officer status. The apparent source of these factors is a statement in *United States v. Germaine*, 99 U.S. (9 Otto) 508, 511 25 L.Ed. 482 (1879) (discussing *United States v. Hartwell*, 6 Wall. 385, 393, 18 L.Ed. 830 (1868)), that "the term [officer] embraces the ideas of tenure, duration, emolument, and duties." See ante, at 2608. Besides the fact that this was dictum, it was dictum in a case where the distinguishing characteristics of inferior officers versus superior officers were in no way relevant, but rather only the distinguishing characteristics of an "officer of the United States" (to which the criminal statute at issue applied) as opposed to a mere employee. Rather than erect a theory of who is an inferior officer on the foundation of such an irrelevancy, I think it preferable to look to the text of the Constitution and the division of power that it establishes. These demonstrate, I think, that the independent counsel is not an inferior officer because she is not subordinate to any officer in the Executive Branch (indeed, not even to the President). Dictionaries in use at the time of the Constitutional Convention gave the word "inferiour" two meanings which it still bears today: (1) "[flower in place, ... station, .. rank of life, ... value or excellency," and (2) "[s]ubordinate." S. Johnson, *Dictionary of the English Language* (6th ed. 1785). In a document dealing with the structure (the constitution) of a government, one would naturally expect the word to bear the latter meaning-- indeed, in such a context it would be unpardonably careless to use the word unless a relationship of subordination was intended. If what was meant was merely "lower in station or rank," one would use instead a term such as "lesser officers." At the only other point in the Constitution at which the word "inferior" appears, it plainly connotes a relationship of subordination. Article III vests the judicial power of the United States in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., Art. III, §1 (emphasis added). In *Federalist No. 81*, Hamilton pauses to describe the "inferior" courts authorized by Article III as inferior in the sense that they are "subordinate" to the Supreme Court. See *id.*, 6 Wall. at 485, n., 490, n.

That "inferior" means "subordinate" is also consistent with what little we know about the evolution of the Appointments Clause. As originally reported to the Committee on Style, the Appointments Clause provided no "exception" from the standard manner of appointment (President with the advice and consent of the Senate) for inferior officers. 2 M. Farrand, *Records of the Federal Convention of 1787*, pp. 498-499, 599 (rev. ed. 1966). On September 15, 1787, the last day of the Convention before the proposed Constitution was signed, in the midst of a host of minor changes that were being considered, Gouverneur Morris moved to add the exceptions clause. *Id.*, at 627. No great debate ensued; the only disagreement was over whether it was necessary at all. *Id.*, at 627-628. Nobody thought that it was a fundamental change, excluding from the President's appointment power and the Senate's confirmation power a category of officers who might function on their own, outside the supervision of those appointed in the more cumbersome fashion. And it is significant that in the very brief discussion Madison mentions (as in apparent contrast to the "inferior officers" covered by the provision) "Superior Officers." *Id.*, at 637. Of course one is not a "superior officer" without some supervisory responsibility, just as,

I suggest, one is not an "inferior officer" within the meaning of the provision under discussion unless one is subject to supervision by a "superior officer." It is perfectly obvious, therefore, both from the relative brevity of the discussion this addition received, and from the content of that discussion, that it was intended merely to make clear (what Madison thought already was clear, see *id.*, at 627) that those officers appointed by the President with Senate approval could on their own appoint their subordinates, who would, of course, by chain of command still be under the direct control of the President.

This interpretation is, moreover, consistent with our admittedly sketchy precedent in this area. For example, in *United States v. Eaton*, 169 U.S. 331, 18 S.Ct. 374, 42 L.Ed. 767 (1898), we held that the appointment by an Executive Branch official other than the President of a "vice- consul," charged with the duty of temporarily performing the function of the consul, did not violate the Appointments Clause. In doing so, we repeatedly referred to the "vice-consul" as a "subordinate" officer. *Id.*, at 343, 18 S.Ct., at 879. See also *United States v. Germaine*, *supra*, 9 Otto at 511 (comparing "inferior" commissioners and bureau officers to heads of department, describing the former as "mere ... subordinates") (*dicta*); *United States v. Hartwell*, *supra*, 6 Wall. at 394 (describing clerk appointed by Assistant Treasurer with approval of Secretary of the Treasury as a "subordinate office [1]" (*dicta*). More recently, in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), we noted that the Attorney General's appointment of the Watergate Special Prosecutor was made pursuant to the Attorney General's "power to appoint subordinate officers to assist him in the discharge of his duties." *Id.*, at 694, 94 S.Ct., at 3100 (*emphasis added*). The Court's citation of *Nixon* as support for its view that the independent counsel is an inferior officer is simply not supported by a reading of the case. We explicitly stated that the Special Prosecutor was a "subordinate office[r]," *ibid.*, because, in the end, the President or the Attorney General could have removed him at any time, if by no other means than amending or revoking the regulation defining his authority. *Id.*, at 696, 94 S.Ct., at 3101. Nor are any of the other cases cited by the Court in support of its view inconsistent with the natural reading that an inferior officer must at least be subordinate to another officer of the United States. In *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 25 L.Ed. 717 (1880), we upheld the appointment by a court of federal "Judges of Election," who were charged with various duties involving the overseeing of local congressional elections. Contrary to the Court's assertion, see *ante*, at 2609, we did not specifically find that these officials were inferior officers for purposes of the Appointments Clause, probably because no one had contended that they were principal officers. Nor can the case be said to represent even an assumption on our part that they were inferior without being subordinate. The power of assisting in the judging of elections that they were exercising was assuredly not a purely executive power, and if we entertained any assumption it was probably that they, like the marshals who assisted them, see *Siebold*, 100 U.S. (10 Otto), at 380, were subordinate to the courts, see *id.*, 10 Otto at 397. Similarly, in *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931), where we held that United States commissioners were inferior officers, we made plain that they were subordinate to the district courts which appointed them: "The commissioner acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which that court had authority to take control at any time." *Id.*, at 354, 51 S.Ct., at 157.

To be sure, it is not a sufficient condition for "inferior" officer status that one be subordinate to a principal officer. Even an officer who is subordinate to a department head can

be a principal officer. That is clear from the brief exchange following Gouverneur Morris' suggestion of the addition of the exceptions clause for inferior officers. Madison responded:

"It does not go far enough if it be necessary at all--Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 M. Farrand, Records of the Federal Convention, of 1787, p. 627 (rev. ed. 1966) (emphasis added).

But it is surely a necessary condition for inferior officer status that the officer be subordinate to another officer.

The independent counsel is not even subordinate to the President. The Court essentially admits as much, noting that "appellant may not be 'subordinate' to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act." Ante, at 2608-2609. In fact, there is no doubt about it. As noted earlier, the Act specifically grants her the "full power and independent authority' to exercise all investigative and prosecutorial functions of the Department of Justice," 28 U.S.C. §594(a) (1982 ed., Supp. V), and makes her removable only for "good cause," a limitation specifically intended to ensure that she be independent of not subordinate to, the President and the Attorney General. See I-I.R.Conf.Rep. No. 100-452, p. 37 (1987).

Because appellant is not subordinate to another officer, she is not an "inferior" officer and her appointment other than by the President with the advice and consent of the Senate is unconstitutional.

IV

I will not discuss at any length why the restrictions upon the removal of the independent counsel also violate our established precedent dealing with that specific subject. For most of it, I simply refer the reader to the scholarly opinion of Judge Silberman for the Court of Appeals below. See *In re Sealed Case*, 267 U.S.App.D.C. 178, 838 F.2d 476 (1988). I cannot avoid commenting, however, about the essence of what the Court has done to our removal jurisprudence today.

There is, of course, no provision in the Constitution stating who may remove executive officers, except the provisions for removal by impeachment. Before the present decision it was established, however, (1) that the President's power to remove principal officers who exercise purely executive powers could not be restricted, see *Myers v. United States*, 272 U.S. 52, 127, 47 S.Ct. 21, 28-29, 71 L.Ed. 160 (1926), and (2) that his power to remove inferior officers who exercise purely executive powers, and whose appointment Congress had removed from the usual procedure of Presidential appointment with Senate consent, could be restricted, at least where the appointment had been made by an officer of the Executive Branch, see *ibid.*; *United States v. Perkins*, 116 U.S. 483, 485, 6 S.Ct. 449, 450, 29 L.Ed. 700 (1886).

The Court could have resolved the removal power issue in this case by simply relying upon its erroneous conclusion that the independent counsel was an inferior officer, and then

extending our holding that the removal of inferior officers appointed by the Executive can be restricted, to a new holding that even the removal of inferior officers appointed by the courts can be restricted. That would in my view be a considerable and unjustified extension, giving the Executive full discretion in neither the selection nor the removal of a purely executive officer. The course the Court has chosen, however, is even worse.

Since our 1935 decision in *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611--which was considered by many at the time the product of an activist, anti- New Deal Court bent on reducing the power of President Franklin Roosevelt--it has been established that the line of permissible restriction upon removal of principal officers lies at the point at which the powers exercised by those officers are no longer purely executive. Thus, removal restrictions have been generally regarded as lawful for so- called "independent regulatory agencies," such as the Federal Trade Commission, see *ibid.*; 15 U.S.C. §41, the Interstate Commerce Commission, see 49 U.S.C. §10301(c) (1982 ed., Supp. IV), and the Consumer Product Safety Commission, see 15 U.S.C. §2053(a), which engage substantially in what has been called the "quasi-legislative activity" of rulemaking, and for members of Article I courts, such as the Court of Military Appeals, see 10 U.S.C. §867(a)(2), who engage in the "quasi- judicial" function of adjudication. It has often been observed, correctly in my view, that the line between "purely executive" functions and "quasi- legislative" or "quasi-judicial" functions is not a clear one or even a rational one. See *ante*, at 2618-2619; *Bowsher v. Synar*, 478 U.S. 714, 761, n. 3, 106 S.Ct. 3181, 3206, n. 3 (1986) (WHITE, J., dissenting); *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-488, 72 S.Ct. 800, 810, 96 L.Ed. 1081 (1952) (Jackson, J., dissenting). But at least it permitted the identification of certain officers, and certain agencies, whose functions were entirely within the control of the President. Congress had to be aware of that restriction in its legislation. Today, however, *Humphrey's Executor* is swept into the dustbin of repudiated constitutional principles. "[O]ur present considered view," the Court says, "is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.' " *Ante*, at 2617. What *Humphrey's Executor* (and presumably *Myers*) really means, we are now told, is not that there are any "rigid categories of those officials who may or may not be removed at will by the President," but simply that Congress cannot "interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed,' " *ante*, at 2617-2618.

One can hardly grieve for the shoddy treatment given today to *Humphrey's Executor*, which, after all, accorded the same indignity (with much less justification) to Chief Justice Taft's opinion 10 years earlier in *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926)-- gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion. It is in fact comforting to witness the reality that he who lives by the ipse dixit dies by the ipse dixit. But one must grieve for the Constitution. *Humphrey's Executor* at least had the decency formally to observe the constitutional principle that the President had to be the repository of all executive power, see 295 U.S., at 627-628, 55 S.Ct., at 874, which, as *Myers* carefully explained, necessarily means that he must be able to discharge those who do not perform executive functions according to his liking. As we noted in *Bowsher*, once an officer is appointed " it is

only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey: " 478 U.S., at 726, 106 S.Ct., at 3188, quoting *Synar v. United States*, 626 F.Supp. 1374, 1401 (DC 1986) (Scalia, Johnson, and Gasch, D.). By contrast, "our present considered view" is simply that any executive officer's removal can be restricted, so long as the President remains "able to accomplish his constitutional role." Ante, at 2618. There are now no lines. If the removal of a prosecutor, the virtual embodiment of the power to "take care that the laws be faithfully executed," can be restricted, what officer's removal cannot? This is an open invitation for Congress to experiment. What about a special Assistant Secretary of State, with responsibility for one very narrow area of foreign policy, who would not only have to be confirmed by the Senate but could also be removed only pursuant to certain carefully designed restrictions? Could this possibly render the President "[um]able to accomplish his constitutional role"? Or a special Assistant Secretary of Defense for Procurement? The possibilities are endless, and the Court does not understand what the separation of powers, what "[a]mbition counteract[ing] ambition," Federalist No. 51, p. 322 (Madison), is all about, if it does not expect Congress to try them. As far as I can discern from the Court's opinion, it is now open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of Humphrey's Executor as cover. The Court essentially says to the President: "Trust us. We will make sure that you are able to accomplish your constitutional role." I think the Constitution gives the President--and the people--more protection than that.

V

The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom. Those who hold or have held offices covered by the Ethics in Government Act are entitled to that protection as much as the rest of us, and I conclude my discussion by considering the effect of the Act upon the fairness of the process they receive.

Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation. Justice Robert Jackson, when he was Attorney General under President Franklin Roosevelt, described it in a memorable speech to United States Attorneys, as follows:

"There is a most important reason why the prosecutor should have, as nearly, as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

"If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm--in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." R. Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors "pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted," if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office. I leave it to the reader to recall the examples of this in recent years. That result, of course, was precisely what the Founders had in mind when they provided that all executive powers would be exercised by a single Chief Executive. As Hamilton put it, "[t]he ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility." *Federalist No. 70*, p. 424. The President is directly dependent on the people, and since there is only one President, he is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive ... is that it tends to conceal faults and destroy responsibility." *Id.*, at 427.

That is the system of justice the rest of us are entitled to, but what of that select class consisting of present or former high-level Executive Branch officials? If an allegation is made against them of any violation of any federal criminal law (except Class B or C misdemeanors or infractions) the Attorney General must give it his attention. That in itself is not objectionable. But if after a 90-day investigation without the benefit of normal investigatory tools, the Attorney General is unable to say that there are "no reasonable grounds to believe" that further investigation is warranted, a process is set in motion that is not in the full control of persons "dependent on the people," and whose flaws cannot be blamed on the President. An independent counsel is selected, and the scope of his or her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor

antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? There is no remedy for that, not even a political one. Judges, after all, have life tenure, and appointing a surefire enthusiastic prosecutor could hardly be considered an impeachable offense. So if there is anything wrong with the selection, there is effectively no one to blame. The independent counsel thus selected proceeds to assemble a staff. As I observed earlier, in the nature of things this has to be done by finding lawyers who are willing to lay aside their current careers for an indeterminate amount of time, to take on a job that has no prospect of permanence and little prospect for promotion. One thing is certain, however: it involves investigating and perhaps prosecuting a particular individual. Can one imagine a less equitable manner of fulfilling the executive responsibility to investigate and prosecute? What would be the reaction if, in an area not covered by this statute, the Justice Department posted a public notice inviting applicants to assist in an investigation and possible prosecution of a certain prominent person? Does this not invite what Justice Jackson described as "picking the man and then searching the law books, or putting investigators to work, to pin some offense on him"? To be sure, the investigation must relate to the area of criminal offense specified by the life-tenured judges. But that has often been (and nothing prevents it from being) very broad--and should the independent counsel or his or her staff come up with something beyond that scope, nothing prevents him or her from asking the judges to expand his or her authority or, if that does not work, referring it to the Attorney General, whereupon the whole process would recommence and, if there was "reasonable basis to believe" that further investigation was warranted, that new offense would be referred to the Special Division, which would in all likelihood assign it to the same independent counsel. It seems to me not conducive to fairness. But even if it were entirely evident that unfairness was in fact the result--the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration--there would be no one accountable to the public to whom the blame could be assigned.

I do not mean to suggest that anything of this sort (other than the inevitable self-selection of the prosecutory staff) occurred in the present case. I know and have the highest regard for the judges on the Special Division, and the independent counsel herself is a woman of accomplishment, impartiality, and integrity. But the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case. It is true, of course, that a similar list of horrors could be attributed to an ordinary Justice Department prosecution--a vindictive prosecutor, an antagonistic staff, etc. But the difference is the difference that the Founders envisioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished.

The above described possibilities of irresponsible conduct must, as I say, be considered in judging the constitutional acceptability of this process. But they will rarely occur, and in the average case the threat to fairness is quite different. As described in the brief filed on behalf of three ex-Attorneys General from each of the last three administrations:

"The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel--specifically, her isolation from the Executive Branch and the internal checks and balances it supplies--is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too

narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests." Brief for Edward H. Levi, Griffin B. Bell, and William. French Smith as Amici Curiae 11.

It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law. Perhaps that is not always achieved, but the mechanism to achieve it is there. The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile--with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.

* * *

The notion that every violation of law should be prosecuted, including-- indeed, especially-- every violation by those in high places, is an attractive one, and it would be risky to argue in an election campaign that that is not an absolutely overriding value. *Fiat justitia, ruat coelum*. Let justice be done, though the heavens may fall. The reality is, however, that it is not an absolutely overriding value, and it was with the hope that we would be able to acknowledge and apply such realities that the Constitution spared us, by life tenure, the necessity of election campaigns. I cannot imagine that there are not many thoughtful men and women in Congress who realize that the benefits of this legislation are far outweighed by its harmful effect upon our system of government, and even upon the nature of justice received by those men and women who agree to serve in the Executive Branch. But it is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called, appropriately enough, the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not. By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.

Worse than what it has done, however, is the manner in which it has done it. A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function the "totality of the circumstances" mode of analysis that this Court has in recent years become fond of Taking all things into account, we conclude that the power taken away from the President here is not really

too much. The next time executive power is assigned to someone other than the President we may conclude, taking all things into account, that it is too much. That opinion, like this one, will not be confined by any rule. We will describe, as we have today (though I hope more accurately) the effects of the provision in question, and will authoritatively announce: "The President's need to control the exercise of the [subject officer's] discretion is so central to the functioning of the Executive Branch as to require complete control," This is not analysis; it is ad hoc judgment. And it fails to explain why it is not true that--as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed--all purely executive power must be under the control of the President.

The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it ought to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says, quite plainly, that "[t]he executive Power shall be vested in a President of the United States."

Thomas FREYTAG, et al., Petitioners
v.
COMMISSIONER OF INTERNAL REVENUE.

No. 99-762.

Supreme Court of the United States

Argued April 23, 1991.

Decided June 27, 1991.

[BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and the opinion of the Court with respect to Part IV, in which REHNQUIST, C.J., and WHITE, MARSHALL, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR, KENNEDY, and SOUTER, joined.]

Justice BLACKMUN delivered the opinion of the Court.

II

This complex litigation began with determinations of federal income tax deficiencies against the several petitioners, who had deducted on their returns approximately \$1.5 billion in losses allegedly realized in a tax shelter scheme. When petitioners sought review in the Tax Court in March 1982, their cases were assigned to Tax Court Judge Richard C. Wilbur. Trial began in 1984. Judge Wilbur became ill in November 1985, and the Chief Judge of the tax Court assigned Special Trial Judge Carleton D. Powell to preside over the trial as evidentiary referee, with the proceedings videotaped. App. 2. When Judge Wilbur's illness forced his retirement and assumption of senior status effective April 1, 1986, the cases were reassigned, with petitioners' specified consent, Brief for Petitioners 8; Tr. of Oral Arg. 10, to Judge Powell for preparation of written findings and an opinion. App. 8, 12-14. The judge concluded that petitioners' tax shelter scheme consisted of sham transactions and that petitioners owed additional taxes. The Chief Judge adopted Judge Powell's opinion as that of the Tax Court. 89 T.C. 849 (1987).

Petitioners took an appeal to the Court of Appeals for the Fifth Circuit. It affirmed. 904 F.2d 1011 (1990). Petitioners did not argue to the Court of Appeals, nor do they argue here, that the Tax Court is not a legitimate body. Rather, they contended that the assignment of cases as complex as theirs to a Special Trial Judge was not authorized by §7443A, and that this violated the Appointments Clause of the Constitution, Art. II, §2, cl. 2. The Court of Appeals ruled that because the question of the special trial judge's authority was "in essence, an attack upon the subject matter jurisdiction of the special trial judge, it may be raised for the first time on appeal." 904 F.2d, at 1015 (footnote omitted). The court then went on to reject petitioners' claims on the

merits. It concluded that the Code authorized the Chief Judge of the Tax Court to assign a special trial judge to hear petitioners' cases and that petitioners had waived any constitutional challenge to this appointment by consenting to a trial before Judge Powell. *Id.*, at 1015, n. 9.

We granted certiorari, 498 U.S. 1066, 111 S.Ct. 781, 112 L.Ed.2d 844 (1991), to resolve the important questions the litigation raises about the Constitution's structural separation of powers.

* * *

IV

This construction of §7443A raises a constitutional issue to which we now must turn. Petitioners submit that if subsection (b)(4) permits a special trial judge to preside over the trial of any Tax Court case, then the statute violates the Appointments Clause of the Constitution, Art. II, §2, cl. 2. According to petitioners, a special trial judge is an "Office[r]" of the United States who must be appointed in compliance with the Clause. The Clause reads:

"He [the President] ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Thus, the Constitution limits congressional discretion to vest power to appoint "inferior Officers" to three sources: "the President alone," "the Heads of Departments," and "the Courts of Law." Petitioners argue that a special trial judge is an "inferior Office[r]," and also contend that the Chief Judge of the Tax Court does not fall within any of the Constitution's three repositories of the appointment power.

A

We first address the Commissioner's argument that petitioners have waived their right to challenge the constitutional propriety of §7443A.

* * *

B

We turn to another preliminary issue in petitioners' Appointments Clause challenge. Petitioners argue that a special trial judge is an "inferior Office[r]" of the United States. If we disagree, and conclude that a special trial judge is only an employee, petitioners' challenge fails, for such "lesser functionaries" need not be selected in compliance with the strict requirements of Article II. *Buckley v. Valeo*, 424 U.S. 1., 126, n. 162, 96 S.Ct. 612, 685, n. 162, 46 L.Ed.2d 659 (1976).

The Commissioner, in contrast to petitioners, argues that a special trial judge assigned under §7443A(b)(4) acts only as an aide to the Tax Court judge responsible for deciding the case. The special trial judge, as the Commissioner characterizes his work, does no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion. Thus, the Commissioner concludes, special trial judges acting pursuant to §7443A(b)(4) are employees rather than "Officers of the United States."

"[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by §2, cl. 2, of [Article II]." Buckley, 424 U.S., at 126, 96 S.Ct., at 685. The two courts that have addressed the issue have held that special trial judges are "inferior Officers." The Tax Court so concluded in *First Western Govt. Securities, Inc. v. Commissioner*, 94 T.C. 549, 557-559 (1990), and the Court of Appeals for the Second Circuit in *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 985 (1991), agreed. Both courts considered the degree of authority exercised by the special trial judges to be so "significant" that it was inconsistent with the classifications of "lesser functionaries" or employees. Cf. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-353, 51 S.Ct. 153, 156-157, 75 L.Ed. 374 (1931) (United States commissioners are inferior officers). We agree with the Tax Court and the Second Circuit that a special trial judge is an "inferior Office[r]" whose appointment must conform to the Appointments Clause.

The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, §2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. See *Burnap v. United States*, 252 U.S. 512, 516-517, 40 S.Ct. 374, 376-377, 64 L.Ed. 692 (1920); *United States v. Germaine*, 99 U.S. 508, 511-512, 25 L.Ed. 482 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article 111 courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two courts have found them to be, our conclusion would be unchanged. Under §§7443A(b)(1), (2), and (3), and (c), the Chief Judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases. The Commissioner concedes that in cases governed by subsections (b)(1), (2), and (3), special trial judges act as inferior officers who exercise independent authority. But the Commissioner urges that petitioners may not rely on the extensive power wielded by the special trial judges in declaratory judgment proceedings and limited-amount tax cases because petitioners lack standing to assert the rights of taxpayers whose cases are assigned to special trial judges under subsections (b)(1), (2), and (3).

This standing argument seems to us to be beside the point. Special trial judges are not inferior officers for purposes of some of their duties under §7443A, but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of subsections (b)(1), (2), and (3), he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed.

C

Having concluded that the special trial judges are "inferior Officers," we consider the substantive aspect of petitioners' Appointments Clause challenge. The principle of separation of powers is embedded in the Appointments Clause. Its relevant language bears repeating: "[Title Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Congress clearly vested the Chief Judge of the Tax Court with the power to appoint special trial judges. An important fact about the appointment in this case should not be overlooked. This case does not involve an "interbranch" appointment. Cf. *Morrison v. Olson*, 487 U.S. 654, 675-677, 108 S.Ct. 2597, 2610-2612, 101 L.Ed.2d 569 (1988). However one might classify the Chief Judge of the Tax Court, there surely is nothing incongruous about giving him the authority to appoint the clerk or an assistant judge for that court. See *id.*, at 676, 108 S.Ct., at 2611. We do not consider here an appointment by some officer of inferior officers in, for example, the Department of Commerce or Department of State. The appointment in this case is so obviously appropriate that petitioners' burden of persuading us that it violates the Appointments Clause is indeed heavy.

Although petitioners bear a heavy burden, their challenge is a serious one. Despite Congress' authority to create offices and to provide for the method of appointment to those offices, "Congress' power ... is inevitably bounded by the express language of Article II, el. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'" *Buckley*, 424 U.S., at 138-139, 96 S.Ct., at 691-692 (discussing Congress' power under the Necessary and Proper Clause).

The "manipulation of official appointments" had long been one of the American revolutionary generation's greatest grievances against executive power, see G. Wood, *The Creation of The American Republic 1776-1787*, p. 79 (1969) (Wood), because "the power of appointment to offices" was deemed "the most insidious and powerful weapon of eighteenth century despotism." *Id.*, at 143. Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion. Although the debate on the Appointments Clause was brief, the sparse record indicates the Framers' determination to limit the distribution of the power of appointment. The Constitutional Convention rejected Madison's complaint that the Appointments Clause did "not go far enough if it be necessary at all": Madison argued that "Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 *Records of the Federal Convention of 1787*, pp. 627-628 (M. Farrand rev. 1966). The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political

force and the will of the people. Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers--ambassadors, ministers, heads of departments, and judges--between the Executive and Legislative Branches. See *Buckley*, 424 U.S., at 129-131, 96 S.Ct., at 687-688. Even with respect to "inferior Officers," the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.

With this concern in mind, we repeat petitioners' central challenge: Can the Chief Judge of the Tax Court constitutionally be vested by Congress with the power to appoint? The Appointments Clause names the possible repositories for the appointment power. It is beyond question in this litigation that Congress did not intend to grant to the President the power to appoint special trial judges. We therefore are left with three other possibilities. First, as the Commissioner urges, the Tax Court 'could be treated as a department with the Chief Judge as its head. Second, as the amicus suggests, the Tax Court could be considered one of "the Courts of Law." Third, we could agree with petitioners that the Tax Court is neither a "Departmen[t]" nor a "Court] of Law." Should we agree with petitioners, it would follow that the appointment power could not be vested in the Chief Judge of the Tax Court.

We first consider the Commissioner's argument. According to the Commissioner, the Tax Court is a department because for 45 years before Congress designated that court as a "court of record" under Article I, see §7441, the body was an independent agency (the predecessor Board of Tax Appeals) within the Executive Branch. Furthermore, the Commissioner argues that §7441 simply changed the status of the Tax Court within that branch. It did not remove the body to a different branch or change its substantive duties.

The Commissioner "readily" acknowledges that "the Tax Court's fit within the Executive Branch may not be a perfect one." Brief for Respondent 41. But he argues that the Tax Court must fall within one of the three branches and that the Executive Branch provides its best home. The reasoning of the Commissioner may be summarized as follows: (1) The Tax Court must fit into one of the three branches; (2) it does not fit into either the Legislative Branch or the Judicial Branch; (3) at one time it was an independent agency and therefore it must fit into the Executive Branch; and (4) every component of the Executive Branch is a department.

We cannot accept the Commissioner's assumption that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power. The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint. The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power. See *Wood* 79-80. So do we. For the Chief Judge of the Tax Court to qualify as a "Hea[d] of [a] Departmen[t]," the Commissioner must demonstrate not only that the Tax Court is a part of the Executive Branch but also that it is a department.

We are not so persuaded. This Court for more than a century has held that the term "Departmen[t]" refers only to " 'a part or division of the executive government, as the

Department of State, or of the Treasury,' " expressly "creat[ed]' and "giv[en] ... the name of a department" by Congress. *Germaine*, 99 U.S., at 510-511. See also *Burnap*, 252 U.S., at 515, 40 S.Ct., at 376 ("The term head of a Department means ... the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet"). Accordingly, the term "Heads of Departments" does not embrace "inferior commissioners and bureau officers." *Germaine*, 99 U.S., at 511.

Confining the term "Heads of Departments" in the Appointments Clause to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power just as the Commissioner's interpretation, in contrast, would diffuse it. The Cabinet-level departments are limited in number and easily identified. Their heads are subject to the exercise of political oversight and share the President's accountability to the people.

Such a limiting construction also ensures that we interpret that term in the Appointments Clause consistently with its interpretation in other constitutional provisions. In *Germaine*, see 99 U.S., at 511, this Court noted that the phrase "Heads of Departments" in the Appointments Clause must be read in conjunction with the Opinion Clause of Art. II, §2, cl. 1. The Opinion Clause provides that the President "may require the Opinion, in writing, of the principal Officer in each of the Executive Departments," and *Germaine* limited the meaning of "Executive Departmen[t]" to the Cabinet members.

The phrase "executive departments" also appears in §4 of the Twenty-fifth Amendment, which empowers the Vice President, together with a majority of the "principal officers of the executive departments," to declare the President "unable to discharge the powers and duties of his office." The Amendment was ratified February 10, 1967, and its language, of course, does not control our interpretation of a prior constitutional provision, such as the Appointments Clause.] Nevertheless, it is instructive that the hearings on the Twenty-fifth Amendment confirm that the term "department" refers to Cabinet-level entities:

"[O]nly officials of Cabinet rank should participate in the decision as to whether presidential inability exists.... The intent ... is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1 [now codified as §101], or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate ... in determining inability." H.R.Rep. No. 203, 89th Cong., 1st Sess., 3 (1965).

Even if we were not persuaded that the Commissioner's view threatened to diffuse the appointment power and was contrary to the meaning of "Departmen[t]" in the Constitution, we still could not accept his treatment of the intent of Congress, which enacted legislation in 1969 with the express purpose of "making the Tax Court an Article I court rather than an executive agency." S.Rep. No. 91-552, p. 303 (1969), U.S.Code Cong. & Admin.News 1969, pp. 1645, 2027. Congress deemed it "anomalous to continue to classify" 10 the Tax Court with executive agencies, *id.*, at 302, and questioned whether it was "appropriate for one executive agency [the pre-1969 tribunal] to be sitting in judgment on the determinations of another executive agency [the IRS]." *Ibid.*

Treating the Tax Court as a "Department" and its Chief Judge as its "Hea[d] would defy the purpose of the Appointments Clause, the meaning of the Constitution's text, and the clear intent of Congress to transform the Tax Court into an Article I legislative court. The Tax Court is not a "Departmen[tj]."

Having so concluded, we now must determine whether it is one of the "Courts of Law," as amicus suggests. Petitioners and the Commissioner both take the position that the Tax Court cannot be a "Cour[t] of Law" within the meaning of the Appointments Clause because, they say, that term is limited to Article III courts.

The text of the Clause does not limit the "Courts of Law" to those courts established under Article III of the Constitution. The Appointments Clause does not provide that Congress can vest appointment power only in "one Supreme Court" and other courts established under Article III, or only in tribunals that exercise broad common-law jurisdiction. Petitioners argue that Article II's reference to the "Courts of Law" must be limited to Article III courts because Article III courts are the only courts mentioned in the Constitution. It of course is true that the Constitution "nowhere makes reference to 'legislative courts.'" See *Glidden*, 370 U.S., at 543, 82 S.Ct., at 1469. But petitioners' argument fails nevertheless. We agree with petitioners that the Constitution's terms are illuminated by their cognate provisions. This analytic method contributed to our conclusion that the Tax Court could not be a department. Petitioners, however, underestimate the importance of this Court's time-honored reading of the Constitution as giving Congress wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals. See, e.g., *American Insurance Co. v. Canter*, 1 Pet. 511, 546, 7 L.Ed. 242 (1828) (the judicial power of the United States is not limited to the judicial power defined under Article III and may be exercised by legislative courts); *Williams v. United States*, 289 U.S. 553, 565-567, 53 S.Ct. 751, 754-755, 77 L.Ed. 1372 (1933) (same).

Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States. In both *Canter* and *Williams*, this Court rejected arguments similar to the literalistic one now advanced by petitioners, that only Article III courts could exercise the judicial power because the term "judicial Power" appears only in Article III. In *Williams*, this Court explained that the power exercised by some non-Article III tribunals is judicial power: "The Court of Claims ... undoubtedly ... exercises judicial power, but the question still remains--and is the vital question--whether it is the judicial power defined by Art. III of the Constitution. "That judicial power apart from that article may be conferred by Congress upon legislative courts ... is plainly apparent from the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter* ... dealing with the territorial courts....[T]he legislative courts possess and exercise judicial power ... although not conferred in virtue of the third article of the Constitution." 289 U.S., at 565-566, 53 S.Ct., at 754-755.

We cannot hold that an Article I court, such as the Court of Claims in *Williams* or the Territorial Court of Florida in *Canter*, can exercise the judicial power of the United States and yet cannot be one of the "Courts of Law."

Nothing in *Buckley v. Valeo* contradicts this conclusion. While this Court in *Buckley* paraphrased the Appointments Clause to allow the appointment of inferior officers "by the President alone, by the heads of departments, or by the Judiciary," 424 U.S., at 132, 96 S.Ct., at 688, we did not hold that "Courts of Law" consist only of the Article III judiciary. The appointment authority of the "Courts of Law" was not before this Court in *Buckley*. Instead, we were concerned with whether the appointment of Federal Elections Commissioners by Congress was constitutional under the Appointments Clause.

The narrow construction urged by petitioners and the Commissioner also would undermine longstanding practice. "[F]rom the earliest days of the Republic," see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64, 102 S.Ct. 2858, 2868, 73 L.Ed.2d 598 (1982), Congress provided for the creation of legislative courts and authorized those courts to appoint clerks, who were inferior officers. See, e.g., *In re Hennen*, 13 Pet. 230, 10 L.Ed. 138 (1839). Congress' consistent interpretation of the Appointments Clause evinces a clear congressional understanding that Article I courts could be given the power to appoint. Because " 'traditional ways of conducting government ... give meaning' to the Constitution," *Mistretta*, 488 U.S., at 401, 109 S.Ct., at 669, quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610, 72 S.Ct. 863, 897, 96 L.Ed. 1153 (1952) (concurring opinion), this longstanding interpretation provides evidence that Article I courts are not precluded from being "Courts of Law" within the meaning of the Appointments Clause.

Having concluded that an Article I court, which exercises judicial power, can be a "Cour[t] of Law" within the meaning of the Appointments Clause, we now examine the Tax Court's functions to define its constitutional status and its role in the constitutional scheme. See *Williams*, 289 U.S., at 563- 567, 53 S.Ct., at 753-755. The Tax Court exercises judicial, rather than executive, legislative, or administrative, power. It was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government. By resolving these disputes, the court exercises a portion of the judicial power of the United States.

The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions.

The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are "Courts of Law." Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs. It has authority to punish contempts by fine or imprisonment, 26 U.S.C. §7456(c); to grant certain injunctive relief, §6213(a); to order the Secretary of the Treasury to refund an overpayment determined by the court, §6512(b)(2); and to subpoena and examine witnesses, order production of documents, and administer oaths, §7456(a). All these powers are quintessentially judicial in nature.

The Tax Court remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President. Nor has Congress made Tax Court decisions subject to review in the federal district courts. Rather, like the

judgments of the district courts, the decisions of the Tax Court are appealable only to the regional United States courts of appeals, with ultimate review in this Court. The courts of appeals, moreover, review those decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." §7482(a). This standard of review contrasts with the standard applied to agency rulemaking by the courts of appeals under §10(e) of the Administrative Procedure Act, 5 U.S.C. §706(2)(A). See *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43-44, 103 S.Ct. 2856, 2866-2867, 77 L.Ed.2d 443 (1983).

The Tax Court's exclusively judicial role distinguishes it from other non- Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands. Moreover, since the early 1800's, Congress regularly granted non-Article III territorial courts the authority to appoint their own clerks of court, who, as of at least 1839, were "inferior Officers" within the meaning of the Appointments Clause. See *In re Hennen*, 13 Pet., at 258. Including Article I courts, such as the Tax Court, that exercise judicial power and perform exclusively judicial functions among the "Courts of Law" does not significantly expand the universe of actors eligible to receive the appointment power.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SCALIA, with whom Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER join, concurring in part and concurring in the judgment.

II

Having struggled to reach petitioners' Appointments Clause objection, the Court finds it invalid. I agree with that conclusion, but the reason the Court assigns is in my view both wrong and full of danger for the future of our system of separate and coequal powers.

The Appointments Clause provides:

"[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, §2, cl. 2.

I agree with the Court that a special trial judge is an "inferior Office[r]" within the meaning of this Clause, with the result that, absent Presidential appointment, he must be appointed by a court of law or the head of a department. I do not agree, however, with the Court's conclusion that the Tax Court is a "Cour[t] of Law" within the meaning of this provision. I would find the appointment valid because the Tax Court is a "Departmen[t]" and the Chief Judge is its head.

A

A careful reading of the Constitution and attention to the apparent purpose of the Appointments Clause make it clear that the Tax Court cannot be one of those "Courts of Law" referred to there. The Clause does not refer generally to "Bodies exercising judicial Functions," or even to "Courts" generally, or even to "Courts of Law" generally. It refers to "the Courts of Law." Certainly this does not mean any "Cour[t] of Law" (the Supreme Court of Rhode Island would not do). The definite article "the" obviously narrows the class of eligible "Courts of Law" to those courts of law envisioned by the Constitution. Those are Article III courts, and the Tax Court is not one of them.

The Court rejects this conclusion because the Appointments Clause does not (in the style of the Uniform Commercial Code) contain an explicit cross-reference to Article III. Ante, at 2644. This is no doubt true, but irrelevant. It is equally true that Article I, §8, cl. 9, which provides that Congress may "constitute Tribunals inferior to the supreme Court," does not explicitly say "Tribunals under Article III, below." Yet, this power "plainly relates to the 'inferior Courts' provided for in Article III, §1; it has never been relied on for establishment of any other tribunals." *Glidden Co. v. Zdanok*, 370 U.S., at 543, 82 S.Ct., at 1469 (opinion of Harlan, J.); see also 3 J. Story, *Commentaries on the Constitution of the United States* §1573, p. 437 (1833). Today's Court evidently does not appreciate, as Chief Justice Marshall did, that the Constitution does not "partake of the prolixity of a legal code," *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819). It does not, like our opinions, bristle with "supras," "infras," and footnotes. Instead of insisting upon such legalisms, we should, I submit, follow the course mapped out in *Buckley v. Valeo*, 424 U.S. 1, 124, 96 S.Ct. 612, 684, 46 L.Ed.2d 659 (1976) (per curiam), and examine the Appointments Clause of the Constitution in light of the "cognate provisions" of which it is a central feature: Article I, Article II, and Article III. The only "Courts of Law" referred to there are those authorized by Article III, §1, whose judges serve during good behavior with undiminishable salary. Art. III, § 1. See *Glidden Co. v. Zdanok*, supra, 370 U.S., at 543, 82 S.Ct., at 1469 (opinion of Harlan, J.); *United States v. Mouat*, 124 U.S. 303, 307, 8 S.Ct. 505, 506, 31 L.Ed. 463 (1888) ("courts of justice") (dictum). The Framers contemplated no other national judicial tribunals. "According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices during good behavior...." *The Federalist* No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (second emphasis in original).

We recognized this in *Buckley*, supra, and it was indeed an essential part of our reasoning. Responding to the argument that a select group of Congressmen was a "Department," we said:

"The phrase 'Heads of Departments,' used as it is in conjunction with the phrase 'Courts of Law,' suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch. While the Clause expressly authorizes Congress to vest the appointment of certain officers in the 'Courts of Law,' the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language 'Heads of Departments' in this part of cl. 2.

"Thus, with respect to four of the six voting members of the Commission, neither the President, the head of any department, nor the Judiciary has any voice in their selection." *Id.*, 424 U.S., at 127, 96 S.Ct., at 686.

The whole point of this passage is that the Heads of Departments" must reasonably be understood to refer exclusively to the Executive Branch (thereby excluding officers of Congress) because "the Courts of Law" obviously refers exclusively to the Judicial Branch. We were right in *Buckley*, and the Court is wrong today.

Even if the Framers had no particular purpose in making the Appointments Clause refer only to Article III courts, we would still of course be bound by that disposition. In fact, however, there is every reason to believe that the Appointments Clause's limitation to Article III tribunals was adopted with calculation and forethought, faithfully implementing a considered political theory for the appointment of officers.

The Framers' experience with post revolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption. The foremost danger was that legislators would create offices with the expectancy of occupying them themselves. This was guarded against by the Incompatibility and Ineligibility Clauses, Article I, §6, cl. 2. See *Buckley*, *supra*, at 124, 96 S.Ct., at 684. But real, if less obvious, dangers remained. Even if legislators could not appoint themselves, they would be inclined to appoint their friends and supporters. This proclivity would be unchecked because of the lack of accountability in a multimember body--as James Wilson pointed out in his criticism of a multimember executive:

"[A]re impartiality and fine discernment likely to predominate in a numerous [appointing] body? In proportion to their own number, will be the number of their friends, favorites and dependents. An office is to be filled. A person nearly connected, by some of the foregoing ties, with one of those who [is] to vote in filling it, is named as a candidate.... Every member, who gives, on his account, a vote for his friend, will expect the return of a similar favor on the first convenient opportunity. In this manner, a reciprocal intercourse of partiality, of interestedness, of favoritism, perhaps of venality, is established; and in no particular instance, is there a practicability of tracing the poison to its source. Ignorant, vicious, and prostituted characters are introduced into office; and some of those, who voted, and procured others to vote for them, are the first and loudest in expressing their astonishment, that the door of admission was ever opened to men of their infamous description. The suffering people are thus wounded and buffeted, like Homer's Ajax, in the dark; and have not even the melancholy satisfaction of knowing by whom the blows are given." 1 Works of James Wilson 359360 (J. Andrews ed. 1896).

See also *Essex Result*, in *Memoir of Theophilus Parsons* 381-382 (1859); *The Federalist* No. 76, pp. 455-457 (C. Rossiter ed. 1961) (A. Hamilton). And not only would unaccountable legislatures introduce their friends into necessary offices, they would create unnecessary offices into which to introduce their friends. As James Madison observed:

"The power of the Legislature to appoint any other than their own officers departs too far from the Theory which requires a separation of the great Departments of Government. One of the best securities against the creation of unnecessary offices or tyrannical powers is an exclusion of the authors from all share in filling the one, or influence in the execution of the other." Madison's Observations on Jefferson's Draft of a Constitution for Virginia, reprinted in 6 Papers of Thomas Jefferson 308, 311 (J. Boyd ed. 1952).

For these good and sufficient reasons, then, the federal appointment power was removed from Congress. The Framers knew, however, that it was not enough simply to define in writing who would exercise this power or that. "After discriminating ... in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task [was] to provide some practical security for each, against the invasion of the others." The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison). Invasion by the Legislature, of course, was the principal threat, since the "legislative authority ... possesses so many means of operating on the motives of the other departments." *Id.*, No. 49, p. 314 (J. Madison). It can "mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments," *id.*, No. 48, p. 310 (J. Madison), and thus control the nominal actions (e.g., appointments) of the other branches. Cf. T. Jefferson, Notes on the State of Virginia 120 (W. Pedened. 1955).

Thus, it was not enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including a separate political constituency, to which he alone was responsible, and the power to veto encroaching laws, see Art. I, §7, or even to disregard them when they are unconstitutional. See Easterbrook, Presidential. Review, 40 Case W.Res.L.Rev. 905, 920-924 (1990). One of the most obvious and necessary, however, was a permanent salary. Art. II, § 1. Without this, "the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him." The Federalist No. 73, p. 441 (C. Rossiter ed. 1961) (A. Hamilton). See also *id.*, No. 51, p. 321 (J. Madison); Mass. Const., Part The Second, Chapter II, §1, Art. XIII (1780).

A power of appointment lodged in a President surrounded by such structural fortifications could be expected to be exercised independently, and not pursuant to the manipulations of Congress. The same is true, to almost the same degree, of the appointment power lodged in the heads of departments. Like the President, these individuals possess a reputational stake in the quality of the individuals they appoint; and though they are not themselves able to resist congressional encroachment, they are directly answerable to the President, who is responsible to his constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants.

Like the President, the Judicial Branch was separated from Congress not merely by a paper assignment of functions, but by endowment with the means to resist encroachment--

foremost among which, of course, are life tenure (during "good behavior") and permanent salary. These structural accoutrements not only assure the fearless adjudication of cases and controversies, see *The Federalist* Nos. 78, 79 (A. Hamilton); *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-60, 102 S.Ct. 2858, 2864-2866, 73 L.Ed.2d 598 (1982) (opinion of Brennan, J.); they also render the Judiciary a potential repository of appointment power free of congressional (as well as Presidential) influence. In the same way that depositing appointment power in a fortified President and his lieutenants ensures an actual exclusion of the legislature from appointment, so too does reposing such power in an Article III court. The Court's holding, that Congress may deposit such power in "legislative courts," without regard to whether their personnel are either Article III judges or "Heads of Departments," utterly destroys this carefully constructed scheme. And the Court produces this result, I remind the reader, not because of, but in spite of, the apparent meaning of the phrase "the Courts of Law."

B

Having concluded, against all odds, that "the Courts of Law" referred to in Article II, §2, are not the courts of law established by Article III, the Court is confronted with the difficult problem of determining what courts of law they are. It acknowledges that they must be courts which exercise "the judicial power of the United States" and concludes that the Tax Court is such a court--even though it is not an Article III court. This is quite a feat, considering that Article III begins "The judicial Power of the United States"--not "Some of the judicial Power of the United States," or even "Most of the judicial Power of the United States"--"shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Despite this unequivocal text, the Court sets forth the startling proposition that "the judicial power of the United States is not limited to the judicial power defined under Article III." Ante, at 2644. It turns out, however--to our relief, I suppose it must be said--that this is really only a pun. "The judicial power," as the Court uses it, bears no resemblance to the constitutional term of art we are all familiar with, but means only "the power to adjudicate in the manner of courts." So used, as I shall proceed to explain, the phrase covers an infinite variety of individuals exercising executive rather than judicial power (in the constitutional sense), and has nothing to do with the separation of powers or with any other characteristic that might cause one to believe that is what was meant by "the Courts of Law." As far as I can tell, the only thing to be said for this approach is that it makes the Tax Court a "Cour[t] of Law"--which is perhaps the object of the exercise.

I agree with the unremarkable proposition that "Congress [has] wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals." Ante, at 2644. Congress may also assign that task to subdivisions of traditional executive departments, as it did in 1924 when it created the Tax Court's predecessor, the Tax Board of Appeals--or to take a more venerable example, as it did in 1791 when it created within the Treasury Department the Comptroller of the United States, who "decide[d] on appeal, without further review by the Secretary, all claims concerning the settlement of accounts." Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 *Wm. & Mary L.Rev.* 211, 238 (1989); see 1 Stat. 66. Such tribunals, like any other administrative board, exercise the executive power, not the judicial power of the United States. They are, in the words of the great Chief Justice, "incapable of receiving [the judicial power]"--unless their members serve for life during good

behavior and receive permanent salary. *American Ins. Co. v. Canter*, 1 Pet. 511, 546, 7 L.Ed. 242 (1828) (Marshall, C.J.).

It is no doubt true that all such bodies "adjudicate," i.e., they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing "inherently judicial" about "adjudication." To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power, as we recognized almost a century and a half ago.

"That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795, [*Martin v. Mott*,] 12 Wheat. 19 [(1827)], or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact." *Murray's Lessee v. Hoboken Land & improvement Co.*, 18 How. 272, 280, 15 L.Ed. 372 (1856).

Accord, Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind.L.J. 233, 264-265 (1990). The first Patent Board, which consisted of Thomas Jefferson, Henry Knox, and Edmund Randolph in their capacities as Secretary of State, Secretary of War, and Attorney General, respectively, 1 Stat. 109, 110 (1790), adjudicated the patentability of inventions, sometimes hearing argument by petitioners. See 18 J.Pat.Off.Soc. 68-69 (July 1936). They were exercising the executive power. See Easterbrook, "Success" and the Judicial Power, 65 Ind.L.J. 277, 280 (1990). Today, the Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act (APA), see 5 U.S.C. §§554, 3105. They are all executive officers. "Adjudication," in other words, is no more an "inherently" judicial function than the promulgation of rules governing primary conduct is an "inherently" legislative one. See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); APA, 5 U.S.C. §553 ("Rule making").

It is true that Congress may commit the sorts of matters administrative law judges and other executive adjudicators now handle to Article III courts--just as some of the matters now in Article III courts could instead be committed to executive adjudicators. "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee*, supra, at 284. See also *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, 49 S.Ct. 411, 413, 73 L.Ed. 789 (1929). Congress could, for instance, allow direct review by the courts of appeals of denials of Social Security benefits. It could instead establish the Social Security Court--composed of judges serving 5-year terms-- within the Social Security Administration. Both tribunals would perform identical functions, but only the former would exercise the judicial power.

In short, given the performance of adjudicatory functions by a federal officer, it is the identity of the officer--not something intrinsic about the mode of decisionmaking or type of decision--that tells us whether the judicial power is being exercised. "[O]ur cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned." *Bowsher v. Synar*, 478 U.S. 714, 749, 106 S.Ct. 3181, 3199, 92 L.Ed.2d 583 (1986) (STEVENS, J., concurring in judgment). Cf. *INS v. Chadha*, 462 U.S. 919, 953, n. 16, 103 S.Ct. 2764, 2785, n. 16, 77 L.Ed.2d 317 (1983). Where adjudicative decisionmakers do not possess life tenure and a permanent salary, they are "incapable of exercising any portion of the judicial power." *Ex parte Randolph*, 20 F.Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C.J.).

The Tax Court is indistinguishable from my hypothetical Social Security Court. It reviews determinations by Executive Branch officials (the Internal Revenue Service) that this much or that much tax is owed--a classic executive function. For 18 years its predecessor, the Board of Tax Appeals, did the very same thing, see H. Dubroff, *The United States Tax Court* 47175 (1979), and no one suggested that body exercised "the judicial power." We held just the opposite:

"The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided." *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 725, 49 S.Ct. 499, 502, 73 L.Ed. 918 (1929) (Taft, C.J.).

Though renamed "the Tax Court of the United States" in 1942, it remained "an independent agency in the Executive Branch," 26 U.S.C. §1100 (1952 ed.), and continued to perform the same function. As an executive agency, it possessed many of the accoutrements the Court considers "quintessentially judicial," ante, at 2645. It administered oaths, for example, and subpoenaed and examined witnesses, §1114; its findings were reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury," §1141(a). This Court continued to treat it as an administrative agency, akin to the Federal Communications Commission (FCC) or the National Labor Relations Board (NLRB). See *Dobson v. Commissioner*, 320 U.S. 489, 495-501, 64 S.Ct. 239, 243-247, 88 L.Ed. 248 (1943)• .

When the Tax Court was statutorily denominated an "Article I Court" in 1969, its judges did not magically acquire the judicial power. They still lack life tenure; their salaries may still be diminished; they are still removable by the President for "inefficiency, neglect of duty, or malfeasance in office." 26 U.S.C. §7443(0). (In *Bowsher v. Synar*, supra, 478 U.S., at 729, 106 S.Ct., at 3189, we held that these latter terms are "very broad" and "could sustain removal ... for any number of actual or perceived transgressions.") How anyone with these characteristics can exercise judicial power "independent ... [of] the Executive Branch" is a complete mystery. It seems to me entirely obvious that the Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power. Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U.Chi.L.Rev. 443, 451, n. 43 (1989). See also *Northern Pipeline*, 458 U.S., at 113, 102 S.Ct., at 2893 (WHITE, J., dissenting) (equating administrative agencies and Article I courts); *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 992-993 (CA2 1991)

(collecting academic authorities for same proposition).

In seeking to establish that "judicial power" in some constitutionally significant sense--in a sense different from the adjudicative exercise of executive power--can be exercised by someone other than an Article III judge, the Court relies heavily upon the existence of territorial courts. Ante, at 2644-2645. Those courts have nothing to do with the issue before us. I agree that they do not exercise the national executive power--but neither do they exercise any national judicial power. They are neither Article III courts nor Article I courts, but Article IV courts-- just as territorial governors are not Article I executives but Article IV executives.

"These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.... in legislating for them, Congress exercises the combined powers of the general, and of a state government." *American Ins. Co. v. Canter*, 1 Pet., at 546, 7 L.Ed. 242 (Marshall, C.J.).

Or as the Court later described it:

"[Territories] are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control." *Benner v. Porter*, 9 How. 235, 242, 13 L.Ed. 119 (1850).

Thus, Congress may endow territorial governments with a plural executive; it may allow the executive to legislate; it may dispense with the legislature or judiciary altogether. It should be obvious that the powers exercised by territorial courts tell us nothing about the nature of an entity, like the Tax Court, which administers the general laws of the Nation. See *Northern Pipeline*, supra, 458 U.S., at 75-76, 102 S.Ct., at 2874 (opinion of Brennan, J.).

The Court claims that there is a "longstanding practice" of permitting Article I courts to appoint inferior officers. Ante, at 2645: I am unaware of such a practice. Perhaps the Court means to refer not to Article I courts but to the territorial courts just discussed, in which case the practice would be irrelevant. As I shall discuss below, an Article I court (such as the Tax Court) that is not within any other department would be able to have its inferior officers appointed by its chief judge--not under the "Courts of Law" provision of Article IT, §2, but under the "Heads of Departments" provision; perhaps it is that sort of practice the Court has in mind. It is certain, in any case, that no decision of ours has ever approved the appointment of an inferior officer by an Article I court. *Ex parte Hennen*, 13 Pet. 230, 10 L.Ed. 138 (1839), which the Court cites, involved appointment by an Article III tribunal.

III

Since the Tax Court is not a court of law, unless the Chief Judge is the head of a

department, the appointment of the Special Trial Judge was void. Unlike the Court, I think he is.

I have already explained that the Tax Court, like its predecessors, exercises the executive power of the United States. This does not, of course, suffice to make it a "Departmen[t]" for purposes of the Appointments Clause. If, for instance, the Tax Court were a subdivision of the Department of the Treasury--as the Board of Tax Appeals used to be--it would not qualify. In fact, however, the Tax Court is a free-standing, self-contained entity in the Executive Branch, whose Chief Judge is removable by the President (and, save impeachment, no one else). Nevertheless, the Court holds that the Chief Judge is not the head of a department.

It is not at all clear what the Court's reason for this conclusion is. I had originally thought that the Court was adopting petitioners' theory--wrong, but at least coherent--that "Heads of Departments" means Cabinet officers. This is suggested by the Court's reliance upon the dictum in *Burnap v. United States*, 252 U.S. 512, 515, 40 S.Ct. 374, 375, 64 L.Ed. 692 (1920), to the effect that the head of a department must be " 'the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet,' " ante, at 2642 (emphasis added); by the Court's observation that "[t]he Cabinet-level departments are limited in number and easily identified," ante, at 2643; and by its reliance upon the fact that in the Twenty-fifth Amendment "the term 'department' refers to Cabinet-level entities," ante, at 2643. Elsewhere, however, the Court seemingly disclaims Cabinet status as the criterion, see ante, at 2643, n. 4, and says that the term "Departmen[t]" means "executive divisions like the Cabinet-level departments," ante, at 2643 (emphasis added). Unfortunately, it never specifies what characteristic it is that causes an agency to be "like a Cabinet-level department," or even provides any intelligible clues as to what it might have in mind. It quotes a congressional Committee Report that seemingly equates Cabinet status with inclusion within the statutory definition of " 'department' " in 5 U.S.C. §101, ante, at 2643 (quoting H.R.Rep. No. 203, 89th Cong., 1st Sess., 3 (1965)), but this hint is canceled by a footnote making it clear that "Cabinet-like" character, whatever it is, is not "strictly limit[ed]" by that provision, ante, at 2643, n. 4. Its approving quotation of *Burnap's* reference to "a great division of the executive branch" might invite the guess that numerosity is the key--but the Department of Education has fewer than 5,000 employees, and the FCC, which the Court also appears willing to consider such a " 'great division,' " ante, at 2642, fewer than 1,800. See *Employment and Trends as of March 1991*, Office of Personnel Management, Table 2. The Court reserves the right to consider as "Cabinet-like" and hence as "Departments" those agencies which, above all others, are at the farthest remove from Cabinet status, and whose heads are specifically designed not to have the quality that the Court earlier thinks important, of being "subject to the exercise of political oversight and shar[ing] the President's accountability to the people," ante, at 2643--namely, independent regulatory agencies such as the Federal Trade Commission and the Securities and Exchange Commission, ante, at 2643, n. 4. Indeed, lest any conceivable improbability be excluded, the Court even reserves the right to consider as a "Departmen[t]" an entity that is not headed by an officer of the United States--the Federal Reserve Bank of St. Louis, whose president is appointed in none of the manners constitutionally permitted for federal officers, but rather by a Board of Directors, two-thirds of whom are elected by regional banks, see 12 U.S.C. §§302, 304, and 341. It is as impossible to respond to this random argumentation as it is to derive a comprehensible theory of the appointments power from it. I shall address, therefore, what was petitioners' point, what I originally took to be the point of the Court's opinion, and what

is the only trace of a flesh-and-blood point that subsists: the proposition that "Departmen[t]" means "Cabinet-level agency."

There is no basis in text or precedent for this position. The term "Cabinet" does not appear in the Constitution, the Founders having rejected proposals to create a Cabinet-like entity. See H. Learned, *The President's Cabinet* 74-94 (1912); E. Corwin, *The President* 97, 238-240 (5th rev. ed. 1984). The existence of a Cabinet, its membership, and its prerogatives (except to the extent the Twenty-fifth Amendment speaks to them), are entirely matters of Presidential discretion. Nor does any of our cases hold that "the Heads of Departments" are Cabinet members. In *United States v. Germaine*, 99 U.S. 508, 25 L.Ed. 482 (1879), we merely held that the Commissioner of Pensions, an official within the Interior Department, was not the head of a department. And, in *Burnap*, *supra*, we held that the Bureau of Public Buildings and Grounds, a bureau within the War Department, was not a department.

The Court's reliance on the Twenty-fifth Amendment is misplaced. I accept that the phrase "the principal officers of the executive departments" is limited to members of the Cabinet. It is the structural composition of the phrase, however, and not the single word "departments" which gives it that narrow meaning--"the principal officers" of the "executive departments" in gross, rather than (as in the Opinions Clause) "the principal Officer in each of the executive Departments," or (in the Appointments Clause) simply "the Heads" (not "principal Heads") "of Departments."

The only history on the point also militates against the Court's conclusion. The 1792 Congress passed an "Act to establish the Post-Office and Post Roads within the United States," creating a Postmaster General and empowering him to appoint "an assistant, and deputy postmasters, at all places where such may be found necessary." §3, 1 Stat. 234. President Washington did not bring the Postmaster into his Cabinet. See Learned, *supra*, at 233-249. It seems likely that the Assistant Postmaster General and Deputy Postmasters were inferior officers--which means either that "the Heads of Departments" include principal officers other than the Cabinet, or that the Second Congress and President Washington did not understand the Appointments Clause. In any case, it is silly to think that the Second Congress {or any later Congress} was supposed to guess whether the President would bring the new agency into his Cabinet in order to determine how the appointment of its inferior officers could be made.

Modern practice as well as original practice refutes the distinction between Cabinet and non-Cabinet agencies. Congress has empowered non-Cabinet agencies to appoint inferior officers for quite some time. See, e.g., 47 U.S.C. §155(f) (FCC--managing director); 15 U.S.C. §78d(b) (Securities and Exchange Commission--"such officers ... as may be necessary"); 15 U.S.C. §42 (Federal Trade Commission--secretary); 7 U.S.C. §4a(c) (Commodity Futures Trading Commission--general counsel). In fact, I know of very few inferior officers in the independent agencies who are appointed by the President, and of none who is appointed by the head of a Cabinet department. The Court's interpretation of "Heads of Departments" casts into doubt the validity of many appointments and a number of explicit statutory authorizations to appoint.

A number of factors support the proposition that "Heads of Departments" includes the

heads of all agencies immediately below the President in the organizational structure of the Executive Branch. It is quite likely that the "Departments" referred to in the Opinions Clause ("The President ... may require the Opinion, in writing, of the principal Officer in each of the executive Departments," Art. II, §2) are the same as the "Departments" in the Appointments Clause. See Germaine, *supra*, at 511. In the former context, it seems to me, the word must reasonably be thought to include all independent establishments. The purpose of the Opinions Clause, presumably, was to assure the President's ability to get a written opinion on all important matters. But if the "Departments" it referred to were only Cabinet departments, it would not assure the current President the ability to receive a written opinion concerning the operations of the Central Intelligence Agency, an agency that is not within any other department, and whose Director is not a member of the Cabinet.

This evident meaning--that the term "Departments" means all independent executive establishments--is also the only construction that makes sense of Article II, §2's sharp distinction between principal officers and inferior officers. The latter, as we have seen, can by statute be made appointable by "the President alone, ... the Courts of Law, or ... the Heads of Departments." Officers that are not "inferior Officers," however, must be appointed (unless the Constitution itself specifies otherwise, as it does, for example, with respect to officers of Congress) by the President, "by and with the Advice and Consent of the Senate." The obvious purpose of this scheme is to make sure that all the business of the Executive will be conducted under the supervision of officers appointed by the President with Senate approval; only officers "inferior," i.e., subordinate, to those can be appointed in some other fashion. If the Appointments Clause is read as I read it, all inferior officers can be made appointable by their ultimate (sub-Presidential) superiors; as petitioners would read it, only those inferior officers whose ultimate superiors happen to be Cabinet members can be. All the other inferior officers, if they are to be appointed by an Executive official at all, must be appointed by the President himself or (assuming cross-department appointments are permissible) by a Cabinet officer who has no authority over the appointees. This seems to me a most implausible disposition, particularly since the makeup of the Cabinet is not specified in the Constitution, or indeed the concept even mentioned. It makes no sense to create a system in which the inferior officers of the Environmental Protection Agency, for example-- which may include, *inter alia*, bureau chiefs, the general counsel, and administrative law judges--must be appointed by the President, the courts of law, or the "Secretary of Something Else."

In short, there is no reason, in text, judicial decision, history, or policy, to limit the phrase "the Heads of Departments" in the Appointments Clause to those officials who are members of the President's Cabinet. I would give the term its ordinary meaning, something which Congress has apparently been doing for decades without complaint. As an American dictionary roughly contemporaneous with adoption of the Appointments Clause provided, and as remains the case, a department is separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person...." I N. Webster, *American Dictionary* 58 (1828). I readily acknowledge that applying this word to an entity such as the Tax Court would have seemed strange to the Founders, as it continues to seem strange to modern ears. But that is only because the Founders did not envision that an independent establishment of such small size and specialized function would be created. They chose the word "Departmen[t]," however, not to connote size or function (much less Cabinet status), but separate organization--a connotation that

still endures even in colloquial usage today ("that is not my department"). The Constitution is clear, I think, about the chain of appointment and supervision that it envisions: Principal officers could be permitted by law to appoint their subordinates. That should subsist, however much the nature of federal business or of federal organizational structure may alter.

I must confess that in the case of the Tax Court, as with some other independent establishments (notably, the so-called "independent regulatory agencies" such as the FCC and the Commission) permitting appointment of inferior officers by the agency head may not ensure the high degree of insulation from congressional control that was the purpose of the appointments scheme elaborated in the Constitution. That is a consequence of our decision in *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), which approved congressional restriction upon arbitrary dismissal of the heads of such agencies by the President, a scheme avowedly designed to make such agencies less accountable to him, and hence he less responsible for them. Depending upon how broadly one reads the President's power to dismiss "for cause," it may be that he has no control over the appointment of inferior officers in such agencies; and if those agencies are publicly regarded as beyond his control--a "headless Fourth Branch"--he may have less incentive to care about such appointments. It could be argued, then, that much of the *raison d'etre* for permitting appointive power to be lodged in "Heads of Departments," see *supra*, at 2651-2654, does not exist with respect to the heads of these agencies, because they, in fact, will not be shored up by the President and are thus not resistant to congressional pressures. That is a reasonable position—though I tend to the view that adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor. But in any event it is not a reasonable position that supports the Court's decision today--both because a "Cour[t] of Law" artificially defined as the Court defines it is even less resistant to those pressures, and because the distinction between those agencies that are subject to full Presidential control and those that are not is entirely unrelated to the distinction between Cabinet agencies and non-Cabinet agencies, and to all the other distinctions that the Court successively embraces. (The Central Intelligence Agency and the Environmental Protection Agency, for example, though not Cabinet agencies or components of Cabinet agencies, are not "independent" agencies in the sense of independence from Presidential control.)

In sum, whatever may be the distorting effects of later innovations that this Court has approved, considering the Chief Judge of the Tax Court to be the head of a department seems to me the only reasonable construction of Article II, §2.

* * *

For the above reasons, I concur in the judgment that the decision below must be affirmed.

FREE ENTERPRISE FUND and Beckstead and Watts, LLP, Petitioners,
v.
PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD et al.

No. 08-861.

Argued Dec. 7, 2009.
Decided June 28, 2010.

Chief Justice Roberts delivered the opinion of the Court.

Our Constitution divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Article 11 vests "[t]he executive Power ... in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. 11, § 1, cl. 1; *id.*, § 3. In light of "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution provides for executive officers to "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed.1939).

Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary. See generally *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). This Court has determined, however, that this authority is not without limit. In *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in *United States v. Perkins*, 116 U.S. 483, 21 Ct.Cl. 499, 6 S.Ct. 449, 29 L.Ed. 700 (1886), and *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors. The parties do not ask us to reexamine any of these precedents, and we do not do so.

We are asked, however, to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure

the faithful execution of the laws." *Id.*, at 693, 108 S.Ct. 2597.

I

A

After a series of celebrated accounting debacles, Congress enacted the Sarbanes–Oxley Act of 2002 (or Act), 116 Stat. 745. Among other measures, the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The Board is composed of five members, appointed to staggered 5–year terms by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight. Congress created the Board as a private "nonprofit corporation," and Board members and employees are not considered Government "officer[s] or employee[s]" for statutory purposes. 15 U.S.C. §§ 7211(a), (b). The Board can thus recruit its members and employees from the private sector by paying salaries far above the standard Government pay scale.

Unlike the self-regulatory organizations, however, the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry. Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. The Board is charged with enforcing the Sarbanes–Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards. To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and "such other requirements as the Board may prescribe."

The Board promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. The willful violation of any Board rule is treated as a willful violation of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78a *et seq.*—a federal crime punishable by up to 20 years' imprisonment or \$25 million in fines (\$5 million for a natural person). And the Board itself can issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm's registration, a permanent ban on a person's associating with any registered firm, and money penalties of \$15 million (\$750,000 for a natural person). Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is "part of the Government" for constitutional purposes, *Lebrun v. National Railroad Passenger Corporation*, 513 U.S. 374, 397, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), and that its members are " 'Officers of the United States' " who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 125-126, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*) (quoting Art. II, § 2, el. 2).

The Act places the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration). But the individual members of the Board—like the officers and directors of the self-regulatory organizations—are substantially insulated from the Commission's control. The Commission cannot remove Board members at will, but only "for good cause shown," "in accordance with" certain procedures.

Those procedures require a Commission finding, "on the record" and "after notice and opportunity for a hearing," that the Board member

"(A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws;

"(B) has willfully abused the authority of that member; or

"(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof."

Removal of a Board member requires a formal Commission order and is subject to judicial review. Similar procedures govern the Commission's removal of officers and directors of the private self-regulatory organizations. The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office," 295 U.S., at 620, 55 S.Ct. 869 (internal quotation marks omitted); and we decide the case with that understanding.

B

Beckstead and Watts, LLP, is a Nevada accounting firm registered with the Board. The Board inspected the firm, released a report critical of its auditing procedures, and began a formal investigation. Beckstead and Watts and the Free Enterprise Fund, a nonprofit organization of which the firm is a member, then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers.

Before the District Court, petitioners argued that the Sarbanes—Oxley Act contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control. *Id.*, at 67-68. Petitioners also challenged the Act under the Appointments Clause, which requires "Officers of the United States" to be appointed by the President with the Senate's advice and consent. Art. II, § 2, cl. 2. The Clause provides an exception for "inferior Officers," whose appointment Congress may choose to vest "in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* Because the Board is appointed by the SEC, petitioners argued that (1) Board members are not "inferior Officers" who may be appointed by "Heads of Departments"; (2) even if they are, the Commission is not a "Departmen[t]"; and (3) even if it is, the several Commissioners (as opposed to the Chairman) are not its "Hea[d]." The United States intervened to defend the Act's constitutionality. Both sides moved for summary judgment; the District Court determined that it had jurisdiction and granted summary judgment to respondents.

A divided Court of Appeals affirmed. 537 F.3d 667 (C.A.D.C.2008). It agreed that the District Court had jurisdiction over petitioners' claims. *Id.*, at 671. On the merits, the Court of Appeals recognized that the removal issue was "a question of first impression," as neither that court nor this one "ha[d] considered a situation where a restriction on removal passes through two levels of control." *Id.*, at 679. It ruled that the dual restraints on Board members' removal are permissible because they do not "render the President unable to perform his constitutional duties." *Id.*, at 683. The majority reasoned that although the President "does not directly select or supervise the Board's members," *id.*, at 681, the Board is subject to the comprehensive control of

the Commission, and thus the President's influence over the Commission implies a constitutionally sufficient influence over the Board as well. *Id.*, at 682-683. The majority also held that Board members are inferior officers subject to the Commission's direction and supervision, *id.*, at 672-676., and that their appointment is otherwise consistent with the Appointments Clause, *id.*, at 676-678.

Judge Kavanaugh dissented. He agreed that the case was one of first impression, *id.*, at 698, but argued that "the double for-cause removal provisions in the [Act] ... combine to eliminate any meaningful Presidential control over the [Board]," *id.*, at 697. Judge Kavanaugh also argued that Board members are not effectively supervised by the Commission and thus cannot be inferior officers under the Appointments Clause. *Id.*, at 709-712.

III

We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers.

A

The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, § 1, cl. 1. As Madison stated on the floor of the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789).

The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away, it remained with the President." Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). "This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher v. Synar*, 478 U.S. 714, 723-724, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (internal quotation marks omitted). And it soon became the "settled and well understood construction of the Constitution." *Ex parte Hennen*, 38 U.S. 230, 13 Pet. 230, 259, 10 L.Ed. 138 (1839).

The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President "the general administrative control of those executing the laws." 272 U.S., at 164, 47 S.Ct. 21. It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase. As we explained in *Myers*, the President therefore must have some "power of removing those for whom he can not continue to be responsible." *Id.*, at 117, 47 S.Ct. 21.

Nearly a decade later in *Humphrey's Executor*, this Court held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7--year terms and could not be removed by the President except for "'inefficiency, neglect of duty, or malfeasance in office.'" 295 U.S., at 620, 55 S.Ct. 869 (quoting 15 U.S.C. § 41). The Court distinguished *Myers* on the ground that *Myers* concerned "an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable

power of removal by the Chief Executive, whose subordinate and aid he is." 295 U.S., at 627, 55 S.Ct. 869. By contrast, the Court characterized the FTC as "quasi-legislative and quasi-judicial" rather than "purely executive," and held that Congress could require it "to act ... independently of executive control." *Id.*, at 627-629, 55 S.Ct. 869. Because "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will," the Court held that Congress had power to "fix the period during which [the Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime." *Id.*, at 629, 55 S.Ct. 869,

Humphrey's Executor did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. See *Myers, supra*, at 119, 127, 47 S.Ct. 21; *Hennen, supra*, at 259-260, 38 U.S. 230. This Court has upheld for-cause limitations on that power as well.

In *Perkins*, a naval cadet-engineer was honorably discharged from the Navy because his services were no longer required. 116 U.S. 483, 21 Ct.Cl. 499, 6 S.Ct. 449, 29 L.Ed. 700. He brought a claim for his salary under statutes barring his peacetime discharge except by a court-martial or by the Secretary of the Navy "for misconduct." This Court adopted verbatim the reasoning of the Court of Claims, which had held that when Congress "'vests the appointment of inferior officers in the heads of Departments[,] it may limit and restrict the power of removal as it deems best for the public interest.'" 116 U.S., at 485, 6 S.Ct. 449. Because Perkins had not been "'dismissed for misconduct .. [or upon] the sentence of a court-martial," the Court agreed that he was "'still in office and ... entitled to [his] pay.'" *Ibid.*

We again considered the status of inferior officers in *Morrison*. That case concerned the Ethics in Government Act, which provided for an independent counsel to investigate allegations of crime by high executive officers. The counsel was appointed by a special court, wielded the full powers of a prosecutor, and was removable by the Attorney General only "'for good cause.'" 487 U.S., at 663, 108 S.Ct. 2597 (quoting 28 U.S.C. § 596(a)(1)). We recognized that the independent counsel was undoubtedly an executive officer, rather than "'quasi-legislative' or 'quasi-judicial,'" but we stated as "our present considered view" that Congress had power to impose good-cause restrictions on her removal. 487 U.S., at 689-691, 108 S.Ct. 2597. The Court noted that the statute "g[a]ve the Attorney General," an officer directly responsible to the President and "through [whom]" the President could act, "several means of supervising or controlling" the independent counsel—"m]ost importantly the power to remove the counsel for good cause." *Id.*, at 695-696, 108 S.Ct. 2597 (internal quotation marks omitted). Under those circumstances, the Court sustained the statute. *Morrison* did not, however, address the consequences of more than one level of good-cause tenure leaving the issue, as both the court and dissent below recognized, "a question of first impression" in this Court. 537 F.3d, at 679; see *id.*, at 698, 108 S.Ct. 2597 (dissenting opinion).

B

As explained, we have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard.

The Act before us does something quite different. It not only protects Board members

from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.

A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute "inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Executor*, 295 U.S., at 620, 55 S.Ct. 869 (internal quotation marks omitted).

This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch." *Clinton v. Jones*, 520 U.S. 681, 712-713, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (Breyer, J., concurring in judgment).

Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, see *Freylctg v. Commissioner*, 501 U.S. 868, 879-880, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), nor on whether "the encroached-upon branch approves the encroachment," *New York v. United States*, 505 U.S. 144, 182, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by

diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." Art. II, § 2, cl. 2. They instead look to the President to guide the "assistants or deputies ... subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed.1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.*, No. 70, at 476 (same). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.

C

Respondents and the dissent resist this conclusion, portraying the Board as "the kind of practical accommodation between the Legislature and the Executive that should be permitted in a `workable government.'" *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991) (*MWAA*) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring)). According to the dissent, Congress may impose multiple levels of for-cause tenure between the President and his subordinates when it "rests agency independence upon the need for technical expertise." The Board's mission is said to demand both "technical competence" and "apolitical expertise," and its powers may only be exercised by "technical professional experts." (internal quotation marks omitted). In this respect the statute creating the Board is, we are told, simply one example of the "vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, [that] provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives."

No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the "'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,'" for "'[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Bowsher*, 478 U.S., at 736, 106 S.Ct. 3181 (quoting *Chadha*, 462 U.S., at 944, 103 S.Ct. 2764).

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily

life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state.

For example, the dissent dismisses the importance of removal as a tool of supervision, concluding that the President's "power to get something done" more often depends on "who controls the agency's budget requests and funding, the relationships between one agency or department and another, ... purely political factors (including Congress' ability to assert influence)," and indeed whether particular *unelected* officials support or "resist" the President's policies. (emphasis deleted). The Framers did not rest our liberties on such bureaucratic minutiae. As we said in *Bowsher, supra*, at 730, 106 S.Ct. 3181, "[t]he separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress."

In fact, the multilevel protection that the dissent endorses "provides a blueprint for extensive expansion of the legislative power." *MWAA, supra*, at 277, 111 S.Ct. 2298. In a system of checks and balances, "[p]ower abhors a vacuum," and one branch's handicap is another's strength. 537 F.3d, at 695, n. 4 (Kavanaugh, J., dissenting) (internal quotation marks omitted). "Even when a branch does not arrogate power to itself," therefore, it must not "impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996). Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that "the Legislature has no right to diminish or modify." 1 *Annals of Cong.*, at 463 (J. Madison).

The Framers created a structure in which "[a] dependence on the people" would be the "primary control on the government." The *Federalist* No. 51, at 349 (J. Madison). That dependence is maintained, not just by "parchment barriers," *id.*, No. 48, at 333 (same), but by letting "[a]mbition ... counteract ambition," giving each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others," *id.*, No. 51, at 349. A key "constitutional means" vested in the President perhaps *the* key means—was "the power. of appointing, overseeing, and controlling those who execute the laws." 1 *Annals of Cong.*, at 463. And while a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, The *Federalist* No. 51, at 349, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher, supra*, at 730, 106 S.Ct. 3181.

Calls to abandon those protections in light of "the era's perceived necessity," *New York*, 505 U.S., at 187, 112 S.Ct. 2408, are not unusual. Nor is the argument from bureaucratic expertise limited only to the field of accounting. The failures of accounting regulation may be a "pressing national problem," but "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *Id.*, at 187-188, 112 S.Ct. 2408. Neither respondents nor the dissent explains why the Board's task, unlike so many others, requires *more* than one layer of insulation from the President--or, for that matter, why only two. The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. And though it may be criticized as "elementary arithmetical logic," two layers are not the same as one.

The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman's lament, to "persuad[ing]" his unelected subordinates "to do what they ought to

do without persuasion." In its pursuit of a "workable government," Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.

D

The United States concedes that some constraints on the removal of inferior executive officers might violate the Constitution. It contends, however, that the removal restrictions at issue here do not.

To begin with, the Government argues that the Commission's removal power over the Board is "broad," and could be construed as broader still, if necessary to avoid invalidation. But the Government does not contend that simple disagreement with the Board's policies or priorities could constitute "good cause" for its removal. Nor do our precedents suggest as much. *Humphrey's Executor*, for example, rejected a removal premised on a lack of agreement "'on either the policies or the administering of the Federal Trade Commission,'" because the FTC was designed to be "'independent in character,'" "free from 'political domination or control,' and not "'subject to anybody in the government' or "'to the orders of the President.'" 295 U.S., at 619, 625, 55 S.Ct. 869. Accord, *Morrison*, 487 U.S., at 693, 108 S.Ct. 2597 (noting that "the congressional determination to limit the removal power of the Attorney General was essential ... to establish the necessary independence of the office"); *Wiener v. United States*, 357 U.S. 349, 356, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958) (describing for-cause removal as "involving the rectitude" of an officer). And here there is judicial review of any effort to remove Board members, so the Commission will not have the final word on the propriety of its own removal orders. The removal restrictions set forth in the statute mean what they say.

Indeed, this case presents an even more serious threat to executive control than an "ordinary" dual for-cause standard. Congress enacted an unusually high standard that must be met before Board members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing. The Act does not even give the Commission power to fire Board members for violations of *other* laws that do not relate to the Act, the securities laws, or the Board's authority. The President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal under § 7217(d)(3).

The rigorous standard that must be met before a Board member may be removed was drawn from statutes concerning private organizations like the New York Stock Exchange. While we need not decide the question here, a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States.

Alternatively, respondents portray the Act's limitations on removal as irrelevant, because ____ as the Court of Appeals held—the Commission wields "at-will removal power over Board *functions* if not Board members." 537 F.3d, at 683 (emphasis added). The Commission's general "oversight and enforcement authority over the Board," is said to "blun[t] the constitutional impact of for-cause removal," 537 F.3d, at 683, and to leave the President no worse off than "if Congress had lodged the Board's functions in the SEC's own staff," PCAOB Brief 15.

Broad power over Board functions is not equivalent to the power to remove Board members. The Commission may, for example, approve the Board's budget, issue binding regulations,

relieve the Board of authority, amend Board sanctions, or enforce Board rules on its own. But altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.

Even if Commission power over Board activities could substitute for authority over its members, we would still reject respondents' premise that the Commission's power in this regard is plenary. As described above, the Board is empowered to take significant enforcement actions, and does so largely independently of the Commission. Its powers are, of course, subject to some latent Commission control. But the Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch.

The Government and the dissent suggest that the Commission could govern and direct the Board's daily exercise of prosecutorial discretion by promulgating new SEC rules, or by amending those of the Board. Enacting general rules through the required notice and comment procedures is obviously a poor means of micromanaging the Board's affairs. So the Government offers another proposal, that the Commission require the Board by rule to "secure SEC approval for any actions that it now may take itself." That would surely constitute one of the "limitations upon the activities, functions, and operations of the Board" that the Act forbids, at least without Commission findings equivalent to those required to fire the Board instead. The Board thus has significant independence in determining its priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without Commission preapproval or direction.

Finally, respondents suggest that our conclusion is contradicted by the past practice of Congress. But the Sarbanes—Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal--including at one level a sharply circumscribed definition of what constitutes "good cause," and rigorous procedures that must be followed prior to removal.

The parties have identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure. As Judge Kavanaugh noted in dissent below:

"Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency." 537 F.3d, at 669.

The dissent here suggests that other such positions might exist, and complains that we do not resolve their status in this opinion. The dissent itself, however, stresses the very size and variety of the Federal Government, and those features discourage general pronouncements on matters neither briefed nor argued here. In any event, the dissent fails to support its premonitions of doom; none of the positions it identifies are similarly situated to the Board.

For example, many civil servants within independent agencies would not qualify as "Officers of the United States," who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley*, 424 U.S., at 126, 96 S.Ct. 612. The parties here concede that Board members are executive "Officers," as that term is used in the Constitution. See Art. II, § 2, el. 2. We do not

decide the status of other Government employees, nor do we decide whether "lesser functionaries subordinate to officers of the United States" must be subject to the same sort of control as those who exercise "significant authority pursuant to the laws." *Buckley, supra*, at 126, and n. 162, 96 S.Ct. 612.

Nor do the employees referenced by the dissent enjoy the same significant and unusual protections from Presidential oversight as members of the Board. Senior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control, and members of the Senior Executive Service may be reassigned or reviewed by agency heads (and entire agencies may be excluded from that Service by the President). While the full extent of that authority is not before us, any such authority is of course wholly absent with respect to the Board. Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.

Finally, the dissent wanders far afield when it suggests that today's opinion might increase the President's authority to remove military officers. Without expressing any view whatever on the scope of that authority, it is enough to note that we see little analogy between our Nation's armed services and the Public Company Accounting Oversight Board. Military officers are broadly subject to Presidential control through the chain of command and through the President's powers as Commander in Chief. Art. II, § 2, cl. 1. The President and his subordinates may also convene boards of inquiry or courts-martial to hear claims of misconduct or poor performance by those officers. Here, by contrast, the President has no authority to initiate a Board member's removal for cause.

There is no reason for us to address whether these positions identified by the dissent, or any others not at issue in this case, are so structured as to infringe the President's constitutional authority. Nor is there any substance to the dissent's concern that the "work of all these various officials" will "be put on hold." As the judgment in this case demonstrates, restricting certain officers to a single level of insulation from the President affects the conditions under which those officers might someday be removed, and would have no effect, absent a congressional determination to the contrary, on the validity of any officer's continuance in office. The only issue in this case is whether Congress may deprive the President of adequate control over the Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy. We hold that it cannot.

V

Petitioners raise three more challenges to the Board under the Appointments Clause. None has merit.

First, petitioners argue that Board members are principal officers requiring Presidential appointment with the Senate's advice and consent. We held in *Edmond v. United States*, 520 U.S. 651, 662-663, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997), that "[w]hether one is an 'inferior' officer depends on whether he has a superior," and that "'inferior officers' are officers whose work is directed and supervised at some level" by other officers appointed by the President with the Senate's consent. In particular, we noted that "[t]he power to remove officers" at will and without cause "is a powerful tool for control" of an inferior. *Id.*, at 664, 117 S.Ct. 1573. As explained above, the statutory restrictions on the Commission's power to remove Board members are unconstitutional and void. Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the

Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a "Hea[d] of Departmen[t]."

But, petitioners argue, the Commission is not a "Departmen[t]" like the "Executive departments" (*e.g.*, State, Treasury, Defense) listed in 5 U.S.C. § 101. In *Freytag*, 501 U.S., at 887, n. 4, 111 S.Ct. 2631, we specifically reserved the question whether a "principal agenc[y], such as ... the Securities and Exchange Commission," is a "Departmen[t]" under the Appointments Clause. Four Justices, however, would have concluded that the Commission is indeed such a "Departmen[t]," see *id.*, at 918, 111 S.Ct. 2631 (SCALIA, J., concurring in part and concurring in judgment), because it is a "free-standing, self-contained entity in the Executive Branch," *id.*, at 915, 111 S.Ct. 2631.

. Respondents urge us to adopt this reasoning as to those entities not addressed by our opinion in *Freytag*, and we do. Respondents' reading of the Appointments Clause is consistent with the common, near-contemporary definition of a "department" as a "separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person." 1 N. Webster, *American Dictionary of the English Language* (1828) (def.2) (1995 facsimile ed.). It is also consistent with the early practice of Congress, which in 1792 authorized the Postmaster General to appoint "an assistant, and deputy postmasters, at all places where such shall be found necessary," § 3, 1 Stat. 234—thus treating him as the "Hea[d] of [a] Departmen[t]" without the title of Secretary or any role in the President's Cabinet, And it is consistent with our prior cases, which have never invalidated an appointment made by the head of such an establishment. See *Freytag*, *supra*, at 917, 111 S.Ct. 2631; cf. *Burnap v. United States*, 252 U.S. 512, 515, 40 S.Ct. 374, 64 L.Ed. 692 (1920); *United States v. Germaine*, 99 U.S. 508, 511, 25 L.Ed. 482 (1879). Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a "Departmen[t]" for the purposes of the Appointments Clause.

But petitioners are not done yet. They argue that the full Commission cannot constitutionally appoint Board members, because only the Chairman of the Commission is the Commission's "Hea[d]." The Commission's powers, however, are generally vested in the ' Commissioners jointly, not the Chairman alone. See, *e.g.*, 15 U.S.C. §§ 77s, 77t, 78u, 78w. The Commissioners do not report to the Chairman, who exercises administrative and executive functions subject to the full Commission's policies. The Chairman is also appointed from among the Commissioners by the President alone, which means that he cannot be regarded as "the head of an agency" for purposes of the Reorganization Act. See 5 U.S.C. § 904. (The Commission as a whole, on the other hand, does meet the requirements of the Act, including its provision that "the head of an agency [may] be an individual or a commission or board with more than one member.")

As a constitutional matter, we see no reason why a multimember body may not be the "Hea[d]" of a "Departmen[t]" that it governs. The Appointments Clause necessarily contemplates collective appointments by the "Courts of Law," Art. II, § 2, cl. 2, and each House of Congress, too, appoints its officers collectively, see Art. 1, § 2, cl. 5; *id.*, § 3, el. 5. Petitioners argue that the Framers vested the nomination of principal officers in the President to avoid the perceived evils of collective appointments, but they reveal no similar concern with respect to inferior officers, whose appointments may be vested elsewhere, including in multimember bodies. Practice has also sanctioned the appointment of inferior officers by multimember

agencies. See *Freytag, supra*, at 918, 111 S.Ct. 2631 (SCALIA, J., concurring in part and concurring in judgment); see also Classification Act of 1923, ch. 265, § 2, 42 Stat. 1488 (defining "the head of the department" to mean "the officer *or group of officers* who are not subordinate or responsible to any other officer of the department" (emphasis added)); 37 Op. Atty. Gen. 227, 231 (1933) (endorsing collective appointment by the Civil Service Commission). We conclude that the Board members have been validly appointed by the full Commission.

In light of the foregoing, petitioners are not entitled to broad injunctive relief against the Board's continued operations. But they are entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive. See *Bowsher*, 478 U.S., at 727, n. 5, 106 S.Ct. 3181 (concluding that a separation of powers violation may create a "here-and-now" injury that can be remedied by a court (internal quotation marks omitted)).

* * *

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself." *The Federalist* No. 70, at 478.

While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction---two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.

The judgment of the United States Court of Appeals for the District of Columbia Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Jon E. EDMOND, Petitioner,
v.
UNITED STATES.

No. 96-262.
Supreme Court of the United States

Argued Feb. 24, 1997.

Decided May 19, 1997.

[SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, D., joined, and in which SOUTER, J., joined as to Parts I and II. SOUTER, J., filed an opinion concurring in part and concurring in the judgment.]

Justice SCALIA delivered the opinion of the Court.

We must determine in this case whether Congress has authorized the Secretary of Transportation to appoint civilian members of the Coast Guard Court of Criminal Appeals, and if so, whether this authorization is constitutional under the Appointments Clause of Article II.

I

The Coast Guard Court of Criminal Appeals (formerly known as the Coast Guard Court of Military Review) is an intermediate court within the military justice system. It is one of four military Courts of Criminal Appeals; others exist for the Army, the Air Force, and the Navy-Marine Corps. The Coast Guard Court of Criminal Appeals hears appeals from the decisions of courts-martial, and its decisions are subject to review by the United States Court of Appeals for the Armed Forces (formerly known as the United States Court of Military Appeals).

Appellate military judges who are assigned to a Court of Criminal Appeals must be members of the bar, but may be commissioned officers or civilians. Art. 66(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. §866(a). During the times relevant to this case, the Coast Guard Court of Criminal Appeals has had two civilian members, Chief Judge Joseph H. Baum and Associate Judge Alfred F. Bridgman, Jr. These judges were originally assigned to serve on the court by the General Counsel of the Department of Transportation, who is, *ex officio*, the Judge Advocate General of the Coast Guard, Art. 1(1), UCMJ, 10 U.S.C. §801(1). Subsequent events, however, called into question the validity of these assignments.

In *Weiss v. United States*, 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994), we considered whether the assignment of commissioned military officers to serve as military judges without reappointment under the Appointments Clause was constitutional. We held that military trial and appellate judges are officers of the United States and must be appointed pursuant to the

Appointments Clause. *Id.*, at 170, 114 S.Ct., at 757. We upheld the judicial assignments at issue in *Weiss* because each of the military judges had been previously appointed by the President as a commissioned military officer, and was serving on active duty under that commission at the time he was assigned to a military court. We noted, however, that "allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question." *Id.*, at 170, n. 4, 114 S.Ct., at 757, n. 4.

In anticipation of our decision in *Weiss*, Chief Judge Baum sent a memorandum to the Chief Counsel of the Coast Guard requesting that the Secretary, in his capacity as a department head, reappoint the judges so the court would be constitutionally valid beyond any doubt. See *United States v. Senior*, 36 M.J. 1016; 1018 (C.G.C.M.R.1993). On January 15, 1993, the Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments to the Coast Guard Court of Military Review "as judicial appointments of my own." The memorandum then listed the names of "[t]hose judges presently assigned and appointed by me," including Chief Judge Baum and Judge Bridgman. Addendum to Brief for Petitioners A6.

Two Terms ago, in *Ryder v. United States*, 515 U.S. 177, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995), we considered the validity of a conviction that had been affirmed by a panel of the Coast Guard Court of Military Review, including its two civilian members, before the secretarial appointments of January 15, 1993. The Government conceded that the civilian judges of the Court of Military Review had not been appointed pursuant to the Appointments Clause, see Brief for United States in *Ryder v. United States*, O.T. 1994, No. 94-431, p. 9, n. 9, but argued that *Ryder's* conviction should be affirmed notwithstanding this defect. We disagreed, holding that *Ryder* was "entitled to a hearing before a properly appointed panel of the Coast Guard Court of Military Review. 515 U.S., at ----, 115 S.Ct. at ---- (slip op., at 10). We did not consider the validity of convictions affirmed by the court after the secretarial appointments.

Each of the petitioners in the present case was convicted by court-martial. In each case the conviction and sentence were affirmed, in whole or in part, by the Coast Guard Court of Criminal Appeals (or its predecessor the Court of Military Review) after the January 15, 1993, secretarial appointments. Chief Judge Baum participated in each decision, and Judge Bridgman participated in the appeals involving two of the petitioners. The Court of Appeals for the Armed Forces affirmed the convictions, relying on its holding on remand in *United States v. Ryder*, 44 M.J. 9 (1996), that the Secretary of Transportation's appointments were valid and cured the defect that had previously existed. Petitioners sought review in a consolidated petition pursuant to this Court's Rule 12.4, and we granted certiorari, 519 U.S. ----, 117 S.Ct. 416, 136 L.Ed.2d 328 (1996).

II

Petitioners argue that the Secretary's civilian appointments to the Coast Guard Court of Criminal Appeals are invalid for two reasons: first, the Secretary lacks authority under 49 U.S.C. §323(a) to appoint members of the court; second, judges of military Courts of Criminal Appeals are principal, not inferior, officers within the meaning of the Appointments Clause, and must therefore be appointed by the President with the advice and consent of the Senate. We

consider these contentions in turn.

Congress has established the Coast Guard as a military service and branch of the armed forces that, except in time of war (when it operates as a service within the Navy), is part of the Department of Transportation. 14 U.S.C. §§1-3. The Secretary of Transportation has broad authority over the Coast Guard, including the power to "promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. §633. The Commandant of the Coast Guard is required to "carry out duties and powers prescribed by the Secretary of Transportation," and he "reports directly to the Secretary." 49 U.S.C. §108(b). Most relevant to the present case, 49 U.S.C. §323(a) provides: "The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers." Petitioners do not dispute that judges of the Coast Guard Court of Criminal Appeals are officers of the Department of Transportation. Thus, although the statute does not specifically mention Coast Guard judges, the plain language of §323(a) appears to give the Secretary power to appoint them.

Petitioners argue, however, that §323(a) is a default statute, applicable only where Congress has not otherwise provided for the appointment of specific officers. Petitioners contend that Article 66(a) of the UCMJ, 10 U.S.C. §866(a), gives the Judge Advocate General of each military branch exclusive authority to appoint judges of his respective Court of Criminal Appeals. That provision reads as follows:

"Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges.... Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as senior judge on each panel."

Were we to accept petitioners' interpretation of Article 66(a) as providing for the "appointment" of Court of Criminal Appeals judges, their argument that Congress intended it to be the exclusive means of appointment might prove persuasive. Ordinarily, where a specific provision conflicts with a general one, the specific governs. *Susie v. United States*, 446 U.S. 398, 406, 100 S.Ct. 1747, 1752-1753, 64 L.Ed.2d 381 (1980). Conspicuously absent from Article 66(a), however, is any mention of the "appointment" of military judges. Instead, the statute refers to judges "who are assigned to a Court of Criminal Appeals" (emphasis added). The difference between the power to "assign" officers to a particular task and the power to "appoint" those officers is not merely stylistic. In *Weiss*, we upheld the assignment of military officers to serve on military courts because they had previously been "appointed" as officers of the United States pursuant to the Appointments Clause, and because Congress had not designated the position of a military judge as one requiring reappointment. 510 U.S., at 176, 114 S.Ct., at

760. We noted in *Weiss* that Congress has consistently used the word "appoint" with respect to military positions requiring a separate appointment, rather than using terms not found within 'the Appointments Clause, such as "assign": "Congress repeatedly and consistently distinguished between an office that would require a separate appointment and a position or duty to which one could be 'assigned' or 'detailed' by a superior officer." *Id.*, at 172, 114 S.Ct., at 758. We found it significant that the sections of the UCMJ relating to military judges "speak explicitly and exclusively in terms of 'detail' or 'assign'; nowhere in these sections is mention made of a separate appointment" *Id.*, at 172, 114 S.Ct., at 758. This analysis suggests that Article 66(a) concerns not the appointment of Court of Criminal Appeals judges, but only their assignment.

Moreover, we see no other way to interpret Article 66(a) that would make it consistent with the Constitution. Under the Appointments Clause, Congress could not give the Judge Advocate General power to "appoint" even inferior officers of the United States; that power can be conferred only upon the President, department heads, and courts of law. Thus, petitioners are asking us to interpret Article 66(a) in a manner that would render it clearly unconstitutional-- which we must of course avoid doing if there is another reasonable interpretation available. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 99 S.Ct. 1313, 1318-19, 59 L.Ed.2d 533 (1979); *Blodgett v. Holden*, 275 U.S. 142, 48 S.Ct. 105, 72 L.Ed. 206 (1927). Petitioners respond that reading §323(a) to permit the Secretary to appoint Court of Criminal Appeals judges causes us unnecessarily to reach the constitutional question whether those judges are inferior officers under the Appointments Clause, since Congress may vest only the appointment. of inferior officers in a department head. But a constitutional question confronted in order to preserve, if possible, a congressional enactment is not a constitutional question confronted unnecessarily.

We conclude that Article 66(a) does not give Judge Advocates General authority to appoint Court of Criminal Appeals judges; that §323(a) does give the Secretary of Transportation authority to do so; and we turn to the constitutional question whether this is consistent with the Appointments Clause.

III

The Appointments Clause of Article II of the Constitution reads as follows:

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, §2, el. 2.

As we recognized in *Buckley v. Valeo*, 424 U.S. 1, 125, 96 S.Ct. 612, 685, 46 L.Ed.2d 659 (1976), the Appointments Clause of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the

United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches. See *id.*, at 128-131, 96 S.Ct., at 686- 688; Weiss, *supra*, at 183-185, 114 S.Ct., at 763-765 (SOUTER, J., concurring); *Freytag v. Commissioner*, 501 U.S. 868, 904, and n. 4, 111 S.Ct. 2631, 2652, and n. 4, 115 L.Ed.2d 764 (1991) (SCALIA, J., concurring). This disposition was also designed to assure a higher quality of appointments: the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body. "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation." The Federalist No. 76, p. 387 (M. Beloff ed. 1987) (A. Hamilton); accord, 3 J. Story, *Commentaries on the Constitution of the United States* 374-375 (1833). The President's power to select principal officers of the United States was not left unguarded, however, as Article II further requires the "Advice and Consent of the Senate." This serves both to curb executive abuses of the appointment power. see 3 Story, at 376-377, and "to promote a judicious choice of [persons] for filling the offices of the union," The Federalist No. 76, at 386-387. By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one. Hamilton observed:

"The blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made, the executive for nominating, and the senate for approving, would participate, though in different degrees, in the opprobrium and disgrace." *Id.*, No. 77, at 392.

See also 3 Story, *supra*, at 375 ("If [the President] should ... surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favor.")

The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers. "[B]ut," the Appointments Clause continues, "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." This provision, sometimes referred to as the "Excepting Clause," was added to the proposed Constitution on the last day of the Grand Convention, with little discussion. See 2 M. Farrand, *Records of the Federal Convention of 1787*, pp. 627-628 (1911 ed.). As one of our early opinions suggests, its obvious purpose is administrative convenience, see *United States v. Germaine*, 99 U.S. 508, 510, 25 L.Ed. 482 (1879)--but that convenience was deemed to outweigh the benefits of the more cumbersome procedure only with respect to the appointment of "inferior Officers." Section 323(a), which confers appointment power upon the Secretary of Transportation, can constitutionally be applied to the appointment of Court of Criminal Appeals judges only if those judges are "inferior Officers."

Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointment Clause purposes. Among the offices that we have found to be inferior are that of a district court clerk, *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 229, 10 L.Ed.

136 (1839), an election supervisor, *Ex parte Siebold*, 100 U.S. 371, 397-398, 25 L.Ed. 717 (1880), a vice-consul charged temporarily with the duties of the consul, *United States v. Eaton*, 169 U.S. 331, 343, 18 S.Ct. 374, 379, 42 L.Ed. 767 (1898), and a "United States commissioner" in district court proceedings, *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-354, 51 S.Ct. 153, 156-157, 75 L.Ed. 374 (1931). Most recently, in *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), we held that the independent counsel created by provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§591-599, was an inferior officer. In reaching that conclusion, we relied on several factors: that the independent counsel was subject to removal by a higher officer (the Attorney General), that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited. *Id.*, at 671-672, 108 S.Ct. at 2608-2609.

Petitioners are quite correct that the last two of these conclusions do not hold with regard to the office of military judge at issue here. It is not "limited in tenure," as that phrase was used in *Morrison* to describe "appoint[ment] essentially to accomplish a single task [at the end of which] the office is terminated." *Id.*, at 672, 108 S.Ct., at 2609.. Nor are military judges "limited in jurisdiction," as used in *Morrison* to refer to the fact that an independent counsel may investigate and prosecute only those individuals, and for only those crimes, that are within the scope of jurisdiction granted by the special three judge appointing panel. See *Weiss*, 510 U.S., at 192, 114 S.Ct., at 768 (SOUTER, J., concurring). However, *Morrison* did not purport to set forth a definitive test for whether an office is "inferior" under the Appointments Clause. To the contrary, it explicitly stated: "We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view [the independent counsel] clearly falls on the 'inferior officer' side of the line." 487 U.S., at 671, 108 S.Ct., at 2608.

To support principal-officer status, petitioners emphasize the importance of the responsibilities that Court of Criminal Appeals judges bear. They review those court-martial proceedings that result in the most serious sentences, including those "in which the sentence, as approved, extends to death, dismissal ..., dishonorable or bad-conduct discharge, or confinement for one year or more." Art. 66(b)(1), UCMJ, 10 U.S.C. §866(b)(1). They must ensure that the court-martial's finding of guilt and its sentence are "correct in law and fact," Art. 66(c), UCMJ, 10 U.S.C. §866(c), which includes resolution of constitutional challenges. And finally, unlike most appellate judges, Court of Criminal Appeals judges are not required to defer to the trial court's factual findings, but may independently "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Ibid.* We do not dispute that military appellate judges are charged with exercising significant authority on behalf of the United States. This, however, is also true of offices that we have held were "inferior" within the meaning of the Appointments Clause. See, e.g., *Freytag v. Commissioner*, 501 U.S. 868, 881- 882, 111 S.Ct. 2631, 2640-2641, 115 L.Ed.2d 764 (1991) (special trial judges having "significan[t] ... duties and discretion" are inferior officers). The exercise of "significant authority pursuant to the laws of the United States" marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer. 424 U.S., at 126, 96 S.Ct., at 685-686.

Generally speaking, the term "inferior officer" connotes a relationship with some higher

ranking officer or officers below the President: whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.

This understanding of the Appointments Clause conforms with the views of the first Congress. On July 27, 1789, Congress established the first executive department, the Department of Foreign Affairs. In so doing, it expressly designated the Secretary of the Department as a "principal officer," and his subordinate, the Chief Clerk of the Department, as an "inferior officer:"

"Section 1. Be it enacted ... that there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution, relative to [matters respecting foreign affairs]; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct.

Section 2. And be it further enacted, That there shall be in the said department, an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the chief Clerk in the Department of Foreign Affairs...." 1 Stat. 28, ch. IV.

Congress used similar language in establishing the Department of War, repeatedly referring to the Secretary of that department as a "principal officer," and the chief clerk, who would be "employed" within the Department as the Secretary "shall deem proper," as an "inferior officer." 1 Stat. 49, ch. VII.

Supervision of the work of Court of Criminal Appeals judges is divided between the Judge Advocate General (who in the Coast Guard is subordinate to the Secretary of Transportation) and the Court of Appeals for the Armed Forces. The Judge Advocate General exercises administrative oversight over the Court of Criminal Appeals. He is charged with the responsibility to "prescribe uniform rules of procedure" for the court, and must "meet periodically [with other Judge Advocates General] to formulate policies and procedure in regard to review of court-martial cases." Art. 66(1), UCMJ, 10 U.S.C. §866(f). It is conceded by the parties that the Judge Advocate General may also remove a Court of Criminal Appeals judge from his judicial assignment without cause. The power to remove officers, we have recognized, is a powerful tool for control. *Bowsher v. Synar*, 478 U.S. 714, 727, 106 S.Ct. 3181, 3188, 92 L.Ed.2d 583 (1986); *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

The Judge Advocate General's control over Court of Criminal Appeals judges is, to be sure, not complete. He may not attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings, Art. 37, UCMJ, 10 U.S.C. §837, and has no power to reverse decisions of the court. This latter power does reside, however, in another Executive Branch entity, the Court of Appeals for the Armed Forces. That court reviews every decision of the Courts of Criminal Appeals in which: (a) the sentence extends to death; (b) the Judge Advocate General orders such review; or (c) the court itself grants review upon petition of the accused. Art. 67(a), UCMJ, 10 U.S.C. §867(a). The scope of review is narrower than that exercised by the Court of Criminal Appeals: so long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces will not reevaluate the facts. Art. 67(c), UCMJ, 10 U.S.C. §867(c); *United States v. Wilson*, 6 M.J. 214 (C.M.A.1979). This limitation upon review does not in our opinion render the judges of the Court of Criminal Appeals principal officers. What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers.

Finally, petitioners argue that *Freytag v. Commissioner*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), which held that special trial judges charged with assisting Tax Court judges were inferior officers and could be appointed by the Chief Judge of the Tax Court, suggests that Court of Criminal Appeals judges are principal officers. Petitioners contend that Court of Criminal Appeals judges more closely resemble Tax Court judges--who we implied (according to petitioners) were principal officers--than they do special trial judges. We note initially that *Freytag* does not hold that Tax Court judges are principal officers; only the appointment of special trial judges was at issue in that case. Moreover, there are two significant distinctions between Tax Court judges and Court of Criminal Appeals judges. First, there is no Executive-Branch tribunal comparable to the Court of Appeals for the Armed Forces that reviews the work of the Tax Court; its decisions are appealable only to courts of the Third Branch. 26 U.S.C. §7482. And second, there is no officer comparable to a Judge Advocate General who supervises the work of the Tax Court, with power to determine its procedural rules, to remove any judge without cause, and to order any decision submitted for review. *Freytag* does not control our decision here.

* * *

We conclude that 49 U.S.C. §323(a) authorizes the Secretary of Transportation to appoint judges of the Coast Guard Court of Criminal Appeals; and that such appointment is in conformity with the Appointments Clause of the Constitution, since those judges are "inferior Officers" within the meaning of that provision, by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces. The judicial appointments at issue in this case are therefore valid.

Accordingly, we affirm the judgment of the Court of Appeals for the Armed Forces with respect to each petitioner.

It is so ordered.

II. STANDING

A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA

Vol 1 Ch 6 (JUDICIAL POWER IN THE UNITED STATES, AND ITS INFLUENCE ON POLITICAL SOCIETY)

THE ANGLO-AMERICANS have retained the characteristics of judicial power which are common to other nations--They have, however, made it a powerful political organ--How--In what the judicial system of the Anglo-americans differs from that of all other nations--Why the American judges have the right of declaring laws to be unconstitutional--How they use this right--Precautions taken by the legislator to prevent its abuse.

I HAVE thought it right to devote a separate chapter to the judicial authorities of the United States, lest their great political importance should be lessened in the reader's eyes by merely incidental mention of them. Confederations have existed in other countries besides America; I have seen republics elsewhere than upon the shores of the New World alone: the representative system of government has been adopted in several states of Europe; but I am not aware that any nation of the globe has hitherto organized a judicial power in the same manner as the Americans. The judicial organization of the United States is the institution which a stranger has the greatest difficulty in understanding. He hears the authority of a judge invoked in the political occurrences of every day, and he naturally concludes that in the United States the judges are important political functionaries; nevertheless, when he examines the nature of the tribunals, they offer at the first glance nothing that is contrary to the usual habits and privileges of those bodies; and the magistrates seem to him to interfere in public affairs only by chance, but by a chance that recurs every day.

When the Parliament of Paris remonstrated, or refused to register an edict, or when it summoned a functionary accused of malversation to its bar, its political influence as a judicial body was clearly visible; but nothing of the kind is to be seen in the United States. The Americans have retained all the ordinary characteristics of judicial authority and have carefully restricted its action to the ordinary circle of its functions.

The first characteristic of judicial power in all nations is the duty of arbitration. But rights must be contested in order to warrant the interference of a tribunal; and an action must be brought before the decision of a judge can be had. As long, therefore, as a law is uncontested, the judicial authority is not called upon to discuss it, and it may exist without being perceived. When a judge in a given case attacks a law relating to that case, he extends the circle of his customary duties, without, however, stepping beyond it, since he is in some measure obliged to decide upon the law in order to decide the case. But if he pronounces upon a law without proceeding from a case, he clearly steps beyond his sphere and invades that of the legislative authority.

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 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.

The third characteristic of the judicial power is that it can act only when it is called upon, or when, in legal phrase, it has taken cognizance of an affair. This characteristic is less general than the other two; but, notwithstanding the exceptions, I think it may be regarded as essential. The judicial power is, by its nature, devoid of action; it must be put in motion in order to produce a result. When it is called upon to repress a crime, it punishes the criminal; when a wrong is to be redressed, it is ready to redress it; when an act requires interpretation, it is prepared to interpret it; but it does not pursue criminals, hunt out wrongs, or examine evidence of its own accord. A judicial functionary who should take the initiative and usurp the censorship of the laws would in some measure do violence to the passive nature of his authority.

The Americans have retained these three distinguishing characteristics of the judicial power: an American judge can pronounce a decision only when litigation has arisen, he is conversant only with special cases, and he cannot act until the cause has been duly brought before the court. His position is therefore exactly the same as that of the magistrates of other nations, and yet he is invested with immense political power. How does this come about? If the sphere of his authority and his means of action are the same as those of other judges, whence does he derive a power which they do not possess? The cause of this difference lies in the simple fact that the Americans have acknowledged the right of judges to found their decisions on the Constitution rather than on the laws. In other words, they have permitted them not to apply such laws as may appear to them to be unconstitutional.

I am aware that a similar right has been sometimes claimed, but claimed in vain, by courts of justice in other countries; but in America it is recognized by all the authorities; and not a party, not so much as an individual, is found to contest it. This fact can be explained only by the principles of the American constitutions. In France the constitution is, or at least is supposed to be, immutable; and the received theory is that no power has the right of changing any part of it.¹ In England the constitution may change continually,² or rather it does not in reality exist; the Parliament is at once a legislative and a constituent assembly. The political theories of America are more simple and more rational. An American constitution is not supposed to be immutable, as in France; nor is it susceptible of modification by the ordinary powers of society, as in England. It constitutes a detached whole, which, as it represents the will of the whole people, is no less binding on the legislator than on the private citizen, but which may be altered by the will of the people in predetermined cases, according to established rules. In America the

Constitution may therefore vary; but as long as it exists, it is the origin of all authority, and the sole vehicle of the predominating force.

It is easy to perceive how these differences must act upon the position and the rights of the judicial bodies in the three countries I have cited. If in France the tribunals were authorized to disobey the laws on the ground of their being opposed to the constitution, the constituent power would in fact be placed in their hands, since they alone would have the right of interpreting a

constitution of which no authority could change the terms. They would therefore take the place of the nation and exercise as absolute a sway over society as the inherent weakness of judicial power would allow them to do. Undoubtedly, as the French judges are incompetent to declare a law to be unconstitutional, the power of changing the constitution is indirectly given to the legislative body, since no legal barrier would oppose the alterations that it might prescribe. But it is still better to grant the power of changing the constitution of the people to men who represent (however imperfectly) the will of the people than to men who represent no one but themselves.

It would be still more unreasonable to invest the English judges with the right of resisting the decisions of the legislative body, since the Parliament which makes the laws also makes the constitution; and consequently a law emanating from the three estates of the realm can in no case be unconstitutional. But neither of these remarks is applicable to America.

In the United States the Constitution governs the legislator as much as the private citizen: as it is the first of laws, it cannot be modified by a law; and it is therefore just that the tribunals should obey the Constitution in preference to any law. This condition belongs to the very essence of the judicature; for to select that legal obligation by which he is most strictly bound is in some sort the natural right of every magistrate.

In France the constitution is also the first of laws, and the judges have the same right to take it as the ground of their decisions; but were they to exercise this right, they must perforce encroach on rights more sacred than their own: namely, on those of society, in whose name they are acting. In this case reasons of state clearly prevail over ordinary motives. In America, where the nation can always reduce its magistrates to obedience by changing its Constitution, no danger of this kind is to be feared. Upon this point, therefore, the political and the logical reason agree, and the people as well as the judges preserve their privileges.

Whenever a law that the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one peculiar to the American magistrate, but it gives rise to immense political influence. In truth, few laws can escape the searching analysis of the judicial power for any length of time, for there are few that are not prejudicial to some private interest or other, and none that may not be brought before a court of justice by the choice of parties or by the necessity of the case. 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 alternative, then, is, that the people must alter the Constitution or the legislature must repeal the law. 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. If the judge had been empowered to contest the law on the ground of theoretical generalities, if he were able to take the initiative and to censure the legislator, he would play a prominent political part; and as the champion or the antagonist of a party, he would have brought the hostile passions of the nation into the conflict. But 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 be accomplished only by the reiterated attacks of judicial functionaries. It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.

I am inclined to believe this practice of the American courts to be at once most favorable to liberty and to public order. If the judge could attack the legislator only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn. The laws would consequently be attacked when the power from which they emanated was weak, and obeyed when it was strong; that is to say, when it would be useful to respect them, they would often be contested; and when it would be easy to convert them into an instrument of oppression, they would be respected. But the American judge is brought into the political arena independently of his own will. He judges the law only because he is obliged to judge a case. The political question that he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice. He performs his functions as a citizen by fulfilling the precise duties which belong to his profession as a magistrate. It is true that, upon this system, the judicial censorship of the courts of justice over the legislature cannot extend to all laws indiscriminately, inasmuch as some of them can never give rise to that precise species of contest which is termed a lawsuit; and even when such a contest is possible, it may happen that no one cares to bring it before a court of justice. The Americans have often felt this inconvenience; but they have left the remedy incomplete, lest they should give it an efficacy that might in some cases prove dangerous. Within these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.

OTHER POWERS GRANTED TO AMERICAN JUDGES. In the United States all the citizens have the right of indicting the public before the ordinary tribunals--How they use this right--Art. 75 of the French Constitution of the year VIII--The Americans and the English cannot understand the purport of this article.

It is hardly necessary to say that in a free country like America all the citizens have the right of indicting public functionaries before the ordinary tribunals, and that all the judges have the power of convicting public officers. The right granted to the courts of justice of punishing the agents of the executive government when they violate the laws is so natural a one that it cannot be looked upon as an extraordinary privilege. Nor do the springs of government appear to me to be weakened in the United States by rendering all public officers responsible to the tribunals. The Americans seem, on the contrary, to have increased by this means that respect which is due to the authorities, and at the same time to have made these authorities more careful not to offend. I was struck by the small number of political trials that occur in the United States, but I had no

difficulty in accounting for this circumstance. A prosecution, of whatever nature it may be, is always a difficult and expensive undertaking. It is easy to attack a public man in the journals, but the motives for bringing him before the tribunals must be serious. A solid ground of complaint must exist before anyone thinks of prosecuting a public officer, and these officers are careful not to furnish such grounds of complaint when they are afraid of being prosecuted.

This does not depend upon the republican form of American institutions, for the same thing happens in England. These two nations do not regard the impeachment of the principal officers of state as the guarantee of their independence. But they hold that it is rather by minor prosecutions, which the humblest citizen can institute at any time, that liberty is protected, and not by those great judicial procedures which are rarely employed until it is too late.

In the Middle Ages, when it was very difficult to reach offenders, the judges inflicted frightful punishments on the few who were arrested; but this did not diminish the number of crimes. It has since been discovered that when justice is more certain and more mild, it is more efficacious. The English and the Americans hold that tyranny and oppression are to be treated like any other crime, by lessening the penalty and facilitating conviction.

In the year VIII of the French Republic a constitution was drawn up in which the following clause was introduced: "Art. 75. All the agents of the government below the rank of ministers can be prosecuted for offenses relating to their several functions only by virtue of a decree of the council of state; in which case the prosecution takes place before the ordinary tribunals." This clause survived the Constitution of the year VIII and is still maintained, in spite of the just complaints of the nation. I have always found a difficulty in explaining its meaning to Englishmen or Americans, and have hardly understood it myself. They at once perceived that, the council of state in France being a great tribunal established in the center of the kingdom, it was a sort of tyranny to send all complainants before it as a preliminary step. But when I told them that the council of state was not a judicial body in the common sense of the term, but an administrative council composed of men dependent on the crown, so that the king, after having ordered one of his servants, called a prefect, to commit an injustice, has the power of commanding another of his servants, called a councillor of state, to prevent the former from being punished. When I showed them that the citizen who has been injured by an order of the sovereign is obliged to ask the sovereign's permission to obtain redress, they refused to credit so flagrant an abuse and were tempted to accuse me of falsehood or ignorance. It frequently happened before the Revolution that a parliament issued a warrant against a public officer who had committed an offense. Sometimes the royal authority intervened and quashed the proceedings. Despotism then showed itself openly, and men obeyed it only by submitting to superior force. It is painful to perceive how much lower we are sunk than our forefathers, since we allow things to pass, under the color of justice and the sanction of law, which violence alone imposed upon them.

Florence FLAST et al, Appellants,
v.
Wilbur J. COHEN, Secretary of Health, Education, and Welfare, et al,

No. 416.

Supreme Court of the United States

Argued March 12, 1968.

Decided June 10, 1968.

[Mr. Justice Harlan dissented.]

Mr. Chief Justice WARREN delivered the opinion of the Court.

In *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), this Court ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. That ruling has stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers. In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment.

Appellants filed suit in the United States District Court for the Southern District of New York to enjoin the allegedly unconstitutional expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, 20 U.S.C. ss 241a et seq., 821 et seq. (1964 ed., Supp. II). The complaint alleged that the seven appellants had as a common attribute that 'each pay(s) income takes of the United. States,' and it is clear from the complaint that the appellants were resting their standing to maintain the action solely on their status as federal taxpayers. The appellees, who are charged by Congress with administering the Elementary and Secondary Education Act of 1965, were sued in their official capacities.

The gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment. Title I of the Act establishes a program for financial assistance to local educational agencies for the education of low-income families. Federal payments are made to state educational agencies, which pass the payments on in the form of grants to local educational agencies. Under §205 of the Act, , a local educational agency wishing to have a plan or program funded by a grant must submit the plan or program to the appropriate state educational agency for approval. The plan or program must be "consistent with such basic criteria as the appellee United States Commissioner of Education) may establish."

The Government moved to dismiss the complaint on the ground that appellants lacked standing to maintain the action. District Judge Frankel, who considered the motion, recognized that *Frothingham v. Mellon*, supra, provided 'powerful' support for the Government's position, but he ruled that the standing question was of sufficient substance to warrant the convening of a three-judge court to decide the question. 267 F.Supp. 351 (1967). The three-judge court received briefs and heard arguments limited to the standing question, and the court ruled on the authority of *Frothingham* that appellants lacked standing. Judge Frankel dissented. 271 F.Supp. 1 (1967). From the dismissal of their complaint on that ground, appellants appealed directly to this Court, 28 U.S.C. s 1253, and we noted probable jurisdiction. 389 U.S. 895, 88 S.Ct. 218, 19 L.Ed.2d 212 (1967). For reasons explained at length below, we hold that appellants do have standing as federal taxpayers to maintain this action, and the judgment below must be reversed.

Thus, since the three-judge court was properly convened below, direct appeal to this Court is proper. We turn now to the standing question presented by this case.

II

This Court first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in a federal court in *Frothingham v. Mellon*, supra, and that decision must be the starting point for analysis in this case. The taxpayer in *Frothingham* attacked as unconstitutional the Maternity Act of 1921, 42 Stat. 224, which established a federal program of grants to those States which would undertake programs to reduce maternal and infant mortality. The taxpayer alleged that Congress, in enacting the challenged statute, had exceeded the powers delegated to it under Article I of the Constitution and had invaded the legislative province reserved to the several States by the Tenth Amendment. The taxpayer complained that the result of the allegedly unconstitutional enactment would be to increase her future federal tax liability and 'thereby take her property without due process of law.' 262 U.S., at 486, 43 S.Ct. at 600. The Court noted that a federal taxpayer's 'interest in the moneys of the treasury * * * is comparatively minute and indeterminable' and that 'the effect upon future taxation, of any payment out of the (Treasury's) funds, * * * (is) remote, fluctuating and uncertain.' *Id.*, at 487, 43 S.Ct. at 601. As a result, the Court ruled that the taxpayer had failed to allege the type of 'direct injury' necessary to confer standing. *Id.*, at 488, 43 S.Ct. at 601.

Although the barrier *Frothingham* erected against federal taxpayer suits has never been breached, the decision has been the source of some confusion and the object of considerable criticism. The confusion has developed as commentators have tried to determine whether *Frothingham* establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled. The conflicting viewpoints are reflected in the arguments made to this Court by the parties in this case. The Government has pressed upon us the view that *Frothingham* announced a constitutional rule, compelled by the Article III limitations on federal court jurisdiction and grounded in

considerations of the doctrine of separation of powers. Appellants, however, insist that Frothingham expressed no more than a policy of judicial self-restraint which can be disregarded when compelling reasons for assuming jurisdiction over a taxpayer's suit exist. The opinion delivered in Frothingham can be read to support either position. The concluding sentence of the opinion states that, to take jurisdiction of the taxpayer's suit, 'would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.' 262 U.S., at 489, 43 S.Ct. 601. Yet the concrete reasons given for denying standing to a federal taxpayer suggest that the Court's holding rests on something less than a constitutional foundation. For example, the Court conceded that standing had previously been conferred on municipal taxpayers to sue in that capacity. However, the Court viewed the interest of a federal taxpayer in total federal tax revenues as 'comparatively minute and indeterminable' when measured against a municipal taxpayer's interest in a smaller city treasury. *Id.*, at 486--487, 43 S.Ct. at 579-- 601. This suggests that the petitioner in Frothingham was denied standing not because she was a taxpayer but because her tax bill was not large enough. In addition, the Court spoke of the 'attendant inconveniences' of entertaining that taxpayer's suit because it might open the door of federal courts to countless such suits 'in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.' *Id.*, at 487, 43 S.Ct. at 601. Such a statement suggests pure policy considerations.

To the extent that Frothingham has been viewed as resting on policy considerations, it has been criticized as depending on assumptions not consistent with modern conditions. For example, some commentators have pointed out that a number of corporate taxpayers today have a federal tax liability running into hundreds of millions of dollars, and such taxpayers have a far greater monetary stake in the Federal Treasury than they do in any municipal treasury. To some degree, the fear expressed in Frothingham that allowing one taxpayer to sue would inundate the federal courts with countless similar suits has been mitigated by the ready availability of the devices of class actions and joinder under the Federal Rules of Civil Procedure, adopted subsequent to the decision in Frothingham. Whatever the merits of the current debate over Frothingham, its very existence suggests that we should undertake a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits.

III

The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into

areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that Justiciability is * * * not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures * *Poe v. Ullman*, 367 U.S. 497, 508, 81 S.Ct. 1752, 1759, 6 L.Ed.2d 989 (1961).

Part of the difficulty in giving precise meaning and form to the concept of justiciability stems from the uncertain historical antecedents of the case-and-controversy doctrine. For example, Mr. Justice Frankfurter twice suggested that historical meaning could be imparted to the concepts of justiciability and case and controversy by reference to the practices of the courts of Westminster when the Constitution was adopted. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (concurring opinion); *Coleman v. Miller*, 307 U.S. 433, 460, 59 S.Ct. 972, 985, 83 L.Ed. 1385 (1939) (separate opinion). However, the power of English judges to deliver advisory opinions was well established at the time the Constitution was drafted. 3 K. Davis, *Administrative Law Treatise* 127--128 (1958). And it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.' C. Wright, *Federal Courts* 34 (1963). Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. See *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911); 3 H. Johnston, *Correspondence and Public Papers of John Jay* 486--489 (1891) (correspondence between Secretary of State Jefferson and Chief Justice Jay). However, the rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.' *United States v. Fruehauf*, 365 U.S. 146, 157, 81 S.Ct. 547, 554, 5 L.Ed.2d 476 (1961). Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy

limitation is 'not always clearly distinguished from the constitutional limitation.' *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034, 97 L.Ed. 1586 (1953). For example, in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345--348, 56 S.Ct. 466, 482--483, 80 L.Ed. 688 (1936), Mr. Justice Brandeis listed seven rules developed by this Court for its own governance' to avoid passing prematurely on constitutional questions. Because the rules operate in 'cases confessedly within (the Court's) jurisdiction,' *id.*, at 346, 56 S.Ct. at 482, they find their source in policy, rather than purely constitutional, considerations. However, several of the cases cited by Mr. Justice Brandeis in illustrating the rules of self-governance articulated purely constitutional grounds for decision. See, e.g., *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *Fairchild v. Hughes*, 258 U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499 (1922); *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 12 S.Ct. 400, 36 L.Ed. 176 (1892). The 'many subtle pressures' which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.

It is in this context that the standing question presented by this case must be viewed and that the Government's argument on that question must be evaluated. As we understand it, the Government's position is that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme, present an absolute bar to taxpayer suits challenging the validity of federal spending programs. The Government views such suits as involving no more than the mere disagreement by the taxpayer 'with the uses to which tax money is put.' According to the Government, the resolution of such disagreements is committed to other branches of the Federal Government and not to the judiciary. Consequently, the Government contends that, under no circumstances, should standing be conferred on federal taxpayers to challenge a federal taxing or spending program. An analysis of the function served by standing limitations compels a rejection of the Government's position.

Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of 'the most amorphous (concepts) in the entire domain of public law.' Some of the complexities peculiar to standing problems result because standing 'serves, on occasion, as a shorthand expression for all the various elements of justiciability.' In addition, there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.

Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is

challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question. A proper party is demanded so that federal courts will not be asked to decide 'illdefined controversies over constitutional issues.' *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947), or a case which is of 'a hypothetical or abstract character.' *Aetna Life Insurance Co. of Hartford, Conn. v. Haworth*, 300 U.S. 27, 240, 57 S.Ct. 461, 463, 81 L.Ed. 617 (1937). So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits, *Chicago & Grand Trunk R. Co. v. Wellman*, *supra*, or those which are feigned or collusive in nature, *United States v. Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943); *Lord v. Veazie*, 8 How. 251, 12 L.Ed. 1067 (1850).

When the emphasis in the standing problem is placed on whether the person invoking a federal court's jurisdiction is a proper party to maintain the action, the weakness of the Government's argument in this case becomes apparent. The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' *Baker v. Carr*, *supra*, 369 U.S. at 204, 82 S.Ct. at 703, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.' *Aetna Life Insurance Co. v. Haworth*, *supra*, 300 U.S. at 240-- 241, 57 S.Ct. at 464. A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer qua taxpayer consistent with the constitutional limitations of Article III.

IV

The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. We have noted that, in deciding the question of standing, it is not relevant that the substantive issues in the litigation might be nonjusticiable. However, our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. For example, standing requirements will vary in First

Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause. See *McGowan v. State of Maryland*, 366 U.S. 420, 429--430, 81 S.Ct. 1101, 1106-- 1107, 6 L.Ed.2d 393 (1961). Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power. Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, s 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, s 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, s 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that 'the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.' 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, s 8.

The allegations of the taxpayer in *Frothingham v. Mellon*, *supra*, were quite different from those made in this case, and the result in *Frothingham* is consistent with the test of taxpayer standing announced today. The taxpayer in *Frothingham* attacked a federal spending program and she, therefore, established the first nexus required. However, she lacked standing because her constitutional attack was not based on an allegation that Congress, in enacting the Maternity Act of 1921, had breached a specific limitation upon its taxing and spending power. The taxpayer in *Frothingham* alleged essentially that Congress, by enacting the challenged statute, had exceeded the general powers delegated to it by Art. 1, s 8, and that Congress had thereby invaded the legislative province reserved to the States by the Tenth Amendment. To be sure, Mrs. Frothingham made the additional allegation that her tax liability would be increased as a result of the allegedly unconstitutional enactment, and she framed that allegation in terms of a deprivation of property without due process of law. However, the Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability, and the taxpayer in *Frothingham* failed to make any additional claim that the harm she alleged resulted from a breach by Congress of the specific constitutional limitations imposed upon an exercise of the taxing and spending power. In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power.

We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, s 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review. Under such circumstances, we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution. We lack that confidence in cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.

While we express no view at all on the merits of appellants' claims in this case, their complaint contains sufficient allegations under the criteria we have outlined to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits.

Reversed.

UNITED STATES et al, Petitioners,
v.
William B. RICHARDSON.

No. 72--885.

Supreme Court of the United States

Argued Oct. 10, 1973.

Decided June 25, 1974.

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the respondent has standing to bring an action as a federal taxpayer alleging that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act of 1949, 63 Stat. 208, 50 U.S.C. s 403a et seq., violate Art. 1, s 9, cl. 7, of the Constitution which provides:

'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.'

Respondent brought this suit in the United States District Court on a complaint in which he recites attempts to obtain from the Government information concerning detailed expenditures of the Central Intelligence Agency. According to the complaint, respondent wrote to the Government Printing Office in 1967 and requested that he be provided with the documents 'published by the Government in compliance with Article 1, section 9, clause (7) of the United States Constitution.' The Fiscal Service of the Bureau of Accounts of the Department of the Treasury replied, explaining that it published the document known as the Combined Statement of Receipts, Expenditures, and Balances of the United States Government. Several copies of the monthly and daily reports of the office were sent with the letter. Respondent then wrote to the same office and, quoting part of the CIA Act, asked whether this statute did not 'cast reflection upon the authenticity of the Treasury's Statement.' He also inquired as to how he could receive further information on the expenditures of the CIA. The Bureau of Accounts replied stating that it had no other available information.

Respondent's complaint alleged that he was 'a member of the electorate, and a loyal citizen of the United States.' At the same time, he states that he 'does not challenge the formulation of the issue contained in the petition for certiorari,' Brief for Respondent in Opposition to Pet. for Cert. 1. The question presented there was: 'Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution.' Pet. for Cert. 2.

In another letter, respondent asserted that the CIA Act was repugnant to the Constitution and requested that the Treasury Department seek an opinion of the Attorney General. The Department answered declining to seek such an opinion and this suit followed. Respondent's complaint asked the court to 'issue a permanent injunction enjoining the defendants from publishing their 'Combined Statement of Receipts, Expenditures and Balances of the United States Government' and representing it as the fulfillment of the mandates of Article I Section 9 Clause 7 until same fully complies with those mandates.' In essence, the respondent asked the federal court to declare unconstitutional that provision of the Central Intelligence Agency Act which permits the Agency to account for its expenditures 'solely on the certificate of the Director . . . 50 U.S.C. s 403j(b). The only injury alleged by respondent was that he 'cannot obtain a document that sets out the expenditures and receipts' of the CIA but on the contrary was 'asked to accept a fraudulent document.' The District Court granted a motion for dismissal on the ground respondent lacked standing under *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), and that the subject matter raised political questions not suited for judicial disposition.

The Court of Appeals sitting en banc, with three judges dissenting, reversed, 465 F.2d 844 (CA3 1972), holding that the respondent had standing to bring this action. The majority relied chiefly on *Flast v. Cohen*, status as a taxpayer and the challenged legislative enactment, i.e., an attack on an enactment under the Taxing and Spending Clause of Art. I, s 8, of the Constitution; and (b) a 'nexus' between the plaintiffs status and a specific constitutional limitation imposed on the taxing and spending power. 392 U.S., at 102-103, 88 S.Ct., at 1953--1954. While noting that the respondent did not directly attack an appropriations act, as did the plaintiff in *Flast*, the Court of Appeals concluded that the CIA statute challenged by the respondent was 'integrally related,' 465 F.2d, at 853, to his ability to challenge the appropriations since he could not question an appropriation about which he had no knowledge. The Court of Appeals seemed to rest its holding on an assumption that this case was a prelude to a later case challenging, on the basis of information obtained in this suit, some particular appropriation for or expenditure of the CIA; respondent stated no such an intention in his complaint. The dissenters took a different approach urging denial of standing principally because, in their view, respondent alleged no specific injury but only a general interest common to all members of the public.

We conclude that respondent lacks standing to maintain a suit for the relief sought and we reverse.

I

As far back as *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), this Court held that judicial power may be exercised only in a case properly before it--a 'case or controversy' not suffering any of the limitations of the political-question doctrine, not then moot or calling for an advisory opinion. In *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), this limitation was described in terms that a federal court cannot

"pronounce any statute, either of the 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.' *Liverpool, N.Y. & P. Steamship Co. v.*

Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899.'

Recently in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), the Court, while noting that '(g)eneralizations about standing to sue are largely worthless as such,' *id.*, at 151, 90 S.Ct., at 829, emphasized that '(o)ne generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to cases' and 'controversies.'

Although the recent holding of the Court in *Flast v. Cohen*, *supra*, is a starting point in an examination of respondent's claim to prosecute this suit as a taxpayer, that case must be read with reference to its principal predecessor, *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). In *Frothingham*, the injury alleged was that the congressional enactment challenged as unconstitutional would, if implemented, increase the complainant's future federal income taxes. Denying standing, the *Frothingham* Court rested on the 'comparatively minute(,) remote, fluctuating and uncertain,' *id.*, at 487, 43 S.Ct., at 601, impact on the taxpayer, and the failure to allege the kind of direct injury required for standing.

'The party who invokes the (judicial) power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' *Id.*, at 488, 43 S.Ct., at 601.

When the Court addressed the question of standing in *Flast*, Mr. Chief Justice Warren traced what he described as the 'confusion' following *Frothingham* as to whether the Court had announced a constitutional doctrine barring suits by taxpayers challenging federal expenditures as unconstitutional or simply a policy rule of judicial self-restraint. In an effort to clarify the confusion and to take into account intervening developments, of which class actions and joinder under the Federal Rules of Civil Procedure were given as examples, the Court embarked on 'a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits.' 392 U.S., at 94, 88 S.Ct., at 1949. That re-examination led, however, to the holding that a 'taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.' *Id.*, at 105-106, 88 S.Ct., at 1955 (Emphasis supplied.) In so holding, the Court emphasized that Art. III requirements are the threshold inquiry:

'The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions.'" *Id.*, at 99, 88 S.Ct., at 1952, citing *Baker v. Carr*, 369 U.S., at 204, 82 S.Ct., at 703.

The Court then announced a two-pronged standing test which requires allegations: (a) challenging an enactment under the Taxing and Spending Clause of Art. I, s 8, of the Constitution; and (b) claiming that the challenged enactment exceeds specific constitutional

limitations imposed on the taxing and spending power. 392 U.S., at 102--103, 88 S.Ct., at 1953--1954. While the 'impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers,' *id.*, at 85, 88 S.Ct., at 1944, had been slightly lowered, the Court made clear it was reaffirming the principle of Frothingham precluding a taxpayer's use of 'a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.' *Id.*, at 106, 88 S.Ct., at 1956. The narrowness of that holding is emphasized by the concurring opinion of Mr. Justice Stewart in *Flast*:

'In concluding that the appellants therefore have standing to sue, we do not undermine the salutary principle, established by Frothingham and reaffirmed today, that a taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" (Citation omitted.) *Id.*, at 114, 88 S.Ct., at 1960.

II

Although the Court made it very explicit in *Flast* that a 'fundamental aspect of standing' is that it focuses primarily on the party seeking to get his complaint before the federal court rather than 'on the issues he wishes to have adjudicated,' *id.*, at 99, 88 S.Ct., at 1952, it made equally clear that

'in ruling on (taxpayer) standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.' *ibid.*, 88 S.Ct., at 1953.

We therefore turn to an examination of the issues sought to be raised by respondent's complaint to determine whether he is 'a proper and appropriate party to invoke federal judicial power,' *id.*, at 102, 88 S.Ct., at 1953, with respect to those issues.

We need not and do not reach the merits of the constitutional attack on the statute; our inquiry into the 'substantive issues' is for the limited purpose indicated above. The mere recital of the respondent's claims and an examination of the statute under attack demonstrate how far he falls short of the standing criteria of *Flast* and how neatly he falls within the Frothingham holding left undisturbed. Although the status he rests on is that he is a taxpayer, his challenge is not addressed to the taxing or spending power, but to the statutes regulating the CIA, specifically 50 U.S.C. s 403j(b). That section provides different accounting and reporting requirements and procedures for the CIA, as is also done with respect to other governmental agencies dealing in confidential areas.

Respondent makes no claim that appropriated funds are being spent in violation of a 'specific constitutional limitation upon the . . . taxing and spending power . . . 392 U.S., at 104, 88 S.Ct., at 1954. Rather, he asks the courts to compel the Government to give him information on precisely how the CIA spends its funds. Thus there is no 'logical nexus' between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a

more detailed report of the expenditures of that agency.

The question presented thus is simply and narrowly whether these claims meet the standards for taxpayer standing set forth in *Flast*; we hold they do not. Respondent is seeking 'to employ a federal court as a forum. in which to air his generalized grievances about the conduct of government.' 392 U.S., at 106, 88 S.Ct., at 1956. Both *Frothingham* and *Flast*, *supra*, reject that basis for standing.

III

The Court of Appeals held that the basis of taxpayer standing

'need not always be the appropriation and the spending of (taxpayer's) money for an invalid purpose. The personal stake may come from an injury in fact even if it is not directly economic in nature. *Association of Data Processing Organizations, Inc. v. Camp*, (397 U.S. 150) 154, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).' 465 F.2d, at 853.

The respondent's claim is that without detailed information on CIA expenditures--and hence its activities--he cannot intelligently follow the actions of Congress or the Executive, nor can he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office.

This is surely the kind of a generalized grievance described in both *Frothingham* and *Flast* since the impact on him is plainly undifferentiated and 'common to all members of the public.' *Ex parte Le vitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937); *Laird v. Tatum*, 408 U.S. 1, 13, 92 S.Ct. 2318, 2325, 33 L.Ed.2d 154 (1972). While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute. As the Court noted in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972):

'(A) mere 'interest in a problem,' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA.' *Id.*, at 739, 92 S.Ct., at 1368.

Ex parte Le vitt, *supra*, is especially instructive. There *Le vitt* sought to challenge the validity of the commission of a Supreme Court Justice who had been nominated and confirmed as such while he was a member of the Senate. *Le vitt* alleged that the appointee had voted for an increase in the emoluments provided by Congress for Justices of the Supreme Court during the term for which he was last elected to the United States Senate. The claim was that the appointment violated the explicit prohibition of Art. I, s 6, cl. 2, of the Constitution. The Court disposed of *Le vitt*'s claim, stating:

'It is an established principle that to entitle a private individual to invoke the judicial

power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.' 302 U.S., at 634, 58 S.Ct., at 1. (Emphasis supplied.)

Of course, if Le vita's allegations were true, they made out an arguable violation of an explicit prohibition of the Constitution. Yet even this was held insufficient to support standing because, whatever Le vitt's injury, it was one he shared with 'all members of the public.' Respondent here, like the petitioner in Le vitt, also fails to clear the threshold hurdle of *Baker v. Carr*, 369 U.S., at 204, 82 S.Ct., at 703. See *supra*, at 2943--2944, and *Flast, supra*.

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the 'ground rules' established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' *Baker v. Carr, supra*, at 204, 82 S.Ct., at 703, or a 'particular, concrete injury,' *Sierra Club, supra*, 405 U.S., at 740-741, n. 16, 92 S.Ct., at 1369, or 'a direct injury,' *Ex parte Le vitt, supra*, 302 U.S., at 634, 58 S.Ct., at 1; in short, something more than 'generalized grievances,' *Flast, supra*, 392 U.S., at 106, 88 S.Ct., at 1956. Respondent has failed to meet these fundamental tests; accordingly, the judgment of the Court of Appeals is reversed.

Reversed.

Mr. Justice POWELL, concurring.

I join the opinion of the Court because I am in accord with most of its analysis, particularly insofar as it relies on traditional barriers against federal taxpayer or citizen standing.

And I agree that *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), which set the boundaries for the arguments of the parties before us, is the most directly relevant precedent and quite correctly absorbs a major portion of the Court's attention. I write solely to indicate that I would go further than the Court and would lay to rest the approach undertaken in *Flast*. I would not overrule *Flast* on its facts, because it is now settled that federal taxpayer standing exists in Establishment Clause cases. I would not, however, perpetuate the doctrinal confusion inherent in the *Flast* two-part 'nexus' test. That test is not a reliable indicator of when a federal taxpayer has standing, and it has no sound relationship to the question whether such a plaintiff, with no other interest at stake, should be allowed to bring suit against one of the branches of the Federal Government. In my opinion, it should be abandoned.

I

My difficulties with *Flast* are several. The opinion purports to separate the question of standing from the merits, *id.*, at 99-101, 88 S.Ct., at 1952-- 1953, yet it abruptly returns to the substantive issues raised by a plaintiff for the purpose of determining 'whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.' *Id.*, at 102, 88 S.Ct., at 1953. Similarly, the opinion distinguishes between constitutional and prudential limits on standing. *Id.*, at 92--94, 97, 88 S.Ct., at 1948. I find it impossible, however, to determine whether the two- part 'nexus' test created in *Flast* amounts to a constitutional or a prudential limitation, because it has no meaningful connection with the Court's statement of the bare-minimum constitutional requirements for standing.

Drawing upon *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), the Court in *Flast* stated the "gist of the question of standing" as 'whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" 392 U.S., at 99, 88 S.Ct., at 1952. As the Court today notes, *ante*, at 2944, this is now the controlling definition of the irreducible Art. III case-or- controversy requirements for standing. But, as Mr. Justice Harlan pointed out in his dissent in *Flast*, 392 U.S., at 116 et seq., 88 S.Ct., at 1961, it is impossible to see how an inquiry about the existence of 'concrete adverseness' is furthered by an application of the *Flast* test.

Flast accounted the following two-part 'nexus' test:

"The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. 1, s 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon

the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, s 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.' *Id.*, at 102--103, 88 S.Ct., at 1954.

Relying on history, the Court identified the Establishment Clause as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, s 8. 392 U.S., at 103-- 105, 88 S.Ct., at 1954--1955. On the other hand, the Tenth Amendment, and apparently the Due Process Clause of the Fifth Amendment, were determined not to be such 'specific' limitations. The bases for these determinations are not wholly clear, but it appears that the Court found the Tenth Amendment addressed to the interests of the States, rather than of taxpayers, and the Due Process Clause no protection against increases in tax liability. *Id.*, at 105, 88 S.Ct., at 1955.

In my opinion, Mr. Justice Harlan's critique of the Flast 'nexus' test is unanswerable. As he pointed out, 'the Court's standard for the determination of standing (i.e., sufficiently concrete adverseness) and its criteria for the satisfaction of that standard are entirely unrelated.' *Id.*, at 122, 88 S.Ct., at 1964. Assuming that the relevant constitutional inquiry is the intensity of the plaintiffs concern, as the Court initially posited, *Id.*, at 99, 88 S.Ct., at 1952, the Flast criteria 'are not in any sense a measurement of any plaintiffs interest in the outcome of any suit. *Id.*, at 121, 88 S.Ct., at 1964 (Harlan, J., dissenting). A plaintiffs incentive to challenge an expenditure does not turn on the 'unconnected fact' that it relates to a regulatory rather than a spending program, *id.*, at 122, 88 S.Ct., at 1964, or on whether the constitutional provision on which he relies is a 'specific limitation' upon Congress' spending powers. *Id.*, at 123, 88 S.Ct., at 1965.

The ambiguities inherent in the Flast '(exus' limitations on federal taxpayer standing are illustrated by this case. There can be little doubt about respondent's fervor in pursuing his case, both within administrative channels and at every level of the federal courts. The intensity of his interest appears to bear no relationship to the fact that, literally speaking, he is not challenging directly a congressional exercise of the taxing and spending power. On the other hand, if the involvement of the taxing and spending power has some relevance, it requires no great leap in reasoning to conclude that the Statement and Account Clause, Art. I, s 9, cl. 7, on which respondent relies, is inextricably linked to that power. And that Clause might well be seen as a 'specific' limitation on congressional spending. Indeed, it could be viewed as the most democratic of limitations. Thus, although the Court's application of Flast to the instant case is probably literally correct, adherence to the Flast test in this instance suggests, as does Flast itself, that the test is not a sound or logical limitation on standing.

The lack of real meaning and of principled content in the Flast 'nexus' test renders it likely that it will in time collapse of its own weight, as Mr. Justice Douglas predicted in his concurring opinion in that case. 392 U.S. at 107, 88 S.Ct., at 1956. This will present several options for the Court. It may either reaffirm pre-Flast prudential limitations on federal and citizen taxpayer standing; attempt new doctrinal departures in this area, as would Mr. Justice STEWART, *post*, at 2959--2960; or simply drop standing barriers altogether, as, judging by his

concurring opinion in *Flast*, *supra*, and his dissenting opinion today, would Mr. Justice DOUGLAS. I believe the first option to be the appropriate course, for reasons which may be emphasized by noting the difficulties I see with the other two. And, while I do not disagree at this late date with the *Baker v. Carr* statement of the constitutional indicia of standing, I further believe that constitutional limitations are not the only pertinent considerations.

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND .
COMMUNITY INITIATIVES,
et al., PETITIONERS v. FREEDOM FROM RELI-
GION FOUNDATION, INC., *et al.*

on writ of certiorari to the united states court of appeals for the seventh circuit

[June 25, 2007]

Justice Alito announced the judgment of the Court and delivered an opinion in which *The Chief Justice* and *Justice Kennedy* join.

I

A

In 2001, the President issued an executive order creating the White House Office of Faith-Based and Community Initiatives within the Executive Office of the President. Exec. Order No. 13199, 3 CFR 752 (2001 Comp.). The purpose of this new office was to ensure that "private and charitable community groups, including religious ones ., have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes" and adhere to "the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality." *Ibid.* The office was specifically charged with the task of eliminating unnecessary bureaucratic, legislative, and regulatory barriers that could impede such organizations' effectiveness and ability to compete equally for federal assistance. *Id.*, at 752-753.

By separate executive orders, the President also created Executive Department Centers for Faith-Based and Community Initiatives within several federal agencies and departments. These centers were given the job of ensuring that faith-based community groups would be eligible to compete for federal financial support without impairing their independence or autonomy, as long as they did "not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization." Exec. Order No. 13279, 3 CFR §2(1), p. 260 (2002 Comp.). To this end, the President directed that "[n]o organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs," *id.*, §2(c), at 260, and that "[a]ll organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief," *id.*, §2(d), at 260. Petitioners, who have been sued in their official capacities, are the directors of the White House Office and various Executive Department Centers.

No congressional legislation specifically authorized the creation of the White House Office or the Executive Department Centers. Rather, they were "created entirely within the

executive branch ... by Presidential executive order." *Freedom From Religion Foundation, Inc. v. Chao*, 433 F. 3d 989, 997 (CA7 2006). Nor has Congress enacted any law specifically appropriating money for these entities' activities. Instead, their activities are funded through general Executive Branch appropriations. For example, the Department of Education's Center is funded from money appropriated for the Office of the Secretary of Education, while the Department of Housing and Urban Development's Center is funded through that Department's salaries and expenses account. See Government Accountability Office, Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability, GA0-06-616, p. 21 (June 2006), online at <http://www.gao.gov/new.items/d06616.pdf> (as visited June 25, 2007, and available in Clerk of Court's case file); see also Amended Complaint in No. 04-C-38I-S (WD Wis.), ¶23, App. to Pet. for Cert. 71a-72a.

B

The respondents are Freedom From Religion Foundation, Inc., a nonstock corporation "opposed to government endorsement of religion," *id.*, ¶5, App. to Pet. for Cert. 68a, and three of its members. Respondents brought suit in the United States District Court for the Western District of Wisconsin, alleging that petitioners violated the Establishment Clause by organizing conferences at which faith-based organizations allegedly "are singled out as being particularly worthy of federal funding ... , and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." *Id.*, ¶32, App. to Pet. for Cert. 73a. Respondents further alleged that the content of these conferences sent a message to religious believers "that they are insiders and favored members of the political community" and that the conferences sent the message to nonbelievers "that they are outsiders" and "not full members of the political community." *Id.*, ¶37, App. to Pet. for Cert. 76a. In short, respondents alleged that the conferences were designed to promote, and had the effect of promoting, religious community groups over secular ones.

The only asserted basis for standing was that the individual respondents are federal taxpayers who are "opposed to the use of Congressional taxpayer appropriations to advance and promote religion." *Id.*, ¶10, App. to Pet. for Cert. 69a; see also *id.*, 11¹J7-9, App. to Pet. for Cert. 68a-69a. In their capacity as federal taxpayers, respondents sought to challenge Executive Branch expenditures for these conferences, which, they contended, violated the Establishment Clause.

C

The District Court dismissed the claims against petitioners for lack of standing.

A divided panel of the United States Court of Appeals for the Seventh Circuit reversed. 433 F. 3d 989.

The Court of Appeals denied en banc review by a vote of seven to four. 447 F. 3d 988 (CA7 2006). Concurring in the denial of rehearing, Chief Judge Flaum expressed doubt about the panel decision, but noted that "the obvious tension which has evolved in this area of jurisprudence ... can only be resolved by the Supreme Court." *Ibid.* We granted certiorari to resolve this question, 549 U. S. (2006), and we now reverse.

II

A

Article III of the Constitution limits the judicial power of the United States to the resolution of "Cases" and "Controversies," and "'Article III standing ... enforces the Constitution's case-or-controversy requirement.'" *DaimlerChrysler Corp. v. Cuno*, 547 U. S.

(2006) (slip op., at 6) (quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 11 (2004)). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U. S. 811, 818 (1997) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37 (1976)).

"[O]ne of the controlling elements in the definition of a case or controversy under Article III" is standing. *ASARCO Inc. v. Kadish*, 490 U. S. 605, 613 (1989) (opinion of *Kennedy*, J.). The requisite elements of Article III standing are well established: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U. S. 737, 751 (1984).

The constitutionally mandated standing inquiry is especially important in a case like this one, in which taxpayers seek "to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens." *ASARCO*, *supra*, at 613 (opinion of *Kennedy*, J.). This is because "[t]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 471 (1982). The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution. Rather, federal courts sit "solely, to decide on the rights of individuals," *Marbury v. Madison*, 1 Cranch 137, 170 (1803), and must " 'refrai[n] from passing upon the constitutionality of an act ... unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.' " *Valley Forge*, *supra*, at 474 (quoting *Blair v. United States*, 250 U. S. 273, 279 (1919)). As we held over 80 years ago, in another case involving the question of taxpayer standing:

"We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. The 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... .

The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Frothingham v. Mellon*, decided with *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923).

B

As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable "personal injury" required for Article III standing. Of course, a taxpayer has standing to challenge the *collection* of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer. See, e.g., *Follett v. Town of McCormick*, 321 U. S. 573 (1944) (invalidating tax on preaching on First Amendment grounds). But that is not the interest on which respondents assert standing here. Rather, their claim is that, having paid lawfully collected taxes into the Federal Treasury at some point, they have a continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution.

We have consistently held that this type of interest is too generalized and attenuated to support Article III standing. In *Frothingham*, a federal taxpayer sought to challenge federal appropriations for mothers' and children's health, arguing that federal involvement in this area intruded on the rights reserved to the States under the Tenth Amendment and would "increase the burden of future taxation and thereby take [the plaintiffs] property without due process of law." 262 U. S., at 486. We concluded that the plaintiff lacked the kind of particularized injury required for Article III standing:

Because the interests of the taxpayer are, in essence, the interests of the public-at-large, deciding a constitutional claim based solely on taxpayer standing "would be[,] not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.*, at 489; see also *Alabama Power Co. v. Ickes*, 302 U. S. 464, 478-479 (1938).

In *Doremus v. Board of Ed of Hawthorne*, 342 U. S. 429, 433 (1952), we reaffirmed this principle, explaining that "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure." We therefore rejected a state taxpayer's claim of standing to challenge a state law authorizing public school teachers to read from the Bible because "the grievance which [the plaintiff] sought to litigate ... is not a direct dollars-and-cents injury but is a religious difference." *Id.*, at 434. In so doing, we gave effect to the basic constitutional principle that "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992).

C

In *Flast*, the Court carved out a narrow exception to the general constitutional prohibition against taxpayer standing. The taxpayer-plaintiff in that case challenged the distribution of federal funds to religious schools under the Elementary and Secondary Education Act of 1965, alleging that such aid violated the Establishment Clause. The Court set out a two-part test for determining whether a federal taxpayer has standing to challenge an allegedly unconstitutional expenditure:

The Court held that the taxpayer-plaintiff in *Flast* had satisfied both prongs of this test: The plaintiffs "constitutional challenge [was] made to an exercise by Congress of its power under Art. I, §8, to spend for the general welfare," and she alleged a violation of the Establishment Clause, which "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, §8." *Id.*, at 103-104.

III

A

Respondents argue that this case falls within the *Flast* exception, which they read to cover any "expenditure of government funds in violation of the Establishment Clause." Brief for Respondents 12. But this broad reading fails to observe "the rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied." *Valley Forge*, 454 U. S., at 481.

The expenditures at issue in *Flast* were made pursuant to an express congressional mandate and a specific congressional appropriation. The plaintiff in that case challenged disbursements made under the Elementary and Secondary Education Act of 1965, 79 Stat. 27. That Act expressly appropriated the sum of \$100 million for fiscal year 1966, §201(b), *id.*, at 36, and authorized the disbursement of those funds to local educational agencies for the education of low-income students, see *Flast, supra*, at 86. The Act mandated that local educational agencies receiving such funds "ma[k]e provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment)" in which students enrolled in private elementary and secondary schools could participate, §2, 79 Stat. 30-31. In addition, recipient agencies were required to ensure that "library resources, textbooks, and other instructional materials" funded through the grants "be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools," §203(a)(3)(B), *id.*, at 37.

The expenditures challenged in *Flast*, then, were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate. Indeed, the *Flast* taxpayer-

plaintiffs constitutional claim was premised on the contention that if the Government's actions were " 'within the authority and intent of the Act, the Act is to that extent unconstitutional and void.' " *Flast*, 392 U. S., at 90. And the judgment reviewed by this Court in *Flast* solely concerned the question whether "if [the challenged] expenditures are authorized by the Act the statute constitutes a 'law respecting an establishment of religion and law 'prohibiting the free exercise thereof " under the First Amendment. *Flast v. Gardner*, 271 F. Supp. 1, 2 (SDNY 1967).

Given that the alleged Establishment Clause violation in *Flast* was funded by a specific congressional appropriation and was undertaken pursuant to an express congressional mandate, the Court concluded that the taxpayer-plaintiffs had established the requisite "logical link between [their taxpayer] status and the type of legislative enactment attacked." In the CoUrt's words, "[t]heir constitutional challenge [was] made to an exercise by Congress of its power under Art. I, §8, to spend for the general welfare." 392 U. S., at 90. But as this Court later noted, *Flast* " limited taxpayer standing to challenges directed 'only [at] exercises of congressional power' " under the Taxing and Spending Clause. *Valley Forge*, 454 U. S at 479.

B

The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action.

We have never found taxpayer standing under such circumstances. In *Valley Forge*, we held that a taxpayer lacked standing to challenge "a decision by [the federal Department of Health, Education and Welfare] to transfer a parcel of federal property" to a religious college because this transfer was "not a congressional action." 454 U. S., at 479. In fact, the connection to congressional action was closer in *Valley Forge* than it is here, because in that case, the "particular Executive Branch action" being challenged was at least "arguably authorized" by the Federal Property and Administrative Services Act of 1949, which permitted federal agencies to transfer surplus property to private entities. *Id.*, at 479, n. 15. Nevertheless, we found that the plaintiffs lacked standing because *Flast* "limited taxpayer standing to challenges directed 'only [at] exercises of congressional power' " under the Taxing and Spending Clause. 454 U. S., at 479 (quoting *Flast*, *supra*, at 102).

Similarly, in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U. S. 208 (1974), the taxpayer-plaintiffs contended that the Incompatibility Clause of Article I prohibited Members of Congress from holding commissions in the Armed Forces Reserve. We held that these plaintiffs lacked standing under *Flast* because they "did not challenge an enactment under Art. I, §8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their

Reserve status." 418 U. S., at 228. This was the case even though the plaintiffs sought to reclaim reservist pay received by those Members--pay that presumably was funded through Congress' general appropriations for the support of the Armed Forces: "Such relief would follow from the invalidity of Executive action in paying persons who could not lawfully have been reservists, not from the invalidity of the statutes authorizing pay to those who lawfully were Reservists." *Ibid.*, n. 17. See also *United States v. Richardson*, 418 U. S. 166, 175 (1974) (denying taxpayers standing to compel publication of accounting for the Central Intelligence Agency because "there is no 'logical nexus' between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency").

Bowen v. Kendrick, 487 U. S. 589 (1988), on which respondents rely heavily, is not to the contrary. In that case, we held that the taxpayer-plaintiffs had standing to mount an as-applied challenge to the Adolescent Family Life Act (AFLA), which authorized federal grants to private community service groups including religious organizations. The Court found "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power," notwithstanding the fact that the "the funding authorized by Congress ha[d] flowed through and been administered" by an Executive Branch official. *Id.*, at 620, 619.

But the key to that conclusion was the Court's recognition that AFLA was "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers," and that the plaintiffs' claims "call[ed] into question how the funds authorized by Congress [were] being disbursed *pursuant to the AFLA'S statutory mandate.*" *Id.*, at 619-620 (emphasis added). AFLA not only expressly authorized and appropriated specific funds for grant-making, it also expressly contemplated that some of those moneys might go to projects involving religious groups. See *id.*, at 595-596; see also *id.*, at 623 (O'Connor, J., concurring) (noting the "partnership between governmental and religious institutions contemplated by the AFLA"). Unlike this case, *Kendrick* involved a "program of disbursement of funds pursuant to Congress' taxing and spending powers" that "Congress had created," "authorized," and "mandate[d]." *Id.*, at 619-620.

Respondents attempt to paint their lawsuit as a *Kendrick-style* as-applied challenge, but this effort is unavailing for the simple reason that they can cite no statute whose application they challenge. The best they can do is to point to unspecified, lump-sum "Congressional budget appropriations" for the general use of the Executive Branch--the allocation of which "is a[n] administrative decision traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, 508 U. S. 182, 192 (1993). Characterizing this case as an "as-applied challenge" to these general appropriations statutes would stretch the meaning of that term past its breaking point. It cannot be that every legal challenge to a discretionary Executive Branch action implicates the constitutionality of the underlying congressional appropriation. When a criminal defendant charges that a federal agent carried out an unreasonable search or seizure, we do not view that claim as an as-applied challenge to the constitutionality of the statute appropriating funds for the Federal Bureau of Investigation. Respondents have not established why the discretionary Executive Branch expenditures here, which are similarly funded by no-strings, lump-sum appropriations, should be viewed any differently.

In short, this case falls outside the "the narrow exception" that *Flast* "created to the general rule against taxpayer standing established in. *Frothingham*." *Kendrick, supra*, at 618. Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents' lawsuit is not directed at an exercise of congressional power, see *Valley Forge*, 454 U. S., at 479, and thus lacks the requisite "logical nexus" between taxpayer status "and the type of legislative enactment attacked." *Flast*, 392 U. S., at 102.

IV

A

1

Respondents argue that it is "arbitrary" to distinguish between money spent pursuant to congressional mandate and expenditures made in the course of executive discretion, because "the injury to taxpayers in both situations is the very injury targeted by the Establishment Clause and *Flast*--the expenditure for the support of religion of funds exacted from taxpayers." Brief for Respondents 13. The panel majority below agreed, based on its observation that "there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause." 433 F. 3d, at 995.

But *Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures. *Flast* itself distinguished the "incidental expenditure of tax funds in the administration of an. essentially regulatory statute," *Flast, supra*, at 102, and we have subsequently rejected the view that taxpayer standing "extends to 'the Government as a whole, regardless of which branch is at work in a particular instance,' " *Valley Forge, supra*, at 484, n. 20. Moreover, we have repeatedly emphasized that the *Flast* exception has a "narrow application in our precedent," *Cuno*, 547 U. S., at (slip op., at 12), that only "slightly lowered" the bar on taxpayer standing, *Richardson*, 418 U. S., at 173, and that must be applied with "rigor," *Valley Forge, supra*, at 481.

It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts. We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause. See *Tilton v. Richardson*, 403 U. S. 672 (1971) (no taxpayer standing to sue under Free Exercise Clause of First Amendment); *Richardson*, 418 U. S., at 175 (no taxpayer standing to sue under Statement and Account Clause of Art. I); *Schlesinger*, 418 U. S., at 228 (no taxpayer standing to sue under Incompatibility Clause of Art. I); *Cuno, supra*, at (slip op., at 13) (no taxpayer standing to sue under Commerce Clause). We have similarly refused to extend *Flast* to permit taxpayer standing for Establishment Clause challenges that do not implicate Congress' taxing and spending power. See *Valley Forge, supra*, at 479-482 (no taxpayer standing to challenge Executive Branch action taken pursuant to Property Clause of Art. IV); see also *District of Columbia Common Cause v. District of Columbia*, 858 F. 2d 1, 3-4 (CA DC 1988); *In re United States Catholic Conference*, 885 F. 2d 1020, 1028 (CA2 1989). In effect, we have adopted the

position set forth by Justice Powell in his concurrence in *Richardson* and have "limit[ed] the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the *results* in *Past* ." 418 U. S., at 196.

2

While respondents argue that Executive Branch expenditures in support of religion are no different from legislative extractions, *Flast* itself rejected this equivalence: "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 392 U. S., at 102.

Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Past* exception to purely executive expenditures would effectively subject every federal action--be it a conference, proclamation or speech--to Establishment Clause challenge by any taxpayer in federal court. To see the wide swathe of activity that respondents' proposed rule would cover, one need look no further than the amended complaint in this action, which focuses largely on speeches and presentations made by Executive Branch officials. See, e.g., Amended Complaint ¶32, App. to Pet. for Cert. 73a (challenging Executive Branch officials' "support of national and regional conferences"); *id.*, ¶33, App. to Pet. for Cert. 73a-75a (challenging content of speech by Secretary of Education); *id.*, ¶135, 36, App. to Pet. for Cert. 76a (challenging content of Presidential speeches); *id.*, ¶41, App. to Pet. for Cert. 77a (challenging Executive Branch officials' "public appearances" and "speeches"). Such a broad reading would ignore the first prong of *Flast's* standing test, which requires "a logical link between [taxpayer] status and the type of legislative enactment attacked." 392 U. S., at 102.

It would also raise serious separation-of-powers concerns. As we have recognized, *Flast* itself gave too little weight to these concerns. By framing the standing question solely in terms of whether the dispute would be presented in an adversary context and in a form traditionally viewed as capable of judicial resolution, *Flast* "failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-A-vis the other branches, concrete adverseness or not." *Lewis v. Casey*, 518 U. S. 343, 353, n. 3 (1996); see also *Valley Forge*, 454 U. S., at 471. Respondents' position, if adopted, would repeat and compound this mistake.

The constitutional requirements for federal-court jurisdiction--including the standing requirements and Article III--"are an essential ingredient of separation and equilibration of powers." *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 101 (1998). "Relaxation of standing requirements is directly related to the expansion of judicial power," and lowering the taxpayer standing bar to permit challenges of purely executive actions "would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *Richardson*, 418 U. S., at 188 (Powell, J., concurring). The rule respondents propose would enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials. This would "be quite at odds with ... *Flast's* own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances' " about the conduct

of government, *Cuno*, 547 U. S., at ___ (slip op., at 12) (quoting *Flast, supra*, at 106), and would "open the Judiciary to an arguable charge of providing 'government by injunction,' " *Schlesinger*, 418 U. S., at 222. It would deputize federal courts as " 'virtually continuing monitors of the wisdom and soundness of Executive action,' " and that, most emphatically, "is not the role of the judiciary." *Allen*, 468 U. S., at 760 (quoting *Laird v. Tatum*, 408 U. S. 1, 15 (1972)).

3

Both the Court of Appeals and respondents implicitly recognize that unqualified federal taxpayer standing to assert Establishment Clause claims would go too far, but neither the Court of Appeals nor respondents has identified a workable limitation. The Court of Appeals, as noted, conceded only that a taxpayer would lack standing where "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause" is "zero." 433 F. 3d, at 995. Applying this rule, the Court of Appeals opined that a taxpayer would not have standing to challenge a President's favorable reference to religion in a State of the Union address because the costs associated with the speech "would be no greater merely because the President had mentioned Moses rather than John Stuart Mill." *Ibid*.

There is reason to question whether the Court of Appeals' intended for its zero-marginalcost test to be taken literally, because the court, without any apparent inquiry into the costs of Secretary Paige's speech, went on to agree that the plaintiffs lacked standing to challenge that speech. *Id.*, at 996. But if we take the Court of Appeals' test literally--i.e., that any marginal cost greater than zero suffices--taxpayers might well have standing to challenge some (and perhaps many) speeches. As Judge Easterbrook. observed: "The total cost of presidential proclamations and speeches by Cabinet officers that touch on religion (Thanksgiving and several other holidays) surely exceeds \$500,000 annually; it may cost that much to use Air Force One and send a Secret Service detail to a single speaking engagement." 447 F. 3d, at 989-990 (concurring in denial of rehearing en bane). At a minimum, the Court of Appeals' approach (asking whether the marginal cost exceeded zero) would surely create difficult and uncomfortable line-drawing problems. Suppose that it is alleged that a speech writer or other staff member spent extra time doing research for the purpose of including "religious imagery" in a speech. Suppose that a President or a Cabinet officer attends or speaks at a prayer breakfast and that the time spent was time that would have otherwise been spent on secular work.

Respondents take a somewhat different approach, contending that their proposed expansion of *Flast* would be manageable because they would require that a challenged expenditure be "fairly traceable to the conduct alleged to violate the Establishment Clause." Brief for Respondents 17. Applying this test, they argue, would "scree[n] out ... challenge[s] the content of one particular speech, for example the State of the Union address, as an Establishment Clause violation." *Id.*, at 21.

We find little comfort in this vague and ill-defined test. As an initial matter, respondents fail to explain why the (often substantial) costs that attend, for example, a Presidential address are any less "traceable" than the expenses related to the Executive Branch statements and

conferences at issue here. Indeed, respondents concede that even lawsuits involving *de minimis* amounts of taxpayer money can pass their proposed "traceability" test. *Id.*, at 20, n. 6.

Moreover, the "traceability" inquiry, depending on how it is framed, would appear to prove either too little or too much. If the question is whether an allegedly unconstitutional executive action can somehow be traced to taxpayer funds *in general*, the answer will always be yes: Almost all Executive Branch activities are ultimately funded by *some* congressional appropriation, whether general or specific, which is in turn financed by tax receipts. If, on the other hand, the question is whether the challenged action can be traced to the contributions of a *particular* taxpayer-plaintiff, the answer will almost always be no: As we recognized in *Frothingham*, the interest of any individual taxpayer in a particular federal expenditure "is comparatively minute and indeterminable ... and constantly changing." 262 U. S., at 487.

B

Respondents set out a parade of horrors that they claim could occur if *Flast* is not extended to discretionary Executive Branch expenditures. For example, they say, a federal agency could use its discretionary funds to build a house of worship or to hire clergy of one denomination and send them out to spread their faith. Or an agency could use its funds to make bulk purchases of Stars of David, crucifixes, or depictions of the star and crescent for use in its offices or for distribution to the employees or the general public. Of course, none of these things has happened, even though *Flast* has not previously been expanded in the way that respondents urge. In the unlikely event that any of these executive actions did take place, Congress could quickly step in. And respondents make no effort to show that these improbable abuses could not be challenged in federal court by plaintiffs who would possess standing based on grounds other than taxpayer standing.

C

Over the years, *Flast* has been defended by some and criticized by others. But the present case does not require us to reconsider that precedent. The Court of Appeals did not apply *Flast*; it extended *Flast*. It is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic. That was the approach that then-Justice Rehnquist took in his opinion for the Court in *Valley Forge*, and it is the approach we take here. We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.

Justice Scalia says that we must either overrule *Flast* or extend it to the limits of its logic. His position is not Thnisane," inconsistent with the "rule of law," or "utterly meaningless." *Post*, at 1 (opinion concurring in judgment). But it is wrong. *Justice Scalia* does not seriously dispute . either (1) that *Flast* itself spoke in terms of "legislative enactment[s]" and "exercises of congressional power," 392 U. S., at 102, or (2) that in the four decades since *Flast* was decided, we have never extended its narrow exception to a purely discretionary Executive Branch expenditure. We need go no further to decide this case. Relying on the provision of the Constitution that limits our role to resolving the "Cases" and "Controversies" before us, we decide only the case at hand.

For these reasons, the judgment of the Court of Appeals for the Seventh Circuit is reversed.

It is so ordered.

Justice Scalia, with whom *Justice Thomas* joins, concurring in the judgment.

Today's opinion is, in one significant respect, entirely consistent with our previous cases addressing taxpayer standing to raise Establishment Clause challenges to government expenditures. Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently. If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast v. Cohen*, 392 U. S. 83 (1968), should be applied to (at a minimum) all challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated. For me, the choice is easy. *Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing.

I

A

There is a simple reason why our taxpayer-standing cases involving Establishment Clause challenges to government expenditures are notoriously inconsistent: We have inconsistently described the first element of the "irreducible constitutional minimum of standing," which minimum consists of (1) a "concrete and particularized" "injury in fact" that is (2) fairly traceable to the defendant's alleged unlawful conduct and (3) likely to be redressed by a favorable decision. See *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992). We have alternately relied on two entirely distinct conceptions of injury in fact, which for convenience I will call "Wallet Injury" and "Psychic Injury."

Wallet Injury is the type of concrete and 'particularized injury one would expect to be asserted in a *taxpayer* suit, namely, a claim that the plaintiffs tax liability is higher than it would be, but for the allegedly unlawful government action. The stumbling block for suits challenging government expenditures based on this conventional type of injury is quite predictable. The plaintiff cannot satisfy the traceability and redressability prongs of standing. It is uncertain what the plaintiffs tax bill would have been had the allegedly forbidden expenditure not been made, and it is even more speculative whether the government will, in response to an adverse court decision, lower taxes rather than spend the funds in some other manner.

Psychic Injury, on the other hand, has nothing to do with the plaintiffs tax liability. Instead, the injury consists of the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner. This shift in focus eliminates traceability and redressability problems. Psychic Injury is directly traceable to the improper *use* of taxpayer funds, and it is redressed when the improper use is enjoined, regardless of whether that injunction affects the taxpayer's purse. *Flast* and the cases following its teaching have invoked a peculiarly restricted version of Psychic Injury, permitting taxpayer displeasure over unconstitutional spending to support standing *only if* the constitutional provision allegedly violated is a specific limitation on the taxing and spending power. Restricted or not, this conceptualizing of injury in fact in purely mental terms conflicts squarely with the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the generalized grievance that the law is being violated. As we reaffirmed unanimously just this Term: " 'We have consistently held that a plaintiff raising only a generally available grievance about government--claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large--does not state an Article III case or controversy.' " *Lance v. Coffman*, 549 U. S. , (2007) (*per curiam*) (slip op., at 3) (quoting *Lujan, supra*, at 573-574).

As the following review of our cases demonstrates, we initially denied taxpayer standing based on Wallet Injury, but then found standing in some later cases based on the limited version of Psychic Injury described above. The basic logical flaw in our cases is thus twofold: We have never explained why Psychic Injury was insufficient in the cases in which standing was denied, and we have never explained why Psychic Injury, however limited, is cognizable under Article III.

B

I

Two *pre-Flast* cases are of critical importance. In *Frothingham v. Mellon*, decided with *Massachusetts v. Mellon*, 262 U. S. 447 (1923), the taxpayer challenged the constitutionality of the Maternity Act of 1921, alleging in part that the federal funding provided by the Act was not authorized by any provision of the Constitution. See *id.*, at 476-477 (argument for Frothingham), 479-480 (opinion of the Court). The Court held that the taxpayer lacked standing. After emphasizing that "the effect upon future taxation ... of any payment out of [Treasury] funds" was "remote, fluctuating and uncertain," *Frothingham*, 262 E.J. S., at 487, the Court concluded that "[t]he party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally," *id.*, at 488. The Court was thus describing the traceability and redressability problems with Wallet Injury, and rejecting Psychic Injury as a generalized grievance rather than concrete and particularized harm.

The second significant *pre-Flast* case is *Doremus v. Board of Ed. of Hawthorne*, 342 U. S. 429 (1952). There the taxpayers challenged under the Establishment Clause a state law

requiring public-school teachers to read the Bible at the beginning of each school day. *Id.*, at 430, 433. Relying extensively on *Frothingham*, the Court denied standing. After first emphasizing that there was no allegation that the Bible reading increased the plaintiffs' taxes or the cost of running the schools, 342 U. S., at 433, and then reaffirming that taxpayers must allege more than an indefinite injury suffered in common with people generally, *id.*, at 434, the Court concluded that the "grievance which [the plaintiffs] sought to litigate here is not a direct dollars-and-cents injury but is a religious difference," *ibid.* In addition to reiterating *Frothingham's* description of the unavoidable obstacles to recovery under a taxpayer theory of Wallet Injury, *Doremus* rejected Psychic Injury in unmistakable terms. The opinion's deprecation of a mere "religious difference," in contrast to a real "dollars-and-cents injury," can only be understood as a flat denial of standing supported only by taxpayer disapproval of the unconstitutional use of tax funds. If the Court had thought that Psychic Injury was a permissible basis for standing, it should have sufficed (as the dissenting Justices in *Doremus* suggested, see 342 U. S., at 435 (opinion of Douglas, J.)) that public employees were being paid in part to violate the Establishment Clause.

2

Sixteen years after *Doremus*, the Court took a pivotal turn. In *Flast v. Cohen*, 392 U. S. 83 (1968), taxpayers challenged the Elementary and Secondary Education Act of 1965, alleging that funds expended pursuant to the Act were being used to support parochial schools. *Id.*, at 8587. They argued that either the Act itself proscribed such expenditures or that the Act violated the Establishment Clause. *Id.*, at 87, 90. The Court held that the taxpayers had standing. Purportedly in order to determine whether taxpayers have the "personal stake and interest" necessary to satisfy Article III, a two-pronged nexus test was invented. *Id.*, at 101-102.

The first prong required the taxpayer to "establish a logical link between [taxpayer] status and the type of legislative enactment." *Id.*, at 102. The Court described what that meant as follows:

"[A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus*

. " *Ibid.*

The second prong required the taxpayer to "establish a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." *Ibid.* The Court elaborated that this required "the taxpayer [to] show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8." *Id.*, at 102-103. The Court held that the Establishment Clause was the type of specific limitation on the taxing and spending power that it had in mind because "one of the specific evils feared by" the Framers of that Clause was that the taxing and spending power would be used to favor one religion over another or to support religion generally. *Id.*, at 103-104

(relying exclusively upon Madison's famous Memorial and Remonstrance Against Religious Assessments).

Because both prongs of its newly minted two-part test were satisfied, *Flast* held that the taxpayers had standing. Wallet Injury could not possibly have been the basis for this conclusion, since the taxpayers in *Flast* were no more able to prove that success on the merits would reduce their tax burden than was the taxpayer in *Frothingham*. Thus, *Flast* relied on Psychic Injury to support standing, describing the "injury" as the taxpayer's allegation that "his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." 392 U. S., at 106.

But that created a problem: If the taxpayers in *Flast* had standing based on Psychic Injury, and without regard to the effect of the litigation on their ultimate tax liability, why did not the taxpayers in *Doremus* and *Frothingham* have standing on a similar basis? Enter the magical two-pronged nexus test. It has often been pointed out, and never refuted, that the criteria in *Flast's* two-part test are *entirely unrelated* to the purported goal of ensuring that the plaintiff has a sufficient "stake in the outcome of the controversy." See *Flast*, 392 U. S., at 121-124 (Harlan, J., dissenting); see also *id.*, at 107 (Douglas, J., concurring); *United States v. Richardson*, 418 U. S. 166, 183 (1974) (Powell, J., concurring). In truth, the test was designed for a quite different goal. Each prong was meant to disqualify from standing one of the two prior cases that would otherwise contradict the holding of *Flast*. The first prong distinguished *Doremus* as involving a challenge to an "incidental expenditure of tax funds in the administration of an essentially regulatory statute," rather than a challenge to a taxing and spending statute. See 392 U. S., at 102. Did the Court proffer any reason why a taxpayer's Psychic Injury is less concrete and particularized, traceable, or redressable when the challenged expenditures are incidental to an essentially regulatory statute (whatever that means)? Not at all. *Doremus* had to be evaded, and so it was. In reality, of course, there is simply no material difference between *Flast* and *Doremus* as far as Psychic Injury is concerned: If taxpayers upset with the government's giving money to parochial schools had standing to sue, so should the taxpayers who disapproved of the government's paying public-school teachers to read the Bible.

Flast's dispatching of *Frothingham* via the second prong of the nexus test was only marginally less disingenuous. Not only does the relationship of the allegedly violated provision to the taxing and spending power have no bearing upon the concreteness or particularity of the Psychic Injury, see Part III, *infra*, but the existence of that relationship does not even genuinely distinguish *Flast* from *Frothingham*. It is impossible to maintain that the Establishment Clause is a more direct limitation on the taxing and spending power than the constitutional limitation invoked in *Frothingham*, which is contained within the very provision creating the power to tax and spend. Article I, §8, el. 1, provides: "The Congress shall have Power To lay and collect Taxes ... , to pay the Debts and provide for the common Defence *and general Welfare* of the United States." (Emphasis added.) Though unmentioned in *Flast*, it was precisely this limitation upon the permissible purposes of taxing and spending upon which Mrs. Frothingham relied. see, e.g., Brief for Appellant in *Frothingham* 0. T. 1922, No. 962, p. 68 ("[T]he words 'provide for the common defence and general welfare of the United States' are used *as limitations on the taxing power*"); *id.*, at 26-81 (discussing the general welfare limitation at length).

Coherence and candor have fared no better in our later taxpayer-standing cases. The three of them containing lengthy discussion of the Establishment Clause warrant analysis.

Flast was dismissively and unpersuasively distinguished just 13 years later in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982). The taxpayers there challenged the decision of the Department of Health, Education, and Welfare to give a 77-acre tract of Government property, worth over half a million dollars, to a religious organization. *Id.*, at 468. The Court, adhering to the strict letter of *Flast's* two-pronged nexus test, held that the taxpayers lacked standing. *Flast's* first prong was not satisfied: Rather than challenging a congressional taxing and spending statute, the plaintiffs were attacking an agency decision to transfer federal property pursuant to Congress's power under the Property Clause, Art. IV, §3, cl. 2. 454 U. S., at 479-480.

In distinguishing between the Spending Clause and the Property Clause, *Valley Forge* achieved the seemingly impossible: It surpassed the high bar for irrationality set by *Flast's* distinguishing of *Doremus* and *Frothingham*. Like the dissenters in *Valley Forge*, see 454 U. S., at 511-512 (opinion of Brennan, J.); *id.*, at 513-514 (opinion of *Stevens, I*), I cannot fathom why Article III standing should turn on whether the government enables a religious organization to obtain real estate by giving it a check drawn from general tax revenues or instead by buying the property itself and then transferring title.

While *Valley Forge's* application of the first prong to distinguish *Flast* was unpersuasive, the Court was at least not trying to hide the ball. Its holding was forthrightly based on a resounding rejection of the very concept of Psychic Injury:

"[Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." 454 U. S., at 485-486 (emphasis omitted).

Of course, in keeping with what was to become the shameful tradition of our taxpayer-standing cases, the Court's candor about the inadequacy of Psychic Injury was combined with a notable silence as to why *Flast* itself was not doomed.

A mere six years later, *Flast* was resuscitated in *Bowen v. Kendrick*, 487 U. S. 589 (1988). The taxpayers there brought facial and as-applied Establishment Clause challenges to the Adolescent Family Life Act (AFLA), which was a congressional scheme that provided grants to public or nonprofit private organizations to combat premarital adolescent pregnancy and sex. *Id.*, at 593. The as-applied challenge focused on whether particular grantees selected by the Secretary

of Health and Human Services were constitutionally permissible recipients. *Id.*, at 620-622. The Solicitor General argued that, under *Valley Forge's* application of *Flast's* first prong, the taxpayers lacked standing for their as-applied claim because that claim was really a challenge to executive decisionmaking, not to Congress's exercise of its taxing and spending power. 487 U. S., at 618-619. The Court rejected this contention, holding that the taxpayers' as-applied claim was still a challenge to Congress's taxing and spending power even though disbursement of the funds authorized by Congress had been administered by the Secretary. *Id.*, at 619.

Kendrick, like *Flast* before it, was obviously based on Psychic Injury: The taxpayers could not possibly make, and did not attempt to make, the showing required for Wallet Injury. But by relying on Psychic Injury, *Kendrick* perfectly revealed the incompatibility of that concept with the outcome in *Doremus*. Just as *Kendrick* did not care whether the appropriated funds would have been spent anyway--given to a different, permissible recipient--so also *Doremus* should not have cared that the teachers would likely receive the same salary once their classroom activities were limited to secular conduct. *Flays* and *Kendrick's* acceptance of Psychic Injury is fundamentally at odds with *Frothinghain*, *Doremus*, and *Valley Forge*.

Which brings me to the final case worthy of mention. Last Term, in *DaimlerChrysler Corp. v. Cuno*, 547 U. S. (2006), we concisely confirmed that *Flast* was based on Psychic Injury. The taxpayers in that case sought to rely on *Flast* to raise a Commerce Clause challenge to a state franchise tax credit. 547 U. S., at (slip op., at 11). In rejecting the analogy and denying standing, we described *Flast* as follows:

"The Court ... understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." 547 U. S., at (slip op., at 13) (citation omitted; some alterations in original).

What *Cuno's* conceptualization of *Flast* reveals is that there are only two logical routes available to this Court. We must initially decide whether Psychic Injury is consistent with Article III. If it is, we should apply *Flast* to *all* challenges to government expenditures in violation of constitutional provisions that specifically limit the taxing and spending power; if it is not, we should overturn *Flast*.

II

A

The plurality today avails itself of neither principled option. Instead, essentially accepting the Solicitor General's primary submission, it limits *Flast* to challenges to expenditures that are "expressly authorized or mandated by ... specific congressional enactment." *Ante*, at 18. It offers no intellectual justification for this limitation, except that "[i]t is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic." *Ante*, at

24. That is true enough, but since courts purport to be engaged in *reasoned* decisionmaking, it is *only* true when (1) the precedent's logic is seen to require narrowing or readjustment in light of relevant distinctions that the new fact situation brings to the fore; or (2) its logic is fundamentally flawed, and so deserves to be limited to the facts that begot it. Today's plurality claims neither of these justifications. As to the first, the plurality offers no explanation of why the factual differences between this case and *Flast* are *material*. It virtually admits that express congressional allocation *vel non* has nothing to do with whether the plaintiffs have alleged an injury in fact that is fairly traceable and likely to be redressed. See *ante*, at 18-19. As the dissent correctly contends and I shall not belabor, see *post*, at 3-4 (opinion of *Souter, J.*), *Flast* is *indistinguishable* from this case for purposes of Article III. Whether the challenged government expenditure is expressly allocated by a specific congressional enactment *has absolutely no relevance* to the Article III criteria of injury in fact, traceability, and redressability.

Yet the plurality is also unwilling to acknowledge that the logic of *Flast* (its Psychic Injury rationale) is simply wrong, and *for that reason* should not be extended to other cases. Despite the lack of acknowledgment, however, that is the only plausible explanation for the plurality's indifference to whether the "distinguishing" fact is legally material, and for its determination to limit *Nast* to its "*lresuUti,*" *ante*, at 19. Why, then, pick a distinguishing fact that may breathe life into *Flast* in future cases, preserving the disreputable disarray of our Establishment Clause standing jurisprudence? Why not hold that only taxpayers raising Establishment Clause challenges to expenditures pursuant to the Elementary and Secondary Education Act of 1965 have standing? That, I suppose, would be too obvious a repudiation of *Flast*, and thus an impediment to the plurality's pose of minimalism.

Because the express-allocation line has no mooring to our tripartite test for Article III standing, it invites demonstrably absurd results. For example, the plurality would deny standing to a taxpayer challenging the President's disbursement to a religious organization of a discrete appropriation that Congress had not explicitly allocated to that purpose, even if everyone knew that Congress and the President had informally negotiated that the entire sum would be spent in that precise manner. See *ante*, at 17, n. 7 (holding that nonstatutory earmarks are insufficient to satisfy the express-allocation requirement). And taxpayers should lack standing to bring Establishment Clause challenges to the Executive Branch's use of appropriated funds when those expenditures have the *added vice* of violating congressional restrictions. If, for example, Congress instructs the President to disburse grants to hospitals that he deems worthy, and the President instead gives all of the money to the Catholic Church, "[t]he link between congressional action and constitutional violation that supported taxpayer standing in *Flast* [would be] missing." *Ante*, at 13. Indeed, taking the plurality at its word, Congress could insulate the President from *all* *Flast*-based suits by codifying the truism that no appropriation can be spent by the Executive Branch in a manner that violates the Establishment Clause.

Any last pretense of minimalism--of adhering to prior law but merely declining to "extend" it--is swept away by the fact that the Court's holding flatly contradicts *Kendrick*. The whole point of the as-applied challenge' in *Kendrick* was that the Secretary, not Congress, had *chosen* inappropriate grant recipients. 487 U. S., at 620-622. Both *Kendrick* and this case equally involve, in the relevant sense, attacks on executive discretion rather than congressional decision:

Congress generally authorized the spending of tax funds for certain purposes but did not explicitly mandate that they be spent in the *unconstitutional* manner challenged by the taxpayers. I thus share the dissent's bewilderment, see *post*, at 4-5 (opinion of *Souter, I.*), as to why the plurality fixates on the amount of *additional* discretion the Executive Branch enjoys under the law beyond the only discretion relevant to the Establishment Clause issue: whether to spend taxpayer funds for a purpose that is unconstitutional. See *ante*, at 25 (focusing on whether the case involves "a *purely* discretionary Executive Branch expenditure" (emphasis added)).

B

While I have been critical of the Members of the plurality, I by no means wish to give the impression that respondents' legal position is any more coherent. Respondents argue that *Flast* did not turn on whether Congress has expressly allocated the funds to the allegedly unconstitutional use, and their case plainly rests on Psychic Injury. They repeatedly emphasize that the injury in *Flast* was merely the governmental extraction and spending of tax money in aid of religion. See, e.g., Brief for Respondents 28. Respondents refuse to admit that their argument logically implies, for the reasons already discussed, that *every* expenditure of tax revenues that is alleged to violate the Establishment Clause is subject to suit under *Flast*.

Of course, such a concession would run headlong into the denial of standing in *Doremus*. Respondents' only answer to *Doremus* is the cryptic assertion that the injury there was not fairly traceable to the unconstitutional conduct. Brief for Respondents 21, and n. 7. This makes no sense. On *Flast's* theory of Psychic Injury, the injury in *Doremus* was perfectly traceable and not in any way attenuated. It consisted of the psychic frustration that tax funds were being used in violation of the Establishment Clause, which was directly caused by the paying of teachers to read the Bible, and which would have been remedied by prohibition of that expenditure.⁴ The hollowness of respondents' traceability argument is perhaps best demonstrated by their counsel's game submission at oral argument that there would be standing to challenge the hiring of a single Secret Service agent who guarded the President during religious trips, but no standing if those responsibilities (and the corresponding taxpayer-funded compensation) were spread out over the entire Secret Service protective detail. Tr. of Oral Arg. 38-39.

The logical consequence of respondents' position finds no support in this Court's precedents or our Nation's history. Any taxpayer would be able to sue whenever tax funds were used in alleged violation of the Establishment Clause. So, for example, any taxpayer could challenge the fact that the Marshal of our Court is paid, in part, to call the courtroom to order by proclaiming "God Save the United States and this Honorable Court." As much as respondents wish to deny that this is what *Flast* logically entails, it blinks reality to conclude otherwise. If respondents are to prevail, they must endorse a future in which ideologically motivated taxpayers could "roam the country in search of governmental wrongdoing and ... reveal their discoveries in federal court," transforming those courts into "ombudsmen of the general welfare" with respect to Establishment Clause issues. *Valley Forge*, 454 U. S., at 487.

C

Ultimately, the arguments by the parties in this case and the opinions of my colleagues serve only to confirm that *Flast's* adoption of Psychic Injury has to be addressed head-on. Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason. Either *Flast* was correct, and must be accorded the wide application that it logically dictates, or it was not, and must be abandoned in its entirety. I turn, finally, to that question.

III

Is a taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner ever sufficiently concrete and particularized to support Article III standing? The answer is plainly no.

As I noted at the outset, *Lujan* explained that the "consisten[tr] view of this Court has been that "a plaintiff raising only a generally available grievance about government--claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large--does not state an Article III case or controversy." 504 U. S., at 573-574. As evidence of the consistency with which we have affirmed that understanding, *Lujan* relied on the reasoning in *Frothingham*, and in several other cases, including *Ex parte Levitt*, 302 U. S. 633 (1937) (dismissing suit challenging Justice Black's appointment to this Court in alleged violation of the Ineligibility Clause, Art. I, §6, el. 2), *United States v. Richardson*, 418 U. S. 166 (1974) (denying standing to challenge the Government's failure to disclose the CIA's expenditures in alleged violation of the Accounts Clause, Art. I, §9, cl. 7), and *Schlesinger v. Reservists Comm. to Stop the War*, 418 U. S. 208 (1974) (rejecting challenge to Members of Congress holding commissions in the military Reserves in alleged violation of the Incompatibility Clause, Art. I, §6, cl. 2). See 504 U. S., at 573-577. Just this Term, relying on precisely the same cases and the same reasoning, we held unanimously that suits raising only generalized grievances do not satisfy Article III's requirement that the injury in fact be concrete and particularized. See *Lance*, 549 U. S., at (slip op., at 2-4).

Nor does *Past's* limitation on Psychic Injury--the limitation that it suffices only when the two-pronged "nexus" test is met--cure the Article III deficiency. The fact that it is the alleged violation of a specific constitutional limit on the taxing and spending power that produces the taxpayer's mental angst does not change the fundamental flaw. It remains the case that the taxpayer seeks "relief that no more directly and tangibly benefits him than it does the public at large." *Lujan, supra*, at 573-574. And it is of no conceivable relevance to this issue whether the Establishment Clause was originally conceived of as a specific limitation on the taxing and spending power. Madison's Remonstrance has nothing whatever to say on the question whether

suits alleging violations of that limitation are anything other than the generalized grievances that federal courts had always been barred from considering before *Flast*. *Past* was forced to rely on the slim reed of the Remonstrance *since* there was no better support for its novel conclusion, in 1968, that violation of the Establishment Clause, unique among the provisions of our law, had always inflicted a personalized. Psychic Injury upon all taxpayers that federal courts had the power to remedy.

Moreover, *Flast* is damaged goods, not only because its fanciful two-pronged "nexus" test has been demonstrated to be irrelevant to the test's supposed objective, but also because its cavalier treatment of the standing requirement rested upon a fundamental underestimation of that requirement's importance. *Flast* was explicitly and erroneously premised on the idea that Article III standing does not perform a crucial separation-of-powers function:

"The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U. S., at 100-101.

A perceptive Frenchman, visiting the United States some 135 years before Chief Justice Warren wrote these words, perceived that they were false.

"It is true that ... judicial censure, exercised by the courts on legislation, cannot extend without distinction to all laws, *for there are some of them that can never give rise to the sort of clearly formulated dispute that one calls a case.*" A. de Tocqueville, *Democracy in America* 97 (H. Mansfield & D. Winthrop trans's. and eds. 2000) (emphasis added).

Fla.sis crabbed (and judge-empowering) understanding of the role Article III standing plays in preserving our system of separated powers has been repudiated:

"To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger, supra*, at 222.

See also *Richardson*, 418 U. S., at 179-180; *Valley Forge*, 454 U. S., at 474; *Luictn*, 504 U. S., at 576-577. We twice have noted explicitly that *Flast* failed to recognize the vital separation-of-powers aspect of Article III standing. See *Spencer v. Kemna*, 523 U. S. 1, 11-12 (1998); *Lewis v. Casey*, 518 U. S. 343, 353, n. 3 (1996). And once a proper understanding of the relationship of standing to the separation of powers is brought to bear, Psychic Injury, even as limited in *Flast*, is revealed for what it is: a contradiction of the basic propositions that the

function of the judicial power "is, solely, to decide on the rights of individuals," *Marbury v. Madison*, 1 Cranch 137, 170 (1803), and that generalized grievances affecting the public at large have their remedy in the political process.

Overruling prior precedents, even precedents as disreputable as *Flast*, is nevertheless a serious undertaking, and. I understand the impulse to take a minimalist approach. But laying just claim to be honoring *stare decisis* requires more than beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive. Even before the addition of the new meaningless distinction devised by today's plurality, taxpayer standing in Establishment Clause cases has been a game of chance. In the proceedings below, well-respected federal judges declined to hear this case en bane, not because they thought the issue unimportant or the panel decision correct, but simply because they found our cases so lawless that there was no point in, quite literally, second-guessing the panel. See *Freedom From Religion Foundation, Inc. v. Chao*, 447 F. 3d 988 (CA7 2006) (Flaum, C. J., concurring in denial of rehearing en bane); *id.*, at 989-990 (Easterbrook, J., concurring in denial of rehearing en bane) (describing our cases as "arbitrary," "illogical," and lacking in "comprehensiveness and rationality"). We had an opportunity today to erase this blot on our jurisprudence, but instead have simply smudged it.

My call for the imposition of logic and order upon this chaotic set of precedents will perhaps be met with the snappy epigram that "Nile life of the law has not been logic: it has been experience." O. Holmes, *The Common Law* 1 (1881). But what experience has shown is that *Flast's* lack of a logical theoretical underpinning has rendered our taxpayer-standing doctrine such a jurisprudential disaster that our appellate judges do not know what to make of it. And of course the case has engendered no reliance interests, not only because one does not arrange his affairs with an eye to standing, but also because there is no relying on the random and irrational. I can think of few cases less warranting of *stare decisis* respect. It is time--it is past time--to call an end. *Flast* should be overruled.

Justice Souter, with whom *Justice Stevens*, *Justice Ginsburg*, and *Justice Breyer* join, dissenting.

Flast v. Cohen, 392 U. S. 83, 102 (1968), held that plaintiffs with an Establishment Clause claim could "demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.". Here, the controlling, plurality opinion declares that *Flast* does not apply, but a search of that opinion for a suggestion that these taxpayers have any less stake in the outcome than the taxpayers in *Flast* will come up empty: the plurality makes no such finding, nor could it. Instead, the controlling opinion closes the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury. I see no basis for this distinction in either logic or precedent, and respectfully dissent.

Manuel LUJAN, Jr., Secretary of the Interior, Petitioner

v.

DEFENDERS OF WILDLIFE, et al.

No. 90-1424.

Supreme Court of the United States

Argued Dec. 3, 1991.

Decided June 12, 1992.

[Justice Kennedy filed an opinion concurring in part and concurring in the judgment in which Justice Souter joined. Justice Stevens filed an opinion concurring in the judgment. Justice Blackmun dissented and filed an opinion in which Justice O'Connor joined.]

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II, III-A, and IV, and an opinion with respect to Part III-B, in which THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting §7 of the Endangered Species Act of 1973 (ESA), 87 Stat. 884, 892, as amended, 16 U.S.C. §1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

I

The ESA, 87 Stat. 884, as amended, 16 U.S.C. §1531 et seq., seeks to protect species of animals against threats to their continuing existence caused by man. See generally *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. 16 U.S.C. §§1533, 1536. Section 7(a)(2) of the Act then provides, in pertinent part:

"Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." 16 U.S.C. §1536(a)(2).

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce respectively,

promulgated a joint regulation stating that the obligations imposed by §7(a)(2) extend to actions taken in foreign nations. 43 Fed.Reg. 874 (1978). The next year, however, the Interior Department began to reexamine its position. Letter from Leo Kuliz, Solicitor, Department of the Interior, to Assistant Secretary, Fish and Wildlife and Parks, Aug. 8, 1979. A revised joint regulation, reinterpreting §7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed.Reg. 29990, and promulgated in 1986, 51 Fed.Reg. 19926; 50 CFR 402.01 (1991).

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of §7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. *Defenders of Wildlife v. Hodel*, 658 F.Supp. 43, 47-48 (Minn.1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation. *Defenders of Wildlife v. Hodel*, 707 F.Supp. 1082 (Minn.1989). The Eighth Circuit affirmed. 911 F.2d 117 (1990). We granted certiorari, 500 U.S. 915, 111 S.Ct. 2008, 114 L.Ed.2d 97 (1991).

II

While the Constitution of the United States divides all power conferred upon the Federal Government into "legislative Powers," Art. I, §1, "[t]he executive Power," Art. II, §1, and "[t]he judicial Power," Art. III, §1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot- Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In *The Federalist* No. 48, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and ... more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain." *The Federalist* No. 48, p. 256 (Carey and McClellan eds. 1990). One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III-- "serv[ing] to identify those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990)--is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

Over the years, our cases have established that the irreducible constitutional minimum of • standing contains three elements. First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, see *id.*, at 756, 104 S.Ct., at 3327; *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n. 16, 92 S.Ct. 1361, 1368-1369, n. 16, 31 L.Ed.2d 636 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Whitmore*, *supra*, 495 U.S., at 155, 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly ... traceable] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43, 96 S.Ct., at 1924, 1926.

The party invoking federal jurisdiction bears the burden of establishing these elements. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990); *Warth*, *supra*, 422 U.S., at 508, 95 S.Ct., at 2210. Since they are not mere pleading requirements but rather an indispensable part of the plaintiffs case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889, 110 S.Ct. 3177, 3185-3189, 111 L.Ed.2d 695 (1990); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 114-115, and n. 31, 99 S.Ct. 1601, 1614-1615, and n. 31, 60 L.Ed.2d 66 (1979); *Simon*, *supra*, 426 U.S., at 45, n. 25, 96 S.Ct., at 1927, and n. 25; *Warth*, *supra*, 422 U.S., at 527, and n. 6, 95 S.Ct., at 2219, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation*, *supra*, 497 U.S., at 889, 110 S.Ct., at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone*, *supra*, 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31.

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiffs asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction--and perhaps on the

response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615, 109 S.Ct. 2037, 2044, 104 L.Ed.2d 696 (1989) (opinion of KENNEDY, J.); see also *Simon*, supra, 426 U.S., at 41-42, 96 S.Ct., at 1925, 1926; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. E.g., *Warth*, supra, 422 U.S., at 505, 95 S.Ct., at 2208. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen*, supra, 468 U.S., at 758, 104 S.Ct., at 3328; *Simon*, supra, 426 U.S., at 44-45, 96 S.Ct., at 1927; *Warth*, supra, 422 U.S., at 505, 95 S.Ct., at 2208.

III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A

Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Complaint 5, App. 13. Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. See, e.g., *Sierra Club v. Morton*, 405 U.S., at 734, 92 S.Ct., at 1366. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.*, at 734-735, 92 S.Ct., at 1366. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their "special interest" in th[e] subject." *Id.*, at 735, 739, 92 S.Ct., at 1366, 1368. See generally *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members--Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of Ethel American ... role in overseeing the rehabilitation of the Aswan High Dam on the Nile ... and [in] develop [ing] ... Egypt's ... Master Water Plan." App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued,

"will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited ... [, which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." *Id.*, at 145-146. When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." *Id.*, at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species-- though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Mses. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, " 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.' " *Lyons*, 461 U.S., at 102, 103 S.Ct., at 1665 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-496, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974)). And the affiants' profession of an "inten[t]" to return to the places they had visited before--where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species--is simply not enough. Such "some day" intentions--without any description of concrete plans, or indeed even any specification of when the some day will be-- do not support a finding of the "actual or imminent" injury that our cases require. See *supra*, at 2136.

Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled "ecosystem nexus," proposes that any person who uses any part of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation*, which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it. 497 U.S., at 887-889, 110 S.Ct., at 3188-3189; see also *Sierra Club*, 405 U.S., at 735, 92 S.Ct., at 1366. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. §1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult

with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible--though it goes to the outermost limit of plausibility--to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist, see *Japan Whaling Assn. v. American Cetacean. Society*, 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

B

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government, violations of law, but the particular programs agencies establish to carry out their legal obligations ... [are], even when premised on allegations of several instances of violations of law, ... rarely if ever appropriate for federal-court adjudication." *Allen*, 468 U.S., at 759-760, 104 S.Ct., at 3329.

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary's controlling authority, see, e.g., 16 U.S.C. §1533(a)(1) ("The Secretary shall" promulgate regulations determining endangered species); §1535(d)(1) ("The Secretary is authorized to provide financial assistance to any State"), with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with the agencies, see §1536(a)(2) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any" funded action is not likely to jeopardize endangered or threatened species) (emphasis added). When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies, see 51 Fed.Reg. 19928 (1986). The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary's authority. (During the period when the Secretary took the view that §7(a)(2) did apply abroad, AID and

FWS engaged in a running controversy over whether consultation was required with respect to the Mahaweli project, AID insisting that consultation applied only to domestic actions.)

Respondents assert that this legal uncertainty did not affect redressability (and hence standing) because the District Court itself could resolve the issue of the Secretary's authority as a necessary part of its standing inquiry. Assuming that it is appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry, resolution by the District Court would not have remedied respondents' alleged injury anyway, because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced. The Court of Appeals tried to finesse this problem by simply proclaiming that "[w]e are satisfied that an injunction requiring the Secretary to publish [respondents' desired] regulatio[n] ... would result in consultation." *Defenders of Wildlife*, 851 F.2d, at 1042, 1043-1044. We do not know what would justify that confidence, particularly when the Justice Department (presumably after consultation with the agencies) has taken the position that the regulation is not binding. The short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. As in *Simon*, 426 U.S., at 43-44, 96 S.Ct., at 1926-1927, it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve. There is no standing.

IV

The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a "procedural injury." The so-called "citizen-suit" provision of the ESA provides, in pertinent part, that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). The court held that, because §7(a)(2) requires interagency consultation, the citizen-suit provision creates a "procedural righ[t]" to consultation in all "persons"--so that anyone can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure. 911 F.2d, at 121-122. To understand the remarkable nature of this holding one must be clear about what it does not rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). Nor is it simply a

case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which. Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.

We have consistently held that a plaintiff raising only a generally available grievance about government--claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large--does not state an Article III case or controversy. For example, in *Fairchild v. Hughes*, 258 U.S. 126, 129-130, 42 S.Ct. 274, 275, 66 L.Ed. 499 (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified. Justice Brandeis wrote for the Court:

"[This is] not a case within the meaning of Article III.... Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit...." *Ibid*.

In *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

"The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.... Here the parties plaintiff have no such case.... [T]heir complaint ... is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.*, at 488-489, 43 S.Ct., at 601.

In *Ex parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937), we dismissed a suit contending that Justice Black's appointment to this Court violated the Ineligibility Clause, Art. I, §6, cl. 2. "It is an established principle," we said, "that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U.S., at 634, 58 S.Ct., at 1. See also *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 433-434, 72 S.Ct. 394, 396-397, 96 L.Ed. 475 (1952) (dismissing taxpayer action on the basis of *Mellon*).

More recent cases are to the same effect. In *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), we dismissed for lack of standing a taxpayer suit challenging the Government's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, §9, cl. 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." We held that such a suit rested upon an impermissible "generalized grievance," and was inconsistent with "the framework of Article III" because "the impact on [plaintiff] is plainly undifferentiated and 'common to all members of the public.'" *Richardson*, supra, at 171, 176-177, 94 S.Ct., at 2944, 2946. And in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, §6, cl. 2, for Members of Congress to hold commissions in the military Reserves. We said that the challenged action, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance.... We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest of th[is] kind...." *Schlesinger*, supra, at 217, 220, 94 S.Ct., at 2930, 2932. Since *Schlesinger* we have on two occasions held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because " 'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning,' " *Allen*, 468 U.S., at 754, 104 S.Ct., at 3326; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483, 102 S.Ct. 752, 764, 70 L.Ed.2d 700 (1982). And only two Terms ago, we rejected the notion that Article III permits a citizen suit to prevent a condemned criminal's execution on the basis of " 'the public interest protections of the Eighth Amendment' "; once again, "[t]his allegation raise [d] only the 'generalized interest of all citizens in constitutional governance' ... and [was] an inadequate basis on which to grant ... standing." *Whitmore*, 495 U.S., at 160, 110 S.Ct., at 1725.

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch--one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed.60 (1803), "is, solely, to decide on the rights of individuals." Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-

powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, §3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," *Massachusetts v. Mellon*, 262 U.S., at 489, 43 S.Ct., at 601, and to become " 'virtually continuing monitors of the wisdom and soundness of Executive action.' " *Allen*, supra, 468 U.S., at 760, 104 S.Ct., at 3329 {quoting *Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972)}. We have always rejected that vision of our role:

"When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers.... This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents.... But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark v. Wickard*, 321 U.S. 288, 309- 310, 64 S.Ct. 559, 571, 88 L.Ed. 733 (1944) (footnote omitted).

"Individual rights," within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. See also *Sierra Club*, 405 U.S., at 740-741, n. 16, 92 S.Ct., at 1369, n. 16.

Nothing in this contradicts the principle that "[t]he ... injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth*, 422 U.S., at 500, 95 S.Ct., at 2206 (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 1148, n. 3, 35 L.Ed.2d 536 (1973)). Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-212, 93 S.Ct. 364, 366-368, 34 L.Ed.2d 415 (1972), and injury to a company's interest in marketing its product free from competition, see *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6, 88 S.Ct. 651, 654, 19 L.Ed.2d 787 (1968)). As we said in *Sierra Club*, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S., at 738, 92 S.Ct., at 1368. Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

**Franklin D. RAINES, Director, Office of Management and Budget, et al.,
Appellants,
v.
Robert C. BYRD et al.**

No. 96-1671.

Supreme Court of the United States

Argued May 27, 1997.

Decided June 26, 1997.

[REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. SOUTER, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined. STEVENS, J., and BREYER, J., filed dissenting opinions.]

Chief Justice REHNQUIST delivered the opinion of the Court.

The District Court for the District of Columbia declared the Line Item Veto Act unconstitutional. On this direct appeal, we hold that appellees lack standing to bring this suit, and therefore direct that the judgment of the District Court be vacated and the complaint dismissed.

I

The appellees are six Members of Congress, four of whom served as Senators and two of whom served as Congressmen in the 104th Congress (1995-1996). On March 27, 1996, the Senate passed a bill entitled the Line Item Veto Act by a vote of 69-31. All four appellee Senators voted "nay." 142 Cong. Rec. 52995. The next day, the House of Representatives passed the identical bill by a vote of 232-177. Both appellee Congressmen voted "nay." *Id.*, at H2986. On April 4, 1996, the President signed the Line Item Veto Act (Act) into law. Pub.L. 104-130, 110 Stat. 1200, codified at 2 U.S.C.A. §691 et seq. (Supp.1997). The Act went into effect on January 1, 1997. See Pub.L. 104- 130, §5. The next day, appellees filed a complaint in the District Court for the District of Columbia against the two appellants, the Secretary of the Treasury and the Director of the Office of Management and Budget, alleging that the Act was unconstitutional.

The provisions of the Line Item Veto Act do not use the term "veto." Instead, the President is given the authority to "cancel" certain spending and tax benefit measures after he has signed them into law. Specifically, the Act provides:

"[T]he President may, with respect to any bill or joint resolution that has been signed

into law pursuant to Article 1, section 7, of the Constitution of the United States, cancel in whole--(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit; if the President--"(A) determines that such cancellation will--(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest; and "(B) notifies the Congress of such cancellation by transmitting a special message ... within five calendar days (excluding Sundays) after the enactment of the law [to which the cancellation applies]." §691(a) (some indentations omitted).

The President's "cancellation" under the Act takes effect when the "special message" notifying Congress of the cancellation is received in the House and Senate. With respect to dollar amounts of "discretionary budget authority," a cancellation means "to rescind." §691e(4)(A). With respect to "new direct spending" items or "limited tax benefit[s]," a cancellation means that the relevant legal provision, legal obligation, or budget authority is "prevent [ed] ... from having legal force or effect." §§691e(4)(B), (C).

The Act establishes expedited procedures in both Houses for the consideration of "disapproval bills," §691d, bills or joint resolutions which, if enacted into law by the familiar procedures set out in Article I, §7 of the Constitution, would render the President's cancellation "null and void," §691b(a). "Disapproval bills" may only be one sentence long and must read as follows after the enacting clause: "That Congress disapproves of cancellations as transmitted by the President in a special message on regarding ." §691e(6)(C). (The blank spaces correspond to the cancellation reference numbers as set out in the special message, the date of the President's special message, and the public law number to which the special message relates, respectively. Ibid.

The Act provides that "[a]ny Member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution." §692(a)(1). Appellees brought suit under this provision, claiming that "[t]he Act violates Article I" of the Constitution. Complaint ¶ 17. Specifically, they alleged that the Act " unconstitutionally expands the President's power," and "violates the requirements of bicameral passage and presentment by granting to the President, acting alone, the authority to 'cancel' and thus repeal provisions of federal law." Ibid. They alleged that the Act injured them "directly and concretely ... in their official capacities" in three ways:

"The Act ,, (a) alter[s] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divest[s] the [appellees] of their constitutional role in the repeal of legislation, and (c) alter[s] the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress." Id., 14.

Appellants moved to dismiss for lack of jurisdiction, claiming (among other things) that appellees lacked standing to sue and that their claim was not ripe. Both sides also filed motions

for summary judgment on the merits. On April 10, 1997, the District Court (i) denied appellants' motion to dismiss, holding that appellees had standing to bring this suit and that their claim was ripe, and (ii) granted appellees' summary judgment motion, holding that the Act is unconstitutional. 956 F.Supp. 25. As to standing, the court noted that the Court of Appeals for the District of Columbia "has repeatedly recognized Members' standing to challenge measures that affect their constitutionally prescribed lawmaking powers." *Id.*, at 30 (citing, e.g., *Michel v. Anderson*, 14 F.3d 623, 625 (C.A.D.C.1994); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 950-952 (C.A.D.C.1984)). See also 956 F.Supp., at 31 ("[T]he Supreme Court has never endorsed the [Court of Appeals] analysis of standing in such cases"). The court held that appellees' claim that the Act "dilute[d] their Article I voting power" was sufficient to confer Article III standing: "[Appellees'] votes mean something different from what they meant before, for good or ill, and [appellees] who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it.... Under the Act the dynamic of lawmaking is fundamentally altered. Compromises and trade-offs by individual lawmakers must take into account the President's item-by-item cancellation power looming over the end product." *Ibid.*

The court held that appellees' claim was ripe even though the President had not yet used the "cancellation" authority granted him under the Act: "Because [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied, and this Court may accede to Congress' directive to address the constitutional cloud over the Act as swiftly as possible." *Id.*, at 32 (referring to §692(a)(1), the section of the Act granting Members of Congress the right to challenge the Act's constitutionality in court). On the merits, the court held that the Act violated the Presentment Clause, Art. I §7, cl. 2, and constituted an unconstitutional delegation of legislative power to the President. 956 F.Supp., at 33, 35, 37-38.

The Act provides for a direct, expedited appeal to this Court. §692(b) (direct appeal to Supreme Court); §692(c) ("It shall be the duty of ... the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any [suit challenging the Act's constitutionality] brought under [§3(a) of the Act]"). On April 18, eight days after the District Court issued its order, appellants filed a jurisdictional statement asking us to note probable jurisdiction, and on April 21, appellees filed a memorandum in response agreeing that we should note probable jurisdiction. On April 23, we did so. 520 U.S. ----, 117 S.Ct. 1489, 137 L.Ed.2d 699 (1997). We established an expedited briefing schedule and heard oral argument on May 27. We now hold that appellees have no standing to bring this suit, and therefore direct that the judgment of the District Court be vacated and the complaint dismissed.

II

Under Article III, §2 of the Constitution, the federal courts have jurisdiction over this dispute between appellants and appellees only if it is a "case" or "controversy." This is a "bedrock requirement." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). As we said in *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37, 96 S.Ct. 1917, 1924,

48 L.Ed.2d 450 (1976), "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."

One element of the case-or-controversy requirement is that appellees, based on their complaint, must establish that they have standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136-2137, 119 L.Ed.2d 351 (1992) (plaintiff bears burden of establishing standing). The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, *Simon*, supra, at 38, 96 S.Ct., at 1924, although that inquiry "often turns on the nature and source of the claim asserted;" *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). To meet the standing requirements of Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) (emphasis added). For our purposes, the italicized words in this quotation from *Allen* are the key ones. We have consistently stressed that a plaintiff's complaint must establish that he has a "personal stake" in the alleged dispute, and that the alleged injury suffered is particularized as to him. See, e.g., *Lujan*, 504 U.S., at 560-561 and n. 1, 112 S.Ct., at 2136 and n. 1 (to have standing, the plaintiff must have suffered a "particularized" injury, which means that "the injury must affect the plaintiff in a personal and individual way"); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543-544, 106 S.Ct. 1326, 1332, 89 L.Ed.2d 501 (1986) (school board member who "has no personal stake in the outcome of the litigation" has no standing); *Simon*, supra, at 39, 96 S.Ct., at 1925 ("The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement").

We have also stressed that the alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered "an invasion of a legally protected interest which is ... concrete and particularized," *Lujan*, 504 U.S., at 560, 112 S.Ct., at 2136, and that the dispute is "traditionally thought to be capable of resolution through the judicial process," *Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942, 1951, 20 L.Ed.2d 947 (1968). See also *Allen*, 468 U.S., at 752, 104 S.Ct., at 3325 ("Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?").

We have always insisted on strict compliance with this jurisdictional standing requirement. See, e.g., *ibid.* (under Article III, "federal courts may exercise power only 'in the last resort, and as a necessity' ") (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892)); *Muskrat v. United States*, 219 U.S. 346, 356, 31 S.Ct. 250, 253, 55 L.Ed. 246 (1911) ("[F]rom its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature"). And our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. See, e.g., *Bender*, supra, at 542, 106 S.Ct., at 1331-1332; *Valley Forge*, supra, at 473-474, 102 S.Ct., at 759-760. As we said in *Allen*, supra, at 752, 104 S.Ct., at 3325, "the law of Art. III standing is built on a single basic idea--the idea of separation of powers." In the light of this overriding and time-honored concern about keeping the

Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to "settle" it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.

III

We have never had occasion to rule on the question of legislative standing presented here. In *Powell v. McCormack*, 395 U.S. 486, 496, 512-514, 89 S.Ct. 1944, 1950-1951, 1959-1960, 23 L.Ed.2d 491 (1969), we held that a Member of Congress' constitutional challenge to his exclusion from the House of Representatives (and his consequent loss of salary) presented an Article III case or controversy. But *Powell* does not help appellees. First, appellees have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally. See n. 7, *infra*. Second, appellees do not claim that they have been deprived of something to which they personally are entitled-- such as their seats as Members of Congress after their constituents had elected them. Rather, appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete. Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress. See Complaint 14 (purporting to sue "in their official capacities"). If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power. See *The Federalist* No. 62, p. 378 (J. Madison) (C. Rossiter ed. 1961) ("It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust").

The one case in which we have upheld standing for legislators (albeit state legislators) claiming an institutional injury is *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939). Appellees, relying heavily on this case, claim that they, like the state legislators in *Coleman*, "have a plain, direct and adequate interest in maintaining the effectiveness of their votes," *id.*, at 438, 59 S.Ct., at 975, sufficient to establish standing. In *Coleman*, 20 of Kansas' 40 State Senators voted not to ratify the proposed "Child Labor Amendment" to the Federal Constitution. With the vote deadlocked 20-20, the amendment ordinarily would not have been ratified. However, the State's Lieutenant Governor, the presiding officer of the State Senate, cast a deciding vote in favor of the amendment, and it was deemed ratified (after the State House of Representatives voted to ratify it). The 20 State Senators who had voted against the amendment, joined by a 21st State Senator and three State House Members, filed an action in the Kansas Supreme Court seeking a writ of mandamus that would compel the appropriate state officials to recognize that the legislature had not in fact ratified the amendment. That court held that the members of the legislature had standing to bring their mandamus action, but ruled against them

on the merits. See *id.*, at 436-437, 59 S.Ct., at 974-975.

This Court affirmed. By a vote of 5-4, we held that the members of the legislature had standing. In explaining our holding, we repeatedly emphasized that if these legislators (who were suing as a bloc) were correct on the merits, then their votes not to ratify the amendment were deprived of all validity:

"Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct, and adequate interest in maintaining the effectiveness of their votes." *Id.*, at 438, 59 S.Ct., at 975 (emphasis added).

"[T]he twenty senators were not only qualified to vote on the question of ratification but their votes, if the Lieutenant governor were excluded as not being a part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution." *Id.*, at 441, 59 S.Ct., at 976 (emphasis added).

"[We] find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." *Id.*, at 446, 59 S.Ct., at 979 (emphasis added).

It is obvious, then, that our holding in *Coleman* stands (at most, see n. 8, *infra*) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

It should be equally obvious that appellees' claim does not fall within our holding in *Coleman*, as thus understood. They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote. Nor can they allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified. In the future, a majority of Senators and Congressman can pass or reject appropriations bills; the Act has no effect on this process. In addition, a majority of Senators and Congressman can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act; again, the Act has no effect on this process. *Coleman* thus provides little meaningful precedent for appellees' argument.

Nevertheless, appellees rely heavily on our statement in *Coleman* that the Kansas senators had "a plain, direct, and adequate interest in maintaining the effectiveness of their votes." Appellees claim that this statement applies to them because their votes on future

appropriations bills (assuming a majority of Congress does not decide to exempt those bills from the Act) will be less "effective" than before, and that the "meaning" and "integrity" of their vote has changed. Brief for Appellees 24, 28. The argument goes as follows. Before the Act, Members of Congress could be sure that when they voted for, and Congress passed, an appropriations bill that included funds for Project X, one of two things would happen: (i) the bill would become law and all of the projects listed in the bill would go into effect, or (ii) the bill would not become law and none of the projects listed in the bill would go into effect. Either way, a vote for the appropriations bill meant a vote for a package of projects that were inextricably linked. After the Act, however, a vote for an appropriations bill that includes Project X means something different. Now, in addition to the two possibilities listed above, there is a third option: the bill will become law and then the President will "cancel" Project X.

Even taking appellees at their word about the change in the "meaning" and "effectiveness" of their vote for appropriations bills which are subject to the Act, we think their argument pulls Coleman too far from its moorings. Appellees' use of the word "effectiveness" to link their argument to Coleman stretches the word far beyond the sense in which the Coleman opinion used it. There is a vast difference between the level of vote nullification at issue in Coleman and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of Coleman. We are unwilling to take that step.

Not only do appellees lack support from precedent, but historical practice appears to cut against them as well. It is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power. The Tenure of Office Act, passed by Congress over the veto of President Andrew Johnson in 1867, was a thorn in the side of succeeding Presidents until it was finally repealed at the behest of President Grover Cleveland in 1887. See generally W. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 210-235, 260-268 (1992). It provided that an official whose appointment to an Executive Branch office required confirmation by the Senate could not be removed without the consent of the Senate. 14 Stat. 430, ch. 154. In 1868, Johnson removed his Secretary of War, Edwin M. Stanton. Within a week, the House of Representatives impeached Johnson. 1 *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States on Impeachment by the House of Representatives for High Crimes and Misdemeanors* 4 (1868). One of the principal charges against him was that his removal of Stanton violated the Tenure of Office Act. *Id.*, at 6-8. At the conclusion of his trial before the Senate, Johnson was acquitted by one vote. 2 *id.*, at 487, 496-498. Surely Johnson had a stronger claim of diminution of his official power as a result of the Tenure of Office Act than do the appellees in the present case. Indeed, if their claim were sustained, it would appear that President Johnson would have had standing to challenge the Tenure of Office Act before he ever thought about firing a cabinet member, simply on the grounds that it altered the calculus by which he would nominate someone to his cabinet. Yet if the federal courts had entertained an action to adjudicate the constitutionality of the Tenure of Office Act immediately after its passage in 1867, they would have been improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress.

Succeeding Presidents--Ulysses S. Grant and Grover Cleveland--urged Congress to repeal the Tenure of Office Act, and Cleveland's plea was finally heeded in 1887. 24 Stat. 500, ch. 353. It occurred to neither of these Presidents that they might challenge the Act in an Article III court. Eventually, in a suit brought by a plaintiff with traditional Article III standing, this Court did have the opportunity to pass on the constitutionality of the provision contained in the Tenure of Office Act. A sort of mini-Tenure of Office Act covering only the Post Office Department had been enacted in 1872, 17 Stat. 284, ch. 335, §2, and it remained on the books after the Tenure of Office Act's repeal in 1887. In the last days of the Woodrow Wilson administration, Albert Burleson, Wilson's Postmaster General, came to believe that Frank Myers, the Postmaster in Portland, Oregon, had committed fraud in the course of his official duties. When Myers refused to resign, Burleson, acting at the direction of the President, removed him. Myers sued in the Court of Claims to recover lost salary. In *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926), more than half a century after Johnson's impeachment, this Court held that Congress could not require senatorial consent to the removal of a Postmaster who had been appointed by the President with the consent of the Senate. *Id.*, at 106-107, 173, 176, 47 S.Ct., at 22, 44, 45-46. In the course of its opinion, the Court expressed the view that the original Tenure of Office Act was unconstitutional. *Id.*, at 176, 47 S.Ct., at 45-46. See also *id.*, at 173, 47 S.Ct., at 44 ("This Court has, since the Tenure of Office Act, manifested an earnest desire to avoid a final settlement of the question until it should be inevitably presented, as it is here").

If the appellees in the present case have standing, presumably President Wilson, or Presidents Grant and Cleveland before him, would likewise have had standing, and could have challenged the law preventing the removal of a presidential appointee without the consent of Congress. Similarly, in *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), the Attorney General would have had standing to challenge the one-House veto provision because it rendered his authority provisional rather than final. By parity of reasoning, President Gerald Ford could have sued to challenge the appointment provisions of the Federal Election Campaign Act which were struck down in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and a Member of Congress could have challenged the validity of President Coolidge's pocket veto that was sustained in *The Pocket Veto Case*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929).

There would be nothing irrational about a system which granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime. See, e.g., Favoreu, *Constitutional Review in Europe*, in *Constitutionalism and Rights* 38, 41 (L. Henkin & A. Rosenthal eds.1990); Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian. Objection to Judicial Review*, 26 *Law & Pol'y Int'l Bus.* 1201, 1209 (1995); A. Stone, *The Birth of Judicial Politics in France* 232 (1992); D. Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* 106 (1976). But it is obviously not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III courts, well expressed by Justice Powell in his concurring opinion in *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974):

"The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests." *Id.*, at 192, 94 S.Ct., at 2954.

IV

In sum, appellees have alleged no injury to themselves as individuals (contra Powell), the institutional injury they allege is wholly abstract and widely dispersed (contra Coleman), and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. See n. 2, *supra*. We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.

We therefore hold that these individual members of Congress do not have a sufficient "personal stake" in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing. The judgment of the District Court is vacated, and the case is remanded with instructions to dismiss the complaint for lack of jurisdiction.

It is so ordered.

STEEL COMPANY, aka Chicago Steel and Pickling Company, Petitioner,
v.
CITIZENS FOR A BETTER ENVIRONMENT.

No. 96-643.

Supreme Court of the United States

Argued Oct. 6, 1997.
Decided March 4, 1998.

Justice SCALIA delivered the opinion of the Court.

This is a private enforcement action under the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 100 Stat. 1755, 42 U.S.C. § 11046(a)(1). The case presents the merits question, answered in the affirmative by the United States Court of Appeals for the Seventh Circuit, whether EPCRA authorizes suits for purely past violations. It also presents the jurisdictional question whether respondent, plaintiff below, has standing to bring this action.

I

Respondent, an association of individuals interested in environmental protection, sued petitioner, a small manufacturing company in Chicago, for past violations of EPCRA. EPCRA establishes a framework of state, regional and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health-threatening release. Central to its operation are reporting requirements compelling users of specified toxic and hazardous chemicals to file annual "emergency and hazardous chemical inventory forms" and "toxic chemical release forms," which contain, inter alia, the name and location of the facility, the name and quantity of the chemical on hand, and, in the case of toxic chemicals, the waste-disposal method employed and the annual quantity released into each environmental medium. 42 U.S.C. §§ 11022 and 11023. The hazardous-chemical inventory forms for any given calendar year are due the following March 1st, and the toxic-chemical release forms the following July 1st. §§ 11022(a)(2) and 11023(a).

Enforcement of EPCRA can take place on many fronts. The Environmental Protection Agency (EPA) has the most powerful enforcement arsenal: it may seek criminal, civil, or administrative penalties. § 11045. State and local governments can also seek civil penalties, as well as injunctive relief §§ 11046(a)(2) and (c). For purposes of this case, however, the crucial enforcement mechanism is the citizen-suit provision, § 11046(a)(1), which likewise authorizes civil penalties and injunctive relief, see § 11046(c). This provides that "any person may

commence a civil action on his own behalf against ... [a]n owner or operator of a facility for failure," among other things, to "[c]omplete and submit an inventory form under section 11022(a) of this title ... [and] section 11023(a) of this title." § 11046(a)(1). As a prerequisite to bringing such a suit, the plaintiff must, 60 days prior to filing his complaint, give notice to the Administrator of the EPA, the State in which the alleged violation occurs, and the alleged violator. § 11046(d). The citizen suit may not go forward if the Administrator "has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty." § 11046(e).

In 1995 respondent sent a notice to petitioner, the Administrator, and the relevant Illinois authorities, alleging--accurately, as it turns out--that petitioner had failed since 1988, the first year of EPCRA's filing deadlines, to complete and to submit the requisite hazardous-chemical inventory and toxic- chemical release forms under §§ 11022 and 11023. Upon receiving the notice, petitioner filed all of the overdue forms with the relevant agencies. The EPA chose not to bring an action against petitioner, and when the 60-day waiting period expired, respondent filed suit in Federal District Court. Petitioner promptly filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (6), contending that, because its filings were up to date when the complaint was filed, the court had no jurisdiction to entertain a suit for a present violation; and that, because EPCRA does not allow suit for a purely historical violation, respondent's allegation of untimeliness in filing was not a claim upon which relief could be granted.

The District Court agreed with petitioner on both points. App. to Pet. for Cert. A24-A26. The Court of Appeals reversed, concluding that citizens may seek penalties against EPCRA violators who file after the statutory deadline and after receiving notice. 90 F.3d 1237 (C.A.7 1996). We granted certiorari, 519 U.S. ----, 117 S.Ct. 1079, 137 L.Ed.2d 214 (1997).

III

In addition to its attempt to convert the merits issue in this case into a jurisdictional one, Justice STEVENS' concurrence proceeds (post, at 1024-1027) to argue the bolder point that jurisdiction need not be addressed first anyway. Even if the statutory question is not "fram[ed] in terms of 'jurisdiction,' " but is simply "characterize[d] .. as whether respondent's complaint states a 'cause of action,' " "it is also clear that we have the power to decide the statutory question first." Post, at 1024. This is essentially the position embraced by several. Courts of Appeals, which find it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. See, e.g., SEC v. American Capital Investments, Inc., 98 F.3d 1133, 1139-1142 (C.A.9 1996), cert. denied, Shelton v. Barnes, 520 U.S. ---, 117 S.Ct. 1468, 137 L.Ed.2d 681 (1997); Smith v. Avino, 91 F.3d 105, 108 (C.A.11 1996); Clow v. U.S. Dept. of Housing and Urban Development, 948 F.2d 614, 616, n. 2 (C.A.9 1991); Cross- Sound Ferry Services, Inc. v. ICC, 934 F.2d 327, 333 (C.A.D.C.1991); United States v. Parcel of Land, 928 F.2d 1, 4 (C.A.1 1991); Browning-Ferris Industries v. Muszynski, 899 F.2d 151, 154-159 (C.A.2 1990). The Ninth Circuit has

denominated this practice--which it characterizes as "assuming" jurisdiction for the purpose of deciding the merits--the "doctrine of hypothetical jurisdiction." See, e.g., *United States v. Troescher*, 99 F.3d 933, 934, n. 1 (1996).

We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones*, supra, 177 U.S., at 453, 20 S.Ct., at 691-692. The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

This Court's insistence that proper jurisdiction appear begins at least as early as 1804, when we set aside a judgment for the defendant at the instance of the losing plaintiff who had himself failed to allege the basis for federal jurisdiction. *Capron v. Van Noorden*, 2 Cranch 126, 2 L.Ed. 229 (1804). Just last Term, we restated this principle in the clearest fashion, unanimously setting aside the Ninth Circuit's merits decision in a case that had lost the elements of a justiciable controversy:

"[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244 [55 S.Ct. 162, 165, 79 L.Ed. 338] (1934). See *Judice v. Vail*, 430 U.S. 327, 331-332 [97 S.Ct. 1211, 1215-1216, 51 L.Ed.2d 376] (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' *United States v. Corrick*, 298 U.S. 435, 440 [56 S.Ct. 829, 831, 80 L.Ed. 1263] (1936) (footnotes omitted)." *Arizonans for Official English v. Arizona*, 520 U.S. 43 - ----, 117 S.Ct. 1055, 1071, 137 L.Ed.2d 170 (1997), quoting from *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986) (brackets in original).

Justice STEVENS' arguments contradicting all this jurisprudence--and asserting that a court may decide the cause of action before resolving Article III jurisdiction--are readily refuted. First, his concurrence seeks to convert *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), into a case in which the cause-of-action question was decided before an Article III standing question. *Post*, at 1024-1025. "Bell," Justice STEVENS asserts, "held that we have

jurisdiction to decide [whether the plaintiff has stated a cause of action] even when it is unclear whether the plaintiffs injuries can be redressed." Post, at 1024. The italicized phrase (the italics are his own) invites the reader to believe that Article III redressability was at issue. Not only is this not true, but the whole point of *Bell* was that it is not true. In *Bell*, which was decided before *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the District Court had dismissed the case on jurisdictional grounds because it believed that (what we would now call) a *Bivens* action would not lie. This Court held that the nonexistence of a cause of action was no proper basis for a jurisdictional dismissal. Thus, the uncertainty about "whether the plaintiffs injuries can be redressed" to which Justice STEVENS refers is simply the uncertainty about whether a cause of action existed--which is precisely what *Bell* holds not to be an Article III "redressability" question. It would have been a different matter if the relief requested by the plaintiffs in *Bell* (money damages) would not have remedied their injury in fact; but it of course would. Justice STEVENS used to understand the fundamental distinction between arguing no cause of action and arguing no Article III redressability, having written for the Court that the former argument is "not squarely directed at jurisdiction itself, but rather at the existence of a remedy for the alleged violation of ... federal rights," which issue is "'not of the jurisdictional sort which the Court raises on its own motion.'" *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398, 99 S.Ct. 1171, 1175-1176, 59 L.Ed.2d 401 (1979) (STEVENS, J.), (quoting *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274, 279, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977)).

Justice STEVENS also relies on *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974). Post, at 1024-1025. But in that case, we did not determine whether a cause of action existed before determining that the plaintiff had Article III standing; there was no question of injury in fact or effectiveness of the requested remedy. Rather, *National Railroad Passenger Corp.* determined whether a statutory cause of action existed before determining whether (if so) the plaintiff came within the "zone of interests" for which the cause of action was available. 414 U.S., at 465, n. 13, 94 S.Ct., at 696, n. 13. The latter question is an issue of statutory standing. It has nothing to do with whether there is case or controversy under Article III.

Much more extensive defenses of the practice of deciding the cause of action before resolving Article III jurisdiction have been offered by the courts of appeals. They rely principally upon two cases of ours, *Norton v. Mathews*, 427 U.S. 524, 96 S.Ct. 2771, 49 L.Ed.2d 672 (1976) and *Secretary of Navy v. Avrech*, 418 U.S. 676, 94 S.Ct. 3039, 41 L.Ed.2d 1033 (1974) (per curiam). Both are readily explained, we think, by their extraordinary procedural postures. In *Norton*, the case came to us on direct appeal from a three-judge District Court, and the jurisdictional question was whether the action was properly brought in that forum rather than in an ordinary district court. We declined to decide that jurisdictional question, because the merits question was decided in a companion case, *Mathews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976), with the consequence that the jurisdictional question could have no effect on the outcome: If the three-judge court had been properly convened, we would have affirmed, and if not we would have vacated and remanded for a fresh decree from which an appeal could be taken to the Court of Appeals, the outcome of which was foreordained by *Lucas*. *Norton v. Mathews*, supra, at 531, 96 S.Ct., at 2775. Thus, *Norton* did not use the pretermission

of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed. Moreover, the Court seems to have regarded the merits judgment that it entered on the basis of *Lucas* as equivalent to a jurisdictional dismissal for failure to present a substantial federal question. The Court said: "This disposition [*Lucas*] renders the merits in the present case a decided issue and thus one no longer substantial in the jurisdictional sense." 427 U.S., at 530-531, 96 S.Ct., at 2774-2775. We think it clear that this peculiar case, involving a merits issue dispositively resolved in a companion case, was not meant to overrule, sub silentio, two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits. See *Clow*, 948 F.2d, at 627 (O'SCANNLAIN, J., dissenting).

Avrech also involved an instance in which an intervening Supreme Court decision definitively answered the merits question. The jurisdictional question in the case had been raised by the Court sua sponte after oral argument, and supplemental briefing had been ordered. *Secretary of the Navy v. Avrech*, 418 U.S., at 677, 94 S.Ct., at 3039-3040. Before the Court came to a decision, however, the merits issue in the case had been conclusively resolved in *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), a case argued the same day as *Avrech*. The Court was unwilling to decide the jurisdictional question without oral argument, *Avrech*, supra, at 677, 94 S.Ct., at 3039-3040, but acknowledged (with some understatement) that "even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is ... foreordained," *id.*, at 678, 94 S.Ct., at 3040. Accordingly, the Court disposed of the case on the basis of the intervening decision in *Parker*, in a minimalist two-page per curiam opinion. The first thing to be observed about *Avrech* is that the supposed jurisdictional issue was technically not that. The issue was whether a court-martial judgment could be attacked collaterally by a suit for back pay. Although *Avrech*, like the earlier case of *United States v. Augenblick*, 393 U.S. 348, 89 S.Ct. 528, • 21 L.Ed.2d 537 (1969), characterized this question as jurisdictional, we later held squarely that it was not. See *Schlesinger v. Councilman*, 420 U.S. 738, 753, 95 S.Ct. 1300, 1310-1311, 43 L.Ed.2d 591 (1975). In any event, the peculiar circumstances of *Avrech* hardly permit it to be cited for the precedent-shattering general proposition that an "easy" merits question may be decided on the assumption of jurisdiction. To the contrary, the fact that the Court ordered briefing on the jurisdictional question sua sponte demonstrates its adherence to traditional and constitutionally dictated requirements. See *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d, at 344-345, and n. 10 (THOMAS, J., concurring in part and concurring in denial of petition for review).

Other cases sometimes cited by the lower courts to support "hypothetical jurisdiction" are similarly distinguishable. *United States v. Augenblick*, as we have discussed, did not involve a jurisdictional issue. In *Philbrook v. Glodgett*, 421 U.S. 707, 721, 95 S.Ct. 1893, 1902, 44 L.Ed.2d 525 (1975), the jurisdictional question was whether, in a suit under 28 U.S.C. § 1343(3) against the Commissioner of the Vermont Department of Social Welfare for deprivation of federal rights under color of state law by denying payments under a federally funded welfare program, the plaintiff could join a similar claim against the Secretary of Health, Education, and Welfare. The merits issue of statutory construction involved in the claim against the Secretary was precisely the same as that involved in the claim against the Commissioner, and the Secretary (while challenging jurisdiction) assured the Court that he would comply with any judgment entered against the Commissioner. The Court's disposition of the case was to dismiss the Secretary's appeal under what was then Court Rule 40(g), for failure to brief the jurisdictional question adequately. Normally, the Court acknowledged, its obligation to inquire into the jurisdiction of the District Court might prevent this disposition. But here, the Court concluded, "the substantive issue decided by the District Court would have been decided by that court even if it had concluded that the Secretary was not properly a party," and "the only practical difference that resulted ... was that its injunction was directed against him as well as against [the Commissioner]," which the Secretary "has [not] properly contended to be wrongful before this Court." *Id.*, at 721-722, 95 S.Ct., at 1902- 1903. And finally, in *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970), we reserved the question whether we had jurisdiction to issue a writ of prohibition or mandamus because the petitioner had not exhausted all available avenues before seeking relief under the All Writs Act, 28 U.S.C. § 1651, and because there was no record to review. *Id.*, at 86-88, 90 S.Ct., at 1654-1656. The exhaustion question itself was at least arguably jurisdictional, and was clearly treated as such. *Id.*, at 86, 90 S.Ct., at 1654-1655.

While some of the above cases must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question, none of them even approaches approval of a doctrine of "hypothetical jurisdiction" that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment-- which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. *Muskrat v. United States*, 219 U.S. 346, 362, 31 S.Ct. 250, 256, 55 L.Ed. 246 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. See *United States v. Richardson*, 418 U.S. 166, 179, 94 S.Ct. 2940, 2947-2948, 41 L.Ed.2d 678 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974). For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.

IV

Having reached the end of what seems like a long front walk, we finally arrive at the threshold jurisdictional question: whether respondent, the plaintiff below, has standing to sue.

Article III, § 2 of the Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies." We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process. *Muskrat v. United States*, supra, at 356-357, 31 S.Ct., at 253-254. Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all. Every criminal investigation conducted by the Executive is a "case," and every policy issue resolved by congressional legislation involves a "controversy." These are not, however, the sort of cases and controversies that Article III, § 2, refers to, since "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Standing to sue is part of the common understanding of what it takes to make a justiciable case. *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990).

The "irreducible constitutional minimum of standing" contains three requirements. *Lujan v. Defenders of Wildlife*, supra, at 560, 112 S.Ct., at 2136. First and foremost, there must be alleged (and ultimately proven) an "injury in fact"--a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, supra, at 149, 155, 110 S.Ct., at 1723 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be causation--a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926, 48 L.Ed.2d 450 (1976). And third, there must be redressability--a likelihood that the requested relief will redress the alleged injury. *Id.*, at 45-46, 96 S.Ct., at 1927-1928; see also *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975). This triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607-608, 107 L.Ed.2d 603 (1990).

We turn now to the particulars of respondent's complaint to see how it measures up to Article III's requirements. This case is on appeal from a Rule 12(b) motion to dismiss on the pleadings, so we must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990). The complaint contains claims "on behalf of both [respondent] itself and its members." App. 4. It describes respondent as an organization that seeks, uses, and acquires data reported under EPCRA. It says that respondent "reports to its members and the public about storage and releases of toxic chemicals into the environment, advocates changes in environmental regulations and statutes, prepares reports for its members and the public, seeks the reduction of toxic chemicals and further seeks, to promote the effective enforcement of environmental laws." App. 5. The complaint asserts that respondent's "right to know about [toxic chemical] releases and its interests in protecting and improving the environment and the health of its members have been, are being, and will be adversely affected by [petitioner's] actions in failing to provide timely and required information under EPCRA." *Ibid.* The complaint also alleges that respondent's members, who live in or frequent the area near petitioner's facility, use the EPCRA-reported information "to learn about

toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit." Ibid. The members' "safety, health, recreational, economic, aesthetic and environmental interests" in the information, it is claimed, "have been, are being, and will be adversely affected by [petitioner's] actions in failing to file timely and required reports under EPCRA." Ibid.

As appears from the above, respondent asserts petitioner's failure to provide EPCRA information in a timely fashion, and the lingering effects of that failure, as the injury in fact to itself and its members. We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA--or at least being deprived of it when one has a particular plan for its use--is a concrete injury in fact that satisfies Article III. Cf. *Lujan v. Defenders of Wildlife*, 504 U.S., at 578, 112 S.Ct., at 2145-2146. And we need not reach that question in the present case because, assuming injury in fact, the complaint fails the third test of standing, redressability.

The complaint asks for (1) a declaratory judgment that petitioner violated EPCRA; (2) authorization to inspect periodically petitioner's facility and records (with costs borne by petitioner); (3) an order requiring petitioner to provide respondent copies of all compliance reports submitted to the EPA; (4) an order requiring petitioner to pay civil penalties of \$25,000 per day for each violation of §§ 11022 and 11023; (5) an award of all respondent's "costs, in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees, as authorized by Section 326(f) of [EPCRA]"; and (6) any such further relief as the court deems appropriate. App. 11. None of the specific items of relief sought, and none that we can envision as "appropriate" under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent.

The first item, the request for a declaratory judgment that petitioner violated EPCRA, can be disposed of summarily. There being no controversy over whether petitioner failed to file reports, or over whether such a failure constitutes a violation, the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world. See *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479, 110 S.Ct. 1249, 1254, 108 L.Ed.2d 400 (1990).

Item (4), the civil penalties authorized by the statute, see § 11045(c), might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties--the only damages authorized by EPCRA--are payable to the United States Treasury. In requesting them, therefore, respondent seeks not remediation of its own injury--reimbursement for the costs it incurred as a result of the late filing--but vindication of the rule of law--the "undifferentiated public interest" in faithful execution of EPCRA. *Lujan v. Defenders of Wildlife*, supra, at 577, 112 S.Ct., at 2145; see also *Fairchild v. Hughes*, 258 U.S. 126, 129-130, 42 S.Ct. 274, 275, 66 L.Ed. 499 (1922). This does not suffice. Justice STEVENS thinks it is enough that respondent will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm. Post, at 1029. If that were so, our holdings in *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973), and *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450

(1976), are inexplicable. Obviously, such a principle would make the redressability requirement vanish. By the mere bringing of his suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. See, e.g., *Allen v. Wright*, 468 U.S. 737, 754-755, 104 S.Ct. 3315, 3326-3327, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-483, 102 S.Ct. 752, 763-765, 70 L.Ed.2d 700 (1982). Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.

Item (5), the "investigation and prosecution" costs "as authorized by Section 326(f)," would assuredly benefit respondent as opposed to the citizenry at large. Obviously, however, a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An "interest in attorney's fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S., at 480, 110 S.Ct., at 1255 (citing *Diamond v. Charles*, 476 U.S. 54, 70-71, 106 S.Ct. 1697, 1707-1708, 90 L.Ed.2d 48 (1986)). Respondent asserts that the "investigation costs" it seeks were incurred prior to the litigation, in digging up the emissions and storage information that petitioner should have filed, and that respondent needed for its own purposes. See Brief for Respondent 37-38. The recovery of such expenses unrelated to litigation would assuredly support Article III standing, but the problem is that § 326(f), which is the entitlement to monetary relief that the complaint invokes, covers only the "costs of litigation." § 11046(f). Respondent finds itself, in other words, impaled upon the horns of a dilemma: for the expenses to be reimbursable under the statute, they must be costs of litigation; but reimbursement of the costs of litigation cannot alone support standing.

The remaining relief respondent seeks (item (2), giving respondent authority to inspect petitioner's facility and records, and item (3), compelling petitioner to provide respondent copies of EPA compliance reports) is injunctive in nature. It cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating EPCRA in the future. See Brief for Respondent 36. The latter objective can of course be "remedial" for Article III purposes, when threatened injury is one of the gravamens of the complaint. If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm. But there is no such allegation here--and on the facts of the case, there seems no basis for it. Nothing supports the requested injunctive relief except respondent's generalized interest in deterrence, which is insufficient for purposes of Article III. See *Los Angeles v. Lyons*, 461 U.S., at 111, 103 S.Ct., at 1670.

The United States, as *amicus curiae*, argues that the injunctive relief does constitute remediation because "there is a presumption of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation," even if that occurs before a complaint is filed. Brief for the United States as *Amicus Curiae* 27-28, and n. 11. This makes a sword out of a shield. The "presumption" the Government refers to has been applied to refute

the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity. See, e.g., *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based. See *Los Angeles v. Lyons*, supra, at 109, 103 S.Ct., at 1669. To accept the Government's view would be to overrule our clear precedent requiring that the allegations of future injury be particular and concrete. *O'Shea v. Littleton*, 414 U.S. 488, 496-497, 94 S.Ct. 669, 676-677, 38 L.Ed.2d 674 (1974). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *Id.*, at 495-496, 94 S.Ct., at 676; see also *Renne v. Geary*, 501 U.S. 312, 320, 111 S.Ct. 2331, 2338, 115 L.Ed.2d 288 (1991) ("[T]he mootness exception for disputes capable of repetition yet evading review ... will not revive a dispute which became moot before the action commenced"). Because respondent alleges only past infractions of EPCRA, and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury.

* * *

Having found that none of the relief sought by respondent would likely remedy its alleged injury in fact, we must conclude that respondent lacks standing to maintain this suit, and that we and the lower courts lack jurisdiction to entertain it. However desirable prompt resolution of the merits EPCRA question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers. EPCRA will have to await another day.

The judgment is vacated and the case remanded with instructions to direct that the complaint be dismissed.

It is so ordered.

FRIENDS OF THE EARTH, INCORPORATED, et al., Petitioners,
v.
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

No. 98-822.

Supreme Court of the United States

Argued Oct. 12, 1999.

Decided Jan. 12, 2000.

Justice GINSBURG delivered the opinion of the Court.

I

A

In 1972, Congress enacted the Clean Water Act (Act), also known as the Federal Water Pollution Control Act, 86 Stat. 816, as amended, 33 U.S.C. §1251 *et seq.* Section 402 of the Act, 33 U.S.C. §1342, provides for the issuance, by the Administrator of the Environmental Protection Agency (EPA) or by authorized States, of National Pollutant Discharge Elimination System (NPDES) permits. NPDES permits impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation's waters. Noncompliance with a permit constitutes a violation of the Act. § 1342(h).

[1][2] Under §505(a) of the Act, a suit to enforce any limitation in an NPDES permit may be brought by any "citizen," defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§1365(a), (g). Sixty days before initiating a citizen suit, however, the would-be plaintiff must give notice of the alleged violation to the EPA, the State in which the alleged violation occurred, and the alleged violator. §1365(b)(1)(A). "[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus ... render unnecessary a citizen suit." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). Accordingly, we have held that citizens lack statutory standing under §505(a) to sue for violations that have ceased by the time the complaint is filed. *id.*, at 56-63, 108 S.Ct. 376. The Act also bars a citizen from suing if the EPA or the State has already commenced, and is "diligently prosecuting," an enforcement action. 33 U.S.C. §1365(b)(1)(B).

The Act authorizes district courts in citizen-suit proceedings to enter injunctions and to assess civil penalties, which are payable to the United States Treasury. §1365(a). In determining the amount of any civil penalty, the district court must take into account "the seriousness of the

violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." §1319(d). In addition, the court "may award costs of litigation {including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." §1365(d).

B

In 1986, defendant-respondent Laidlaw Environmental Services (TOC), Inc., bought a hazardous waste incinerator facility in Roebuck, South Carolina, that included a wastewater treatment plant. (The company has since changed its name to Safety-Kleen (Roebuck), Inc., but for simplicity we will refer to it as "Laidlaw" throughout.) Shortly after Laidlaw acquired the facility, the South Carolina Department of Health and Environmental Control (DHEC), acting under 33 U.S.C. §1342(a)(1), granted Laidlaw an NPDES permit authorizing the company to discharge treated water into the North Tyger River. The permit, which became effective on January 1, 1987, placed limits on Laidlaw's discharge of several pollutants into the river, including--of particular relevance to this case--mercury, an extremely toxic pollutant. The permit also regulated the flow, temperature, toxicity, and pH of the effluent from the facility, and imposed monitoring and reporting obligations.

Once it received its permit, Laidlaw began to discharge various pollutants into the waterway; repeatedly, Laidlaw's discharges exceeded the limits set by the permit. In particular, despite experimenting with several technological fixes, Laidlaw consistently failed to meet the permit's stringent 1.3 ppb (parts per billion) daily average limit on mercury discharges. The District Court later found that Laidlaw had violated the mercury limits on 489 occasions between 1987 and 1995. 956 F.Supp., at 613-621.

On April 10, 1992, plaintiff-petitioners Friends of the Earth (FOE) and Citizens Local Environmental Action Network, Inc. (CLEAN) (referred to collectively in this opinion, together with later joined plaintiff-petitioner Sierra Club, as "FOE") took the preliminary step necessary to the institution of litigation. They sent a letter to Laidlaw notifying the company of their intention to file a citizen suit against it under §505(a) of the Act after the expiration of the requisite 60-day notice period, *i.e.*, on or after June 10, 1992. Laidlaw's lawyer then contacted DHEC to ask whether DHEC would consider filing a lawsuit against Laidlaw. The District Court later found that Laidlaw's reason for requesting that DHEC file a lawsuit against it was to bar FOE's proposed citizen suit through the operation of 33 U.S.C. §1365(b)(1)(B). 890 F.Supp. 470, 478 {D.S.C.1995}. DHEC agreed to file a lawsuit against Laidlaw; the company's lawyer then drafted the complaint for DHEC and paid the filing fee. On June 9, 1992, the last day before FOE's 60-day notice period expired, DHEC and Laidlaw reached a settlement requiring Laidlaw to pay \$100,000 in civil penalties and to make " 'every effort' " to comply with its permit obligations. *Id.*, at 479-481.

On June 12, 1992, FOE filed this citizen suit against Laidlaw under §505(a) of the Act, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved for summary judgment on the ground that FOE

had failed to present evidence demonstrating injury in fact, and therefore lacked Article III standing to bring the lawsuit. Record, Doc. No. 43. In opposition to this motion, FOE submitted affidavits and deposition testimony from members of the plaintiff organizations. Record, Doc. No. 71 (Exhs. 41-51). The record before the District Court also included affidavits from the organizations' members submitted by FOE in support of an earlier motion for preliminary injunctive relief. Record, Doc. No. 21 (Exhs. 5-10). After examining this evidence, the District Court denied Laidlaw's summary judgment motion, finding--albeit "by the very slimmest of margins"--that FOE had standing to bring the suit. App. in No. 97-1246(C,A.4), pp. 207-208 (Tr. of Hearing 39- 40 (June 30, 1993)).

Laidlaw also moved to dismiss the action on the ground that the citizen suit was barred under 33 U.S.C. §1365(b)(1)(B) by DHEC's prior action against the company. The United States, appearing as *amicus curiae*, joined FOE in opposing the motion. After an extensive analysis of the Laidlaw-DHEC settlement and the circumstances under which it was reached, the District Court held that DHEC's action against Laidlaw had not been "diligently prosecuted"; consequently, the court allowed FOE's citizen suit to proceed. 890 F.Supp., at 499. The record indicates that after FOE initiated the suit, but before the District Court rendered judgment, Laidlaw violated the mercury discharge limitation in its permit 13 times. 956 F.Supp., at 621. The District Court also found that Laidlaw had committed 13 monitoring and 10 reporting violations during this period. *Id.*, at 601. The last recorded mercury discharge violation occurred in January 1995, long after the complaint was filed but about two years before judgment was rendered. *Id.*, at 621.

On January 22, 1997, the District Court issued its judgment. 956 F.Supp. 588 (D.S.C.). It found that Laidlaw had gained a total economic benefit of \$1,092,581 as a result of its extended period of noncompliance with the mercury discharge limit in its permit. *Id.*, at 603. The court concluded, however, that a civil penalty of \$405,800 was adequate in light of the guiding factors listed in 33 U.S.C. §1319(d). 956 F.Supp., at 610. In particular, the District Court stated that the lesser penalty was appropriate taking into account the judgment's "total deterrent effect." In reaching this determination, the court "considered that Laidlaw will be required to reimburse plaintiffs for a significant amount of legal fees." *Id.*, at 610-611. The court declined to grant FOE's request for injunctive relief, stating that an injunction was inappropriate because "Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992." *Id.*, at 611.

FOE appealed the District Court's civil penalty judgment, arguing that the penalty was inadequate, but did not appeal the denial of declaratory or injunctive relief. Laidlaw cross-appealed, arguing, among other things; that FOE lacked standing to bring the suit and that DHEC's action qualified as a diligent prosecution precluding FOE's litigation. The United States continued to participate as *amicus curiae* in support of FOE.

On July 16, 1998, the Court of Appeals for the Fourth Circuit issued its judgment. 149 F.3d 303. The Court of Appeals assumed without deciding that FOE initially had standing to bring the action, *id.*, at 306, n. 3, but went on to hold that the case had become moot. The appellate court stated, first, that the elements of Article III standing--injury, causation, and redressability--must persist at every stage of review, or else the action becomes moot. *Id.*, at

306. Citing our decision in *Steel Co.*, the Court of Appeals reasoned that the case had become moot because "the only remedy currently available to [FOE]--civil penalties payable to the government--would not redress any injury [FOE has] suffered." 149 F.3d, at 306-307. The court therefore vacated the District Court's order and remanded with instructions to dismiss the action. In a footnote, the Court of Appeals added that FOE's "failure to obtain relief on the merits of [its] claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.'" *Id.*, at 307, n. 5 (quoting 33 U.S.C. §1365(d)).

According to Laidlaw, after the Court of Appeals issued its decision but before this Court granted certiorari, the entire incinerator facility in Roebuck was permanently closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased. Respondent's Suggestion of Mootness 3.

We granted certiorari, 525 U.S. 1176, 119 S.Ct. 1111, 143 L.Ed.2d 107 (1999), to resolve the inconsistency between the Fourth Circuit's decision in this case and the decisions of several other Courts of Appeals, which have held that a defendant's compliance with its permit after the commencement of litigation does not moot claims for civil penalties under the Act. See, e.g., *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (C.A.7), cert. denied, 522 U.S. 981, 118 S.Ct. 442, 139 L.Ed.2d 379 (1997); *Natural Resources Defense Council, Inc. v. Texaco Rfg. and Mktg, Inc.*, 2 F.3d 493, 503-504 (C.A.3 1993); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-1021 (C.A.2 1993); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (C.A.11 1990).

II

A

The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, §2, underpins both our standing and our mootness jurisprudence, but the two inquiries differ in respects critical to the proper resolution of this case, so we address them separately. Because the Court of Appeals was persuaded that the case had become moot and so held, it simply assumed without deciding that FOE had initial standing. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (court may assume without deciding that standing exists in order to analyze mootness). But because we hold that the Court of Appeals erred in declaring the case moot, we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation. We therefore address the question of standing before turning to mootness.

[3][4] In *Lujan v. DefenderS of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), we held that, to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its

members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

[5] Laidlaw contends first that FOE lacked standing from the outset even to seek injunctive relief, because the plaintiff organizations failed to show that any of their members had sustained or faced the threat of any "injury in fact" from Laidlaw's activities. In support of this contention Laidlaw points to the District Court's finding, made in the course of setting the penalty amount, that there had been "no demonstrated proof of harm to the environment" from Laidlaw's mercury discharge violations. 956 F.Supp., at 602; see also *ibid.* ("[T]he NPDES permit violations at issue in this citizen suit did not result in any health risk or environmental harm.").

The relevant showing for purposes of Article ICI standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry {as the dissent in essence does, *post*, at 713-714) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit. Focusing properly on injury to the plaintiff, the District Court found that FOE had demonstrated sufficient injury to establish standing. App. in No. 97-1246(CA4), at 207-208 (Tr. of Hearing 39-40). For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw's facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges. Record, Doc. No. 71 (Exhs. 41, 42). Curtis reaffirmed these statements in extensive deposition testimony. For example, he testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw's discharges. *Ibid.* (Exh. 43, at 52-53; Exh. 44, at 33).

Other members presented evidence to similar effect. CLEAN member Angela Patterson attested that she lived two miles from the facility; that before Laidlaw operated the facility, she picnicked, walked, birdwatched, and waded in and along the North Tyger River because of the natural beauty of the area; that she no longer engaged in these activities in or near the river because she was concerned about harmful effects from discharged pollutants; and that she and her husband would like to purchase a home near the river but did not intend to do so, in part because of Laidlaw's discharges. Record, Doc. No. 21 {Exh. 10). CLEAN member Judy Pruitt averred that she lived one-quarter mile from Laidlaw's facility and would like to fish, hike, and picnic along the North Tyger River, but has refrained from those activities because of the discharges. *Ibid.* (Exh. 7). FOE member Linda Moore attested that she lived 20 miles from Roebuck, and would use the North Tyger River south of Roebuck and the land surrounding it for recreational purposes were she not concerned that the water contained harmful pollutants. Record, Doc. No. 71 (Exhs. 45, 46). In her deposition, Moore testified at length that she would hike, picnic, camp, swim, boat, and drive near or in the river were it not for her concerns about illegal discharges. *Ibid.* (Exh. 48, at 29, 36-37, 62-63, 72). CLEAN member Gail Lee attested that her home, which is near Laidlaw's facility, had a lower value than similar homes located

farther from the facility, and that she believed the pollutant discharges accounted for some of the discrepancy. Record, Doc. No. 21 (Exh. 9). Sierra Club member Norman Sharp averred that he had canoed approximately 40 miles downstream of the Laidlaw facility and would like to canoe in the North Tyger River closer to Laidlaw's discharge point, but did not do so because he was concerned that the water contained harmful pollutants. *Ibid*, (Exh. 8).

[6] These sworn statements, as the District Court determined, adequately documented injury in fact. We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be *lessened*" by the challenged activity. *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). See also *Defenders of Wildlife*. 504 U.S., at 562-563, 112 S.Ct. 2130 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.").

Our decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), is not to the contrary. In that case an environmental organization assailed the Bureau of Land Management's "land withdrawal review program," a program covering millions of acres, alleging that the program illegally opened up public lands to mining activities. The defendants moved for summary judgment, challenging the plaintiff organization's standing to initiate the action under the Administrative Procedure Act, 5 U.S.C. §702. We held that the plaintiff could not survive the summary judgment motion merely by offering "averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." 497 U.S., at 889, 110 S.Ct. 3177.

In contrast, the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in *National Wildlife Federation. Id.*, at 888, 110 S.Ct. 3177. Nor can the affiants' conditional statements--that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it--be equated with the speculative " 'some day' intentions" to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife*. 504 U.S., at 564, 112 S.Ct. 2130.

Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), relied on by the dissent, *post*, at 714, does not weigh against standing in this case. In *Lyons*, we held that a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat from the policy. 461 U.S., at 107, n. 7, 103 S.Ct. 1660. In the footnote from *Lyons* cited by the dissent, we noted that "[t]he reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct," and that his "subjective apprehensions" that such a recurrence would even *take place* were not enough to support standing. *Id.*, at 108, n. 8, 103 S.Ct. 1660. Here, in contrast, it is undisputed that Laidlaw's unlawful conduct-- discharging pollutants in excess of permit limits--was occurring at the time the complaint was filed. Under *Lyons*, then,

the only "subjective" issue here is "[t]he reasonableness of [the] fear" that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. Unlike the dissent, *post*, at 714, we see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact.

[7] Laidlaw argues next that even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Here the asserted defect is not injury but redressability. Civil penalties offer no redress to private plaintiffs, Laidlaw argues, because they are paid to the Government, and therefore a citizen plaintiff can never have standing to seek them.

[8] Laidlaw is right to insist that a plaintiff must demonstrate standing separately for each form of relief sought. See, e.g., *Lyons*, 461 U.S., at 109, 103 S.Ct. 1660 (notwithstanding the fact that plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief); see also *Lewis v. Casey*, 518 U.S. 343, 358, n. 6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[S]tanding is not dispensed in gross."). But it is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties.

We have recognized on numerous occasions that "all civil penalties have some deterrent effect." *Hudson v. United States*, 522 U.S. 93, 102, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); see also, e.g., *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 778, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). More specifically, Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect. "The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties. ... [The district court may] seek to deter future violations by basing the penalty on its economic impact." *Tull v. United States*, 481 U.S. 412, 422-423, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.

The dissent argues that it is the *availability* rather than the *imposition* of civil penalties that deters any particular polluter from continuing to pollute. *Post*, at 718-719. This argument misses the mark in two ways. First, it overlooks the interdependence of the availability and the imposition; a threat has no deterrent value unless it is credible that it will be carried out. Second, it is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties. A would-be polluter may or may not be dissuaded by the

existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again.

We recognize that there may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing. The fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case. Justice Frankfurter's observations for the Court, made in a different context nearly 60 years ago, hold true here as well:

"How to effectuate policy--the adaptation of means to legitimately sought ends--is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tarn* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis." *Tigner v. Texas*, 310 U.S. 141, 148, 60 S.Ct. 879, 84 L.Ed. 1124 (1940).

In this case we need not explore the outer limits of the principle that civil penalties provide sufficient deterrence to support redressability. Here, the civil penalties sought by FOE carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries by abating current violations and preventing future ones--as the District Court reasonably found when it assessed a penalty of \$405,800. 956 F.Supp., at 610-611.

Laidlaw contends that the reasoning of our decision in *Steel Co.* directs the conclusion that citizen plaintiffs have no standing to seek civil penalties under the Act. We disagree. *Steel Co.* established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit. 523 U.S., at 106-107, 118 S.Ct. 1003. We specifically noted in that case that there was no allegation in the complaint of any continuing or imminent violation, and that no basis for such an allegation appeared to exist. *Id.*, at 108, 118 S.Ct. 1003; see also *Gwaltney*, 484 U.S., at 59, 108 S.Ct. 376 ("the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past"). In short, *Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

The Court begins its analysis by finding injury in fact on the basis of vague affidavits that are undermined by the District Court's express finding that Laidlaw's discharges caused no demonstrable harm to the environment. It then proceeds to marry private wrong with public remedy in a union that violates traditional principles of federal standing--thereby permitting law

enforcement to be placed in the hands of private individuals. Finally, the Court suggests that to avoid mootness one needs even less of a stake in the outcome than the Court's watered-down requirements for initial standing. I dissent from all of this.

I

Plaintiffs, as the parties invoking federal jurisdiction, have the burden of proof and , persuasion as to the existence of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (hereinafter *Lujan*); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). The plaintiffs in this case fell far short of carrying their burden of demonstrating injury in fact. The Court cites affiants' testimony asserting that their enjoyment of the North Tyger River has been diminished due to "concern" that the water was polluted, and that they "believed" that Laidlaw's mercury exceedances had reduced the value of their homes. *Ante*, at 704-705. These averments alone cannot carry the plaintiffs' burden of demonstrating that they have suffered a "concrete and particularized" injury, *Lujan*, 504 U.S., at 560, 112 S.Ct. 2130. General allegations of injury may suffice at the pleading stage, but at summary judgment plaintiffs must set forth "specific facts" to support their claims. *Id.*, at 561, 112 S.Ct. 2130. And where, as here, the case has proceeded to judgment, those specific facts must be " 'supported adequately by the evidence adduced at trial,' " *ibid.* (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115, n. 31, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). In this case, the affidavits themselves are woefully short on "specific facts," and the vague allegations of injury they do make are undermined by the evidence adduced at trial.

Typically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him. This route to injury is barred in the present case, however, since the District Court concluded after considering all the evidence that there had been "no demonstrated proof of harm to the environment," 956 F.Supp. 588, 602 (D.S.C.1997), that the "permit violations at issue in this citizen suit did not result in any health risk or environmental harm," *ibid.*, that "[a]ll available data ... fail to show that Laidlaw's *actual* discharges have resulted in harm to the North Tyger River," *id.*, at 602-603, and that "the overall quality of the river exceeds levels necessary to support ... recreation in and on the water," *id.*, at 600.

The Court finds these conclusions unproblematic for standing, because "[O]le relevant showing for purposes of Article III standing ... is not injury to the environment but injury to the plaintiff." *Ante*, at 704. This statement is correct, as far as it goes. We have certainly held that a demonstration of harm to the environment is not *enough* to satisfy the injury- in-fact requirement unless the plaintiff can demonstrate how he personally was harmed. *E.g.*, *Lujan, supra*, at 563, 112 S.Ct. 2130. In the normal course, however, a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs. While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury. Ongoing "concerns" about the environment are not enough, for "[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiffs subjective apprehensions," *Los Angeles v. Lyons*, 461 U.S. 95, 107, n. 8, 103 S.Ct.

1660, 75 L.Ed.2d 675 (1983). At the very least, in the present case, one would expect to see evidence supporting the affidavits' bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw's violations, even though harmless to the environment, are somehow responsible for these effects. Cf. *Gladstone*, *supra*, at 115, 99 S.Ct. 1601 (noting that standing could be established by "convincing evidence" that a decline in real estate values was attributable to the defendant's conduct). Plaintiffs here have made no attempt at such a showing, but rely entirely upon unsupported and unexplained affidavit allegations of "concern."

Indeed, every one of the affiants deposed by Laidlaw cast into doubt the (in any event inadequate) proposition that subjective "concerns" actually affected their conduct. Linda Moore, for example, said in her affidavit that she would use the affected waterways for recreation if it were not for her concern about pollution. Record, Doc. No. 71 (Exhs. 45, 46). Yet she testified in her deposition that she had been to the river only twice, once in 1980 (when she visited someone who lived by the river) and once after this suit was filed. Record, Doc. No. 62 (Moore Deposition 23-24). Similarly, Kenneth Lee Curtis, who claimed he was injured by being deprived of recreational activity at the river, admitted that he had not been to the river since he was "a kid," *ibid.* (Curtis Deposition, pt. 2, p. 38), and when asked whether the reason he stopped visiting the river was because of pollution, answered "no," *id.*, at 39. As to Curtis's claim that the river "looke[d] and smell[ed] polluted," this condition, if present, was surely not caused by Laidlaw's discharges, which according to the District Court "did not result in any health risk or environmental harm." 956 F.Supp., at 602. The other affiants cited by the Court were not deposed, but their affidavits state either that they *would* use the river if it were not polluted or harmful (as the court subsequently found it is not), Record, Doc. No. 21 (Exhs. 7, 8, and 9), or said that the river looks polluted (which is also incompatible with the court's findings), *ibid.* (Exh. 10). These affiants have established nothing but "subjective apprehensions."

The Court is correct that the District Court explicitly found standing--albeit "by the very slimmest of margins," and as "an awfully close call." App. in No. 97-1246 (C.A.4), pp. 207-208 (Tr. of Hearing 39-40 (June 30, 1993)): That cautious finding, however, was made in 1993, long before the court's 1997 conclusion that Laidlaw's discharges did not harm the environment. As we have previously recognized, an initial conclusion that plaintiffs have standing is subject to reexamination, particularly if later evidence proves inconsistent with that conclusion. *Gladstone*, 441 U.S., at 115, and n. 31, 99 S.Ct. 1601; *Wyoming v. Oklahoma*, 502 U.S. 437, 446, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992). Laidlaw challenged the existence of injury in fact on appeal to the Fourth Circuit, but that court did not reach the question. Thus no lower court has reviewed the injury-in-fact issue in light of the extensive studies that led the District Court to conclude that the environment was not harmed by Laidlaw's discharges.

Inexplicably, the Court is untroubled by this, but proceeds to find injury in fact in the most casual fashion, as though it is merely confirming a careful analysis made below. Although we have previously refused to find standing based on the "conclusory allegations of an affidavit," *Litjail v. National Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), the Court is content to do just that today. By accepting plaintiffs' vague, contradictory, and unsubstantiated allegations of "concern" about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not

demonstrably harmed, the Court makes the injury-in-fact requirement a sham. If there are permit violations, and a member of a plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today's lenient standard.

II

The Court's treatment of the redressability requirement--which would have been unnecessary if it resolved the injury-in-fact question correctly--is equally cavalier. As discussed above, petitioners allege ongoing injury consisting of diminished enjoyment of the affected waterways and decreased property values. They allege that these injuries are caused by Laidlaw's continuing permit violations. But the remedy petitioners seek is neither recompense for their injuries nor an injunction against future violations. Instead, the remedy is a statutorily specified "penalty" for past violations, payable entirely to the United States Treasury. Only last Term, we held that such penalties do not redress any injury a citizen plaintiff has suffered from past violations. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106-107, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The Court nonetheless finds the redressability requirement satisfied here, distinguishing *Steel Co.* on the ground that in this case petitioners allege ongoing violations; payment of the penalties, it says, will remedy petitioners' injury by deterring future violations by Laidlaw. *Ante*, at 706-707. It holds that a penalty payable to the public "remedies" a threatened private harm, and suffices to sustain a private suit.

That holding has no precedent in our jurisprudence, and takes this Court beyond the "cases and controversies" that Article III of the Constitution has entrusted to its resolution. Even if it were appropriate, moreover, to allow Article III's remediation requirement to be satisfied by the indirect private consequences of a public penalty, those consequences are entirely too speculative in the present case. The new standing law that the Court makes--like all expansions of standing beyond the traditional constitutional limits--has grave implications for democratic governance. I shall discuss these three points in turn.

A

In *Linda R.S. v. Richard* 13410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973), the plaintiff, mother of an illegitimate child, sought, on behalf of herself, her child, and all others similarly situated, an injunction against discriminatory application of Art. 602 of the Texas Penal Code. Although that provision made it a misdemeanor for "any parent" to refuse to support his or her minor children under 18 years of age, it was enforced only against married parents. That refusal, the plaintiff contended, deprived her and her child of the equal protection of the law by denying them the deterrent effect of the statute upon the father's failure to fulfill his support obligation. The Court held that there was no Article III standing. There was no "'direct' relationship," it said, "between the alleged injury and the claim sought to be adjudicated," since "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.*, at 618, 93 S.Ct. 1146. "[Our cases] demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.*, at 619, 93 S.Ct. 1146.

Although the Court in *Linda R.S.* recited the "logical nexus" analysis of *Flast v. Cohen*,

392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), which has since fallen into desuetude, "it is clear that standing was denied ... because of the unlikelihood that the relief requested would redress appellant's claimed injury." , *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79, n. 24, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). There was no "logical nexus" between nonenforcement of the statute and Linda R. S.'s failure to receive support payments because "[t]he prospect that prosecution will result in payment of support" was "speculative," *Linda R. S. supra*, at 618, 93 S.Ct. 1146--that is to say, it was uncertain whether the relief would prevent the injury. Of course precisely the same situation exists here. The principle that "in American jurisprudence ... a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another" applies no less to prosecution for civil penalties payable to the State than to prosecution for criminal penalties owing to the State.

The Court's opinion reads as though the only purpose and effect of the redressability requirement is to assure that the plaintiff receive *some* of the benefit of the relief that a court orders. That is not so. If it were, a federal tort plaintiff fearing repetition of the injury could ask for tort damages to be paid not only to himself but to other victims as well, on the theory that those damages would have at least some deterrent effect beneficial to him. Such a suit is preposterous because the "remediation" that is the traditional business of Anglo-American courts is relief specifically tailored to the plaintiff's injury, and not *any* sort of relief that has some incidental benefit to the plaintiff. Just as a "generalized grievance" that affects the entire citizenry cannot satisfy the injury-in-fact requirement even though it aggrieves the plaintiff along with everyone else, see *Lujan*, 504 U.S., at 573-574, 112 S.Ct. 2130, so also a generalized remedy that deters all future unlawful activity against all persons cannot satisfy the remediation requirement, even though it deters (among other things) repetition of this particular unlawful activity against these particular plaintiffs.

Thus, relief against prospective harm is traditionally afforded by way of an injunction, the scope of which is limited by the scope of the threatened injury. *Lewis v. Casey*, 518 U.S. 343, 357-360, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); *Lyons*, 461 U.S., at 105-107, and n. 7, 103 S.Ct. 1660. In seeking to overturn that tradition by giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an "undifferentiated public interest" into an "individual right" vindicable in the courts. *Lujan supra*, at 577, 112 S.Ct. 2130; *Steel Co.*, 523 U.S., at 106, 118 S.Ct. 1003. The sort of scattershot redress approved today makes nonsense of our statement in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222, 94 S.Ct. 2925 (1974), that the requirement of injury in fact "insures the framing of relief no broader than required by the precise facts." A claim of particularized future injury has today been made the vehicle for pursuing generalized penalties for past violations, and a threshold showing of injury in fact has become a lever that will move the world.

B

As I have just discussed, it is my view that a plaintiff's desire to benefit from the deterrent effect of a public penalty for past conduct can never suffice to establish a case or controversy of the sort known to our law. Such deterrent effect is, so to speak, "speculative as a matter of law." Even if that were not so, however, the deterrent effect in the present case would surely be

speculative as a matter of fact.

The Court recognizes, of course, that to satisfy Article HI, it must be "likely," as opposed to "merely speculative," that a favorable decision will redress plaintiffs' injury, *Lujan, supra*, at 561, 112 S.Ct. 2130. See *ante*, at 704. Further, the Court recognizes that not *all* deterrent effects of *all* civil penalties will meet this standard--though it declines to "explore the outer limits" of adequate deterrence, *ante*, at 707. It concludes, however, that in the present case "the civil penalties sought by FOE carried with them a deterrent effect" that satisfied the "likely [rather than] speculative" standard. *Ibid.* There is little in the Court's opinion to explain why it believes this is so.

The Court cites the District Court's conclusion that the penalties imposed, along with anticipated fee awards, provided "adequate deterrence." *Ante*, at 703, 707; 956 F.Supp., at 611. There is absolutely no reason to believe, however, that this meant "deterrence adequate to prevent an injury to these plaintiffs that would otherwise occur." The statute does not even *mention* deterrence in general (much less deterrence of future harm to the particular plaintiff) as one of the elements that the court should consider in fixing the amount of the penalty. {That element can come in, if at all, under the last, residual category of "such other matters as justice may require." 33 U.S.C. §1319(d).} The statute does require the court to consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violationS, any good-faith efforts to comply with the applicable requirements, [and] the economic impact of the penalty on the violator...." *Ibid.*, see 956 F.Supp., at 601. The District Court meticulously discussed, in subsections (a) through (e) of the portion of its opinion entitled "Civil Penalty," *each one* of those specified factors, and then--under subsection (f) entitled "Other Matters As Justice May Require," it discussed "1. Laidlaw's Failure to Avail. Itself of the Reopener Clause," "2. Recent Compliance History," and "3. The Ever-Changing Mercury Limit." There is no mention whatever--in this portion of the opinion or anywhere else--of the degree of deterrence necessary to prevent future harm to these particular plaintiffs. Indeed, neither the District Court's final opinion (which contains the "adequate deterrence" statement) nor its earlier opinion dealing with the preliminary question whether South Carolina's previous lawsuit against Laidlaw constituted "diligent prosecution" that would bar citizen suit, see 33 U.S.C. §1365(b)(1)(B), displayed *any awareness* that deterrence *of future injury to the plaintiffs'* was necessary to support standing.

The District Court's earlier opinion did, however, quote with approval the passage from a District Court case which began: " 'Civil penalties seek to deter pollution by discouraging future violations. To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business.' " App. 122, quoting *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F.Supp. 1158, 1166 (D.N.J. 1989). When the District Court concluded the "Civil Penalty" section of its opinion with the statement that "Waken together, this court believes the above penalty, potential fee awards, and Laidlaw's own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case," 956 F.Supp., at 611, it was obviously harking back to this general statement of what the statutorily prescribed factors (and the "as justice may require" factors, which in this case did not include particularized or even generalized deterrence) were designed to achieve. It meant no more than that the court believed the civil penalty it had prescribed met the statutory standards.

The Court points out that we have previously said " all civil penalties have some deterrent effect,' " *ante*, at 706 (quoting *Hudson v. United States*, 522 U.S. 93, 102, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997)). That is unquestionably true: As a general matter, polluters as a class are deterred from violating discharge limits by the *availability* of civil penalties. However, none of the cases the Court cites focused on the deterrent effect of a single *imposition* of penalties on a particular lawbreaker. Even less did they focus on the question whether that particularized deterrent effect (if any) was enough to redress the injury of a citizen plaintiff in the sense required by Article III. They all involved penalties pursued by the government, not by citizens. See *id.*, at 96, 118 S.Ct. 488; *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 773, 114 S.Ct. 1937, 128 L.Ed.,2d 767 (1994); *Tull v. United States*, 481 U.S. 412, 414, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

If the Court had undertaken the necessary inquiry into whether significant deterrence of the plaintiffs' feared injury was "likely," it would have had to reason something like this: Strictly speaking, no polluter is deterred by a penalty for past pollution; he is deterred by the *fear* of a penalty for *future* pollution. That fear will be virtually nonexistent if the prospective polluter knows that all emissions violators are given a free pass; it will be substantial under an emissions program such as the federal scheme here, which is regularly and notoriously enforced; it will be even higher when a prospective polluter subject to such a regularly enforced program has as here, been the object of public charges of pollution and a suit for injunction; and it will surely be near the top of the graph when, as here, the prospective polluter has already been subjected to *state* penalties for the past pollution. The deterrence on which the plaintiffs must rely for standing in the present case is the marginal increase in Laidlaw's fear of future penalties that will be achieved by adding federal penalties for Laidlaw's past conduct.

I cannot say for certain that this marginal increase is zero; but I can say for certain that it is entirely speculative whether it will make the difference between these plaintiffs' suffering injury in the future and these plaintiffs' going unharmed. In fact, the assertion that it will "likely" do so is entirely farfetched. The speculativeness of that result is much greater than the speculativeness we found excessive in *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 43, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), where we held that denying §501(c)(3) charitable-deduction tax status to hospitals that refused to treat indigents was not sufficiently likely to assure future treatment of the indigent plaintiffs to support standing. And it is much greater than the speculativeness we found excessive in *Linda R.S. v. Richard D.*, discussed *supra*, at 715-716, where we said that "[t]he prospect that prosecution [for nonsupport] will ... result in payment of support can, at best, be termed only speculative," 410 U.S., at 618, 93 S.Ct. 1146.

In sum, if this case is, as the Court suggests, within the central core of "deterrence" standing, it is impossible to imagine what the "outer limits" could possibly be. The Court's expressed reluctance to define those "outer limits" serves only to disguise the fact that it has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests.

C

Article II of the Constitution commits it to the President to "take Care that the Laws be faithfully executed," Art. II, §3, and provides specific methods by which all persons exercising significant executive power are to be appointed, Art. II, §2. As Justice KENNEDY'S concurrence correctly observes, the question of the conformity of this legislation with Article II has not been argued--and I, like the Court, do not address it. But Article III, no less than Article II, has consequences for the structure of our government, see *Schlesinger*, 418 U.S., at 222, 94 S.Ct. 2925, and it is worth noting the changes in that structure which today's decision allows.

By permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA. Where, as is often the case, the plaintiff is a national association, it has significant discretion in choosing enforcement targets. Once the association is aware of a reported violation, it need not look long for an injured member, at least under the theory of injury the Court applies today. See *supra*, at 700-702. And once the target is chosen, the suit goes forward without meaningful public control. The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power--which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs! choosing. See Greve, *The Private Enforcement of Environmental Law*, 65 *Tulane L.Rev.* 339, 355-359 (1990). Thus is a public fine diverted to a private interest.

To be sure, the EPA may foreclose the citizen suit by itself bringing suit. 33 U.S.C. §1365(b)(1)(B). This allows public authorities to avoid private enforcement only by accepting private direction as to when enforcement should be undertaken--which is no less constitutionally bizarre. Elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed. See §1365(b)(1)(A) (providing that citizen plaintiff need only wait 60 days after giving notice of the violation to the government before proceeding with action). This is the predictable and inevitable consequence of the Court's allowing the use of public remedies for private wrongs.

* * *

By uncritically accepting vague claims of injury, the Court has turned the Article III requirement of injury in fact into a "mere pleading requirement," *Lujan*, 504 U.S., at 561, 112 S.Ct. 2130; and by approving the novel theory that public penalties can redress anticipated private wrongs, it has come close to "mak[ing] the redressability requirement vanish," *Steel Co.*, *supra*, at 107, 118 S.Ct. 1003. The undesirable and unconstitutional consequence of today's decision is to place the immense power of suing to enforce the public laws in private hands. I respectfully dissent.

VERMONT AGENCY OF NATURAL RESOURCES, Petitioner,
v.
UNITED STATES ex rd. STEVENS.

No. 98-1828.

Supreme Court of the United States

Argued Nov. 29, 1999.

Decided May 22, 2000.

Justice SCALIA delivered the opinion of the Court.

This case presents the question whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U.S.C. §§3729-3733.

I

Originally enacted in 1863, the False Claims Act (FCA) is the most frequently used of a handful of extant laws creating a form of civil action known as *qui tam*. As amended, the FCA imposes civil liability upon "rainy person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." 31 U.S.C. §3729(a). The defendant is liable for up to treble damages and a civil penalty of up to \$10,000 per claim. *Ibid*. An FCA action may be commenced in one of two ways. First, the Government itself may bring a civil action against the alleged false claimant. §3730(a). Second, as is relevant here, a private person (the relator) may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." §3730(b)(1).

If a relator initiates the FCA action, he must deliver a copy of the complaint, and any supporting evidence, to the Government, §3730(b)(2), which then has 60 days to intervene in the action, §§3730(b)(2), (4). If it does so, it assumes primary responsibility for prosecuting the action, §3730(c)(1), though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement, §3730(c)(2). If the Government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action, §3730(b)(4), and the Government may subsequently intervene only on a showing of "good cause," §3730(c)(3). The relator receives a share of any proceeds from the action--generally ranging from 15 to 25 percent if the Government intervenes (depending upon the relator's contribution to the prosecution), and from 25 to 30 percent if it does not (depending upon the court's assessment of what is reasonable)-- plus attorney's fees and costs. §§3730(d)(1)-(2).

Respondent Jonathan Stevens brought this *qui tam* action in the United States District

Court for the District of Vermont against petitioner Vermont Agency of Natural Resources, his former employer, alleging that it had submitted false claims to the Environmental Protection Agency (EPA) in connection with various federal grant programs administered by the EPA. Specifically, he claimed that petitioner had overstated the amount of time spent by its employees on the federally funded projects, thereby inducing the Government to disburse more grant money than petitioner was entitled to receive. The United States declined to intervene in the action. Petitioner then moved to dismiss, arguing that a State (or state agency) is not a "person" subject to liability under the FCA and that a *qui tam* action in federal court against a State is barred by the Eleventh Amendment. The District Court denied the motion in an unpublished order. App. to Pet. for Cert. 86-87. Petitioner then filed an interlocutory appeal, and the District Court stayed proceedings pending its outcome. Respondent United States intervened in the appeal in support of respondent Stevens. A divided panel of the Second Circuit affirmed, 162 F.3d 195 (1998), and we granted certiorari, 527 U.S. 1034, 119 S.Ct. 2391, 144 L.Ed.2d 792 (1999).

II

We first address the jurisdictional question whether respondent Stevens has standing under Article III of the Constitution to maintain this suit. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

[1] As we have frequently explained, a plaintiff must meet three requirements in order to establish Article III standing. See, e.g., *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). First, he must demonstrate "injury in fact"--a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (internal quotation marks and citation omitted). Second, he must establish causation--a "fairly ... trace [able]" connection between the alleged injury in fact and the alleged conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). And third, he must demonstrate redressability--a "substantial likelihood" that the requested relief will remedy the alleged injury in fact, *Id.*, at 45, 96 S.Ct. 1917. These requirements together constitute the "irreducible constitutional minimum" of standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), which is an "essential and unchanging part" of Article III's case-or-controversy requirement, *ibid.*, and a key factor in dividing the power of government between the courts and the two political branches, see *id.*, at 559-560, 112 S.Ct. 2130.

[2] Respondent Stevens contends that he is suing to remedy an injury in fact suffered by the United States. It is beyond doubt that the complaint asserts an injury to the United States--both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud. But "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party.*" *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (emphasis added); see also *Sierra Club v. Morton*, 405 U.S. 727, 734- 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). It would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, *in whose name* (as the statute provides, see 31 U.S.C. §3730(b)) the suit is brought--and that the relator's bounty is simply the fee he receives

out of the United States' recovery for filing and/or prosecuting a successful action on behalf of the Government. This analysis is precluded, however, by the fact that the statute gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery. Thus, it provides that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government," §3730(b) {emphasis added}; gives the relator "the right to continue as a party to the action" even when the Government itself has assumed "primary responsibility" for prosecuting it, §3730(c)(1); entitles the relator to a hearing before the Government's voluntary dismissal of the suit, §3730(c)(2)(A); and prohibits the Government from settling the suit over the relator's objection without a judicial determination of "fair[ness], adequa[cy] and reasonable[ness]," §3730(c)(2)(B). For the portion of the recovery retained by the relator, therefore, some explanation of standing other than agency for the Government must be identified.

[3][4] There is no doubt, of course, that as to this portion of the recovery--the bounty he will receive if the suit is successful--a *qui tarn* relator has a "concrete private interest in the outcome of [the] suit." *Lujan, supra*, at 573, 112 S.Ct. 2130. But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Sierra Club, supra*, at 734-735, 92 S.Ct. 1361. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. See *Lujan, supra*, at 560-561, 112 S.Ct. 2130. A *qui tarn* relator has suffered no such invasion--indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. See *Warth, supra*, at 500, 95 S.Ct. 2197. As we have held in another context, however, an interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes. See *Steel Co.*, 523 U.S., at 107, 118 S.Ct. 1003 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit"); see also *Diamond v. Charles*, 476 U.S. 54, 69-71, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) (holding that assessment of attorney's fees against a party does not confer standing to pursue the action on appeal).

[5] We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits, see, e.g., *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 465, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 829, 70 S.Ct. 894, 94 L.Ed. 1312 (1950); *Hubbard v. Tod*, 171 U.S. 474, 475, 19 S.Ct. 14, 43 L.Ed. 246 (1898)--and also suits by subrogees, who have been described as "equitable assign[ees]," L. Simpson, *Law of Suretyship* 205 (1950); see, e.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 531, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995); *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 288, 113 S.Ct. 2085, 124 L.Ed.2d 194 (1993). We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

We are confirmed in this conclusion by the long tradition of *qui tam* actions in England and the American Colonies. That history is particularly relevant to the constitutional standing inquiry since, as we have said elsewhere, Article III's restriction of the judicial power to "Cases" and "Controversies" is properly understood to mean "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co., supra*, at 102, 118 S.Ct. 1003; see also *Coleman v. Miller*, 307 U.S. 433, 460, 59 S.Ct. 972, 83 L.Ed. 1385 (1939) (opinion of Frankfurter, J.) (the Constitution established that "[l]judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies' ").

Qui tam actions appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf. See, e.g., *Prior of Lewes v. De Holt* (1300), reprinted in 48 Selden Society 198 (1931). Suit in this dual capacity was a device for getting their private claims into the respected royal courts, which generally entertained only matters involving the Crown's interests. See Milsorn, *Trespass from Henry III to Edward III, Part III: More Special Writs and Conclusions*, 74 L.Q. Rev. 561, 585 (1958). Starting in the 14th century, as the royal courts began to extend jurisdiction to suits involving wholly private wrongs, the common-law *qui tarn* action gradually fell into disuse, although it seems to have remained technically available for several centuries. See 2 W. Hawkins, *Pleas of the Crown* 369 (8th ed. 1824).

At about the same time, however, Parliament began enacting statutes that explicitly provided for *qui tarn* suits. These were of two types: those that allowed injured parties to sue in vindication of their own interests (as well as the Crown's), see, e.g., *Statute Providing a Remedy for Him Who Is Wrongfully Pursued in the Court of Admiralty*, 2 Hen. IV, ch. 11 (1400), and--more relevant here--those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves, see, e.g., *Statute Prohibiting the Sale of Wares After the Close of Fair*, 5 Edw. III, ch. 5 (1331); see generally *Common Informers Act*, 14 & 15 Geo. VI, ch. 39, sched. (1951) (listing informer statutes). Most, though not all, of the informer statutes expressly gave the informer a cause of action, typically by bill, plaint, information, or action of debt. See, e.g., *Bill for Leases of Hospitals, Colleges, and Other Corporations*, 33 Hen. VIII, ch. 27 (1541); *Act to Avoid Horse-Stealing*, 31 Eliz. I, ch. 12, §2 (1589); *Act to Prevent the Over-Charge of the People by Stewards of Court-Leets and Court-Barons*, 2 Jac. I, ch. 5 (1604).

For obvious reasons, the informer statutes were highly subject to abuse, see M. Davies, *The Enforcement of English Apprenticeship* 58-61 (1956)-- particularly those relating to obsolete offenses, see generally 3 E. Coke, *Institutes of the Laws of England* 191 (4th ed. 1797) (informer prosecutions under obsolete statutes had been used to "vex and entangle the subject"). Thus, many of the old enactments were repealed, see *Act for Continuing and Reviving of Divers Statutes and Repeal of Divers Others*, 21 Jac. I, ch. 28, §11 1623), and statutes were passed deterring and penalizing vexatious informers, limiting the locations in which informer suits could be brought, and subjecting such suits to relatively short statutes of limitation, see *Act to Redress Disorders in Common Informers*, 18 Eliz. I, ch. 5 (1576); *Act Concerning Informers*, 31 Eliz. I, ch. 5 (1589); see generally Davies, *supra*. at 63-76. Nevertheless, laws allowing *qui tam* suits

by informers continued to exist in England until 1951, when all of the remaining ones were repealed. See Note, The History and Development of Qui Tam, 1972 Wash. U.L.Q. 81, 88, and n. 44 (citing Common Informers Act, 14 & 15 Geo. VI, ch. 39 (1951)).

Qui lam actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution. Although there is no evidence that the Colonies allowed common-law *qui tarn* actions (which, as we have noted, were dying out in England by that time), they did pass several informer statutes expressly authorizing *qui tam* suits. See, e.g., Act for the Restraining and Punishing of Privateers and Pirates, 1st Assembly, 4th Sess. (N.Y. 1692), reprinted in 1 Colonial Laws of New York 279, 281 (1894) (allowing informers to sue for, and receive share of, fine imposed upon officers who neglect their duty to pursue privateers and pirates). Moreover, immediately after the framing, the First Congress enacted a considerable number of informer statutes. Like their English counterparts, some of them provided both a bounty and an express cause of action; others provided a bounty only.

We think this history well nigh conclusive with respect to the question before us here: whether *qui tarn* actions were "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S., at 102, 118 S.Ct. 1003. When combined with the theoretical justification for relator standing discussed earlier, it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing. We turn, then, to the merits.

SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER *v.* EDITH SCHLAIN
WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE
ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[July __, 2013]

JUSTICE KENNEDY delivered the opinion of the Court.

....

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, *e.g.*, *Baehr v. Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993), and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See 28 U. S. C. §1738C.

Section 3 is at issue here. It amends the Dictionary Act in Title 1, §7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U. S. C. §7.

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, *Defense of Marriage Act: Update to Prior Report 1* (GAO–04–353R, 2004).

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer’s health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one. See 699 F. 3d 169, 177–178 (CA2 2012).

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” 26 U. S. C. §2056(a). Windsor paid \$363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a “surviving spouse.” Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the

guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U. S. C. §530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s §3. Noting that “the Department has previously defended DOMA against . . . challenges involving legally married same-sex couples,” App. 184, the Attorney General informed Congress that “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.” *Id.*, at 191. The Department of Justice has submitted many §530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government’s defense of a statute and has issued a judgment against it. This case is unusual, however, because the §530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive’s own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although “the President . . . instructed the Department not to defend the statute in *Windsor*,” he also decided “that Section 3 will continue to be enforced by the Executive Branch” and that the United States had an “interest in providing Congress a full and fair opportunity to participate in the litigation of those cases.” *Id.*, at 191–193. The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to “recogniz[e] the judiciary as the final arbiter of the constitutional claims raised.” *Id.*, at 192.

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of §3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG’s motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. See Fed. Rule Civ. Proc. 24(a)(2).

On the merits of the tax refund suit, the District Court ruled against the United States. It held that §3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court’s judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and *Windsor* had urged. The United States has not complied with the judgment. *Windsor* has not received her refund, and the Executive Branch continues to enforce §3 of DOMA.

In granting certiorari on the question of the constitutionality of §3 of DOMA, the Court requested argument on two additional questions: whether the United States’ agreement with *Windsor*’s legal position precludes further review and whether BLAG has standing to appeal the case. All parties agree that the Court has jurisdiction to decide this case; and, with the case in that framework, the Court appointed Professor Vicki Jackson as *amicus curiae* to argue the position that the Court lacks jurisdiction to hear the dispute. 568 U. S. ____ (2012). She has ably discharged her duties.

....

II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here.

There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution. “[A] taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer.” *Hein v. Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 599 (2007) (plurality opinion) (emphasis deleted). Windsor suffered a redressable injury when she was required to pay estate taxes from which, in her view, she was exempt but for the alleged invalidity of §3 of DOMA.

The decision of the Executive not to defend the constitutionality of §3 in court while continuing to deny refunds and to assess deficiencies does introduce a complication. Even though the Executive’s current position was announced before the District Court entered its judgment, the Government’s agreement with Windsor’s position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government’s position—agreeing with Windsor’s legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. Windsor, the Government, BLAG, and the *amicus* appear to agree upon that point. The disagreement is over the standing of the parties, or aspiring parties, to take an appeal in the Court of Appeals and to appear as parties in further proceedings in this Court.

The *amicus*’ position is that, given the Government’s concession that §3 is unconstitutional, once the District Court ordered the refund the case should have ended; and the *amicus* argues the Court of Appeals should have dismissed the appeal. The *amicus* submits that once the President agreed with Windsor’s legal position and the District Court issued its judgment, the parties were no longer adverse. From this standpoint the United States was a prevailing party below, just as Windsor was. Accordingly, the *amicus* reasons, it is inappropriate for this Court to grant certiorari and proceed to rule on the merits; for the United States seeks no redress from the judgment entered against it.

This position, however, elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise. See *Warth v. Seldin*, 422 U. S. 490, 498 (1975). The latter are “essentially matters of judicial self-governance.” *Id.*, at 500. The Court has kept these two strands separate: “Article III standing, which enforces the Constitution’s case-or-controversy requirement, see *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 559–562 (1992); and prudential standing, which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction,’ *Allen [v. Wright]*, 468 U. S. [737,] 751 [(1984)].” *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 11–12 (2004).

The requirements of Article III standing are familiar:

“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural or hypothetical.”’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be

‘redressed by a favorable decision.’ ” *Lujan, supra*, at 560–561 (footnote and citations omitted).

Rules of prudential standing, by contrast, are more flexible “rule[s] . . . of federal appellate practice,” *Deposit Guaranty Nat. Bank v. Roper*, 445 U. S. 326, 333 (1980), designed to protect the courts from “decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.” *Warth, supra*, at 500.

In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is “a real and immediate economic injury,” *Hein*, 551 U. S., at 599, indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court’s order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with §3 of DOMA, which results in Windsor’s liability for the tax. Windsor’s ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court’s ruling.

This Court confronted a comparable case in *INS v. Chadha*, 462 U. S. 919 (1983). A statute by its terms allowed one House of Congress to order the Immigration and Naturalization Service (INS) to deport the respondent Chadha. There, as here, the Executive determined that the statute was unconstitutional, and “the INS presented the Executive’s views on the constitutionality of the House action to the Court of Appeals.” *Id.*, at 930. The INS, however, continued to abide by the statute, and “the INS brief to the Court of Appeals did not alter the agency’s decision to comply with the House action ordering deportation of Chadha.” *Ibid.* This Court held “that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take,” *ibid.*, regardless of whether the agency welcomed the judgment. . . .

....

While these principles suffice to show that this case presents a justiciable controversy under Article III, the prudential problems inherent in the Executive’s unusual position require some further discussion. The Executive’s agreement with Windsor’s legal argument raises the risk that instead of a “‘real, earnest and vital controversy,’” the Court faces a “friendly, non-adversary, proceeding . . . [in which] ‘a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.’ ” *Ashwander v. TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 339, 345 (1892)). Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon “that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U. S. 186, 204 (1962).

There are, of course, reasons to hear a case and issue a ruling even when one party is reluctant to prevail in its position. Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to “countervailing considerations [that] may outweigh the concerns underlying the

usual reluctance to exert judicial power.” *Warth*, 422 U. S., at 500–501. One consideration is the extent to which adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative act. . . .

In the case now before the Court the attorneys for BLAG present a substantial argument for the constitutionality of §3 of DOMA. BLAG’s sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA’s sweep involving over 1,000 federal statutes and a myriad of federal regulations. For instance, the opinion of the Court of Appeals for the First Circuit, addressing the validity of DOMA in a case involving regulations of the Department of Health and Human Services, likely would be vacated with instructions to dismiss, its ruling and guidance also then erased. See *Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F. 3d 1 (CA1 2012). Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent. That numerical prediction may not be certain, but it is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense. True, the very extent of DOMA’s mandate means that at some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circumstances, the very term “prudential” counsels that it is a proper exercise of the Court’s responsibility to take jurisdiction. For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court’s ruling and its affirmance in the Court of Appeals on BLAG’s own authority.

The Court’s conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive’s failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, as noted, the Government’s agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive’s agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court’s primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President’s. This would undermine the clear dictate of the separation-of-powers principle that “when an Act of Congress is alleged to conflict with the Constitution, [i]t is emphatically the province and duty of the judicial department to say what the law is.” *Zivotofsky v. Clinton*, 566 U. S. ___, ___ (2012) (slip op., at 7) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress’ enactment solely on its own initiative and without any determination from the Court.

The Court’s jurisdictional holding, it must be underscored, does not mean the arguments for dismissing this dispute on prudential grounds lack substance. Yet the difficulty the Executive faces should be acknowledged. When the Executive makes a principled determination that a statute is unconstitutional, it faces a difficult choice. Still, there is no suggestion here that it is appropriate for the

Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise. But this case is not routine. And the capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court's decision to proceed to the merits.

....

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER *v.* EDITH SCHLAIN
WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE
ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[July __, 2013]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

....

I A

The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges’ intrusion into their lives. They gave judges, in Article III, only the “judicial Power,” a power to decide not abstract questions but real, concrete “Cases” and “Controversies.” Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we *doing* here?

The answer lies at the heart of the jurisdictional portion of today’s opinion, where a single sentence lays bare the majority’s vision of our role. The Court says that we have the power to decide this case because if we did not, then our “primary role in determining the constitutionality of a law” (at least one that “has inflicted real injury on a plaintiff”) would “become only secondary to the President’s.” *Ante*, at 12. But wait, the reader wonders—Windsor won below, and so *cured* her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we “undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is.” *Ibid.* (internal quotation marks and brackets omitted).

That is jaw-dropping. It is an assertion of judicial supremacy over the people’s Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere “primary” in its role.

This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of “primary” power, and so created branches of government that would be “perfectly co-ordinate by the terms of their common commission,” none of which branches could “pretend to an exclusive or superior right of settling the boundaries between their respective powers.” *The Federalist*, No. 49, p. 314 (C. Rossiter ed. 1961) (J. Madison). The people did this to protect themselves. They did it to guard their right to self-rule against the black-robed supremacy that today’s majority finds so attractive. So it was that Madison could confidently state, with no fear of contradiction, that there was nothing of “greater intrinsic value” or “stamped with the authority of more enlightened patrons of liberty” than a government of separate and coordinate powers.

Id., No. 47, at 301.

For this reason we are quite forbidden to say what the law is whenever (as today’s opinion asserts) “ ‘an Act of Congress is alleged to conflict with the Constitution.’ ” *Ante*, at 12. We can do so only when that allegation will determine the outcome of a lawsuit, and is contradicted by the other party. The “judicial Power” is not, as the majority believes, the power “ ‘to say what the law is,’ ” *ibid.*, giving the Supreme Court the “primary role in determining the constitutionality of laws.” The majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court and allows that primacy to be exercised in contexts other than a lawsuit. See, *e.g.*, Basic Law for the Federal Republic of Germany, Art. 93. The judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons. Sometimes (though not always) the parties before the court disagree not with regard to the facts of their case (or not *only* with regard to the facts) but with regard to the applicable law—in which event (and *only* in which event) it becomes the “ ‘province and duty of the judicial department to say what the law is.’ ” *Ante*, at 12.

In other words, declaring the compatibility of state or federal laws with the Constitution is not only not the “primary role” of this Court, it is not a separate, free-standing role *at all*. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us. Then, and only then, does it become “ ‘the province and duty of the judicial department to say what the law is.’ ” That is why, in 1793, we politely declined the Washington Administration’s request to “say what the law is” on a particular treaty matter that was not the subject of a concrete legal controversy. 3 Correspondence and Public Papers of John Jay 486–489 (H. Johnston ed. 1893). And that is why, as our opinions have said, some questions of law will *never* be presented to this Court, because there will never be anyone with standing to bring a lawsuit. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U. S. 208, 227 (1974); *United States v. Richardson*, 418 U. S. 166, 179 (1974). As Justice Brandeis put it, we cannot “pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding”; absent a “ ‘real, earnest and vital controversy between individuals,’ ” we have neither any work to do nor any power to do it. *Ashwander v. TVA*, 297 U. S. 288, 346 (1936) (concurring opinion) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 339, 345 (1892)). Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

That is completely absent here. Windsor’s injury was cured by the judgment in her favor. And while, in ordinary circumstances, the United States is injured by a directive to pay a tax refund, this suit is far from ordinary. Whatever injury the United States has suffered will surely not be redressed by the action that it, as a litigant, asks us to take. The final sentence of the Solicitor General’s brief on the merits reads: “For the foregoing reasons, the judgment of the court of appeals *should be affirmed.*” Brief for United States (merits) 54 (emphasis added). That will not cure the Government’s injury, but carve it into stone. One could spend many fruitless afternoons ransacking our library for any other petitioner’s brief seeking an affirmance of the judgment against it.¹ What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct. And the same was true in the Court of Appeals: Neither party sought to undo the judgment for Windsor, and so that court should

¹For an even more advanced scavenger hunt, one might search the annals of Anglo-American law for another “Motion to Dismiss” like the one the United States filed in District Court: It argued that the court should agree “with Plaintiff and the United States” and “*not* dismiss” the complaint. (Emphasis mine.) Then, having gotten exactly what it asked for, the United States promptly appealed.

have dismissed the appeal (just as we should dismiss) for lack of jurisdiction. Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there. The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States.

We have never before agreed to speak—to “say what the law is”—where there is no controversy before us. In the more than two centuries that this Court has existed as an institution, we have never suggested that we have the power to decide a question when every party agrees with both its nominal opponent *and the court below* on that question’s answer. The United States reluctantly conceded that at oral argument. See Tr. of Oral Arg. 19–20.

The closest we have ever come to what the Court blesses today was our opinion in *INS v. Chadha*, 462 U. S. 919 (1983). But in that case, two parties to the litigation disagreed with the position of the United States and with the court below: the House and Senate, which had intervened in the case. Because *Chadha* concerned the validity of a mode of congressional action—the one-house legislative veto—the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers. The Executive choosing not to defend that power,² we permitted the House and Senate to intervene. Nothing like that is present here.

....

The majority’s discussion of the requirements of Article III bears no resemblance to our jurisprudence. It accuses the *amicus* (appointed to argue against our jurisdiction) of “elid[ing] the distinction between . . . the jurisdictional requirements of Article III and the prudential limits on its exercise.” *Ante*, at 6. It then proceeds to call the requirement of adverseness a “prudential” aspect of standing. *Of standing*. That is incomprehensible. A plaintiff (or appellant) can have all the standing in the world—satisfying all three standing requirements of *Lujan* that the majority so carefully quotes, *ante*, at 7—and yet no Article III controversy may be before the court. Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint. It is not the *amicus* that has done the eliding of distinctions, but the majority, calling the quite separate Article III requirement of adverseness between the parties an element (which it then pronounces a “prudential” element) of standing. The question here is not whether, as the majority puts it, “the United States retains a stake sufficient to support Article III jurisdiction,” *ibid.* the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor. There is not.

I find it wryly amusing that the majority seeks to dismiss the requirement of party-adverseness as nothing more than a “prudential” aspect of the sole Article III requirement of standing. (Relegating a jurisdictional requirement to “prudential” status is a wondrous device, enabling courts to ignore the

² There the Justice Department’s refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers. There is no justification for the Justice Department’s abandoning the law in the present case. The majority opinion makes a point of scolding the President for his “failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions,” *ante*, at 12. But the rebuke is tongue-in-cheek, for the majority gladly gives the President what he wants. Contrary to all precedent, it decides this case (and even decides it the way the President wishes) *despite* his abandonment of the defense and the consequent absence of a case or controversy.

requirement whenever they believe it “prudent”—which is to say, a good idea.) Half a century ago, a Court similarly bent upon announcing its view regarding the constitutionality of a federal statute achieved that goal by effecting a remarkably similar *but completely opposite* distortion of the principles limiting our jurisdiction. The Court’s notorious opinion in *Flast v. Cohen*, 392 U. S. 83, 98–101 (1968), held that *standing* was merely an element (which it pronounced to be a “prudential” element) of the sole Article III requirement of *adverseness*. We have been living with the chaos created by that power-grabbing decision ever since, see *Hein v. Freedom From Religion Foundation, Inc.*, 551 U. S. 587 (2007), as we will have to live with the chaos created by this one.

The authorities the majority cites fall miles short of supporting the counterintuitive notion that an Article III “controversy” can exist without disagreement between the parties. . . . The “prudential” discretion to which both those cases refer was the discretion to *deny* an appeal even when a live controversy exists—not the discretion to *grant* one when it does not. The majority can cite no case in which this Court entertained an appeal in which both parties urged us to affirm the judgment below. And that is because the existence of a controversy is not a “prudential” requirement that we have invented, but an essential element of an Article III case or controversy. The majority’s notion that a case between friendly parties can be entertained so long as “adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor” the other side of the issue, *ante*, at 10, effects a breathtaking revolution in our Article III jurisprudence.

It may be argued that if what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional. Where the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the litigation should end in an order or a consent decree enjoining enforcement. This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce nor to defend the statute he believed to be unconstitutional, see Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (Nov. 2, 1994)—in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive’s determination of unconstitutionality would have escaped this Court’s desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. Or the President could have evaded presentation of the constitutional issue to this Court simply by declining to appeal the District Court and Court of Appeals dispositions he agreed with. Be sure of this much: If a President wants to insulate his judgment of unconstitutionality from our review, he can. What the views urged in this dissent produce is not insulation from judicial review but insulation from Executive contrivance.

The majority brandishes the famous sentence from *Marbury v. Madison*, 1 Cranch 137, 177 (1803) that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Ante*, at 12 (internal quotation marks omitted). But that sentence neither says nor implies that it is *always* the province and duty of the Court to say what the law is—much less that its responsibility in that regard is a “primary” one. The very next sentence of Chief Justice Marshall’s opinion makes the crucial qualification that today’s majority ignores: “*Those who apply the rule to particular cases*, must of necessity expound and interpret that rule.” 1 Cranch, at 177 (emphasis added). Only when a “particular case” is before us—that is, a controversy that it is our business to resolve under Article III—do we have the province and duty to pronounce the law. . . .

....

There is, in the words of *Marbury*, no “necessity [to] expound and interpret” the law in this case; just a desire to place this Court at the center of the Nation’s life. 1 Cranch, at 177.

....

SUPREME COURT OF THE UNITED STATES

No. 12–144

DENNIS HOLLINGSWORTH, ET AL., PETITIONERS v. KRISTIN M. PERRY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July ____, 2013]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

....

I

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. *In re Marriage Cases*, 43 Cal. 4th 757, 183 P. 3d 384. Later that year, California voters passed the ballot initiative at the center of this dispute, known as Proposition 8. That proposition amended the California Constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California.” Cal. Const., Art. I, §7.5. Shortly thereafter, the California Supreme Court rejected a procedural challenge to the amendment, and held that the Proposition was properly enacted under California law. *Strauss v. Horton*, 46 Cal. 4th 364, 474–475, 207 P. 3d 48, 122 (2009).

....

Respondents, two same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The complaint named as defendants California’s Governor, attorney general, and various other state and local officials responsible for enforcing California’s marriage laws. Those officials refused to defend the law, although they have continued to enforce it throughout this litigation. The District Court allowed petitioners—the official proponents of the initiative, see Cal. Elec. Code Ann. §342 (West 2003)—to intervene to defend it. After a 12-day bench trial, the District Court declared Proposition 8 unconstitutional, permanently enjoining the California officials named as defendants from enforcing the law, and “directing the official defendants that all persons under their control or supervision” shall not enforce it. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (ND Cal. 2010).

Those officials elected not to appeal the District Court order. When petitioners did, the Ninth Circuit asked them to address “why this appeal should not be dismissed for lack of Article III standing.” *Perry v. Schwarzenegger*, Civ. No. 10–16696 (CA9, Aug. 16, 2010), p. 2. After briefing and argument, the Ninth Circuit certified a question to the California Supreme Court:

“Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative’s validity or the authority to assert the State’s interest in the initiative’s validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.” *Perry v. Schwarzenegger*, 628 F. 3d 1191, 1193 (2011).

The California Supreme Court agreed to decide the certified question, and answered in the

affirmative. Without addressing whether the proponents have a particularized interest of their own in an initiative’s validity, the court concluded that “[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.” *Perry v. Brown*, 52 Cal. 4th 1116, 1127, 265 P. 3d 1002, 1007 (2011).

Relying on that answer, the Ninth Circuit concluded that petitioners had standing under federal law to defend the constitutionality of Proposition 8. California, it reasoned, “ ‘has standing to defend the constitutionality of its [laws],’ ” and States have the “prerogative, as independent sovereigns, to decide for themselves who may assert their interests.” *Perry v. Brown*, 671 F. 3d 1052, 1070, 1071 (2012) (quoting *Diamond v. Charles*, 476 U. S. 54, 62 (1986)). “All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.” 671 F. 3d, at 1072.

....

II

....

Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an “actual controversy” persist throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, 568 U. S. ___, ___ (2013) (slip op., at 4) (internal quotation marks omitted). That means that standing “must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.” *Arizonans for Official English v. Arizona*, 520 U. S. 43, 64 (1997). We therefore must decide whether petitioners had standing to appeal the District Court’s order.

Respondents initiated this case in the District Court against the California officials responsible for enforcing Proposition 8. The parties do not contest that respondents had Article III standing to do so. Each couple expressed a desire to marry and obtain “official sanction” from the State, which was unavailable to them given the declaration in Proposition 8 that “marriage” in California is solely between a man and a woman. App. 59.

After the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it, however, the inquiry under Article III changed. Respondents no longer had any injury to redress—they had won—and the state officials chose not to appeal.

The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a “personal and individual way.” *Defenders of Wildlife, supra*, at 560, n. 1. He must possess a “direct stake in the outcome” of the case. *Arizonans for Official English, supra*, at 64 (internal quotation marks omitted). Here, however, petitioners had no “direct stake” in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

We have repeatedly held that such a “generalized grievance,” no matter how sincere, is insufficient

to confer standing. A litigant “raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Defenders of Wildlife, supra*, at 573–574; see *Lance v. Coffman*, 549 U. S. 437, 439 (2007) (*per curiam*) (“Our refusal to serve as a forum for generalized grievances has a lengthy pedigree.”); *Allen v. Wright*, 468 U. S. 737, 754 (1984) (“an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court”); *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923) (“The party who invokes the [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.”).

Petitioners argue that the California Constitution and its election laws give them a “‘unique,’ ‘special,’ and ‘distinct’ role in the initiative process—one ‘involving both authority and responsibilities that differ from other supporters of the measure.’” Reply Brief 5 (quoting 52 Cal. 4th, at 1126, 1142, 1160, 265 P. 3d, at 1006, 1017–1018, 1030). True enough—but only when it comes to the process of enacting the law. Upon submitting the proposed initiative to the attorney general, petitioners became the official “proponents” of Proposition 8. Cal. Elec. Code Ann. §342 (West 2003). As such, they were responsible for collecting the signatures required to qualify the measure for the ballot. §§9607–9609. After those signatures were collected, the proponents alone had the right to file the measure with election officials to put it on the ballot. §9032. Petitioners also possessed control over the arguments in favor of the initiative that would appear in California’s ballot pamphlets. §§9064, 9065, 9067, 9069.

But once Proposition 8 was approved by the voters, the measure became “a duly enacted constitutional amendment or statute.” 52 Cal. 4th, at 1147, 265 P. 3d, at 1021. Petitioners have no role—special or otherwise—in the enforcement of Proposition 8. See *id.*, at 1159, 265 P. 3d, at 1029 (petitioners do not “possess any official authority . . . to directly enforce the initiative measure in question”). They therefore have no “personal stake” in defending its enforcement that is distinguishable from the general interest of every citizen of California. *Defenders of Wildlife, supra*, at 560–561.

Article III standing “is not to be placed in the hands of ‘concerned bystanders,’ who will use it simply as a ‘vehicle for the vindication of value interests.’” *Diamond*, 476 U. S., at 62. No matter how deeply committed petitioners may be to upholding Proposition 8 or how “zealous [their] advocacy,” *post*, at 4 (KENNEDY, J., dissenting), that is not a “particularized” interest sufficient to create a case or controversy under Article III. *Defenders of Wildlife*, 504 U. S., at 560, and n. 1; see *Arizonans for Official English*, 520 U. S., at 65 (“Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.”); *Don’t Bankrupt Washington Committee v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 460 U. S. 1077 (1983) (summarily dismissing, for lack of standing, appeal by an initiative proponent from a decision holding the initiative unconstitutional).

III

A

Without a judicially cognizable interest of their own, petitioners attempt to invoke that of someone else. They assert that even if *they* have no cognizable interest in appealing the District Court’s judgment, the State of California does, and they may assert that interest on the State’s behalf. It is, however, a “fundamental restriction on our authority” that “[i]n the ordinary course, a litigant must

assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.” *Powers v. Ohio*, 499 U. S. 400, 410 (1991). There are “certain, limited exceptions” to that rule. *Ibid.* But even when we have allowed litigants to assert the interests of others, the litigants themselves still “must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.” *Id.*, at 411 (internal quotation marks omitted).

....

B

Petitioners contend that this case is different, because the California Supreme Court has determined that they are “authorized under California law to appear and assert the state’s interest” in the validity of Proposition 8. 52 Cal. 4th, at 1127, 265 P. 3d, at 1007. The court below agreed: “All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.” 671 F. 3d, at 1072. As petitioners put it, they “need no more show a personal injury, separate from the State’s indisputable interest in the validity of its law, than would California’s Attorney General or did the legislative leaders held to have standing in *Karcher v. May*, 484 U. S. 72 (1987).” Reply Brief 6.

In *Karcher*, we held that two New Jersey state legislators—Speaker of the General Assembly Alan Karcher and President of the Senate Carmen Orechio—could intervene in a suit against the State to defend the constitutionality of a New Jersey law, after the New Jersey attorney general had declined to do so. 484 U. S., at 75, 81–82. “Since the New Jersey Legislature had authority under state law to represent the State’s interests in both the District Court and the Court of Appeals,” we held that the Speaker and the President, in their official capacities, could vindicate that interest in federal court on the legislature’s behalf. *Id.*, at 82.

Far from supporting petitioners’ standing, however, *Karcher* is compelling precedent against it. The legislators in that case intervened in their official capacities as Speaker and President of the legislature. No one doubts that a State has a cognizable interest “in the continued enforceability” of its laws that is harmed by a judicial decision declaring a state law unconstitutional. *Maine v. Taylor*, 477 U. S. 131, 137 (1986). To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. See *Poindexter v. Greenhow*, 114 U. S. 270, 288 (1885) (“The State is a political corporate body [that] can act only through agents”). That agent is typically the State’s attorney general. But state law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State’s presiding legislative officers in *Karcher*. See 484 U. S., at 81–82.

What is significant about *Karcher* is what happened after the Court of Appeals decision in that case. Karcher and Orechio lost their positions as Speaker and President, but nevertheless sought to appeal to this Court. We held that they could not do so. We explained that while they were able to participate in the lawsuit in their official capacities as presiding officers of the incumbent legislature, “since they no longer hold those offices, they lack authority to pursue this appeal.” *Id.*, at 81.

The point of *Karcher* is not that a State could authorize *private parties* to represent its interests; Karcher and Orechio were permitted to proceed only because they were state officers, acting in an official capacity. As soon as they lost that capacity, they lost standing. Petitioners here hold no office and have always participated in this litigation solely as private parties.

....

C

Both petitioners and respondents seek support from dicta in *Arizonans for Official English v. Arizona*, 520 U. S. 43. The plaintiff in *Arizonans for Official English* filed a constitutional challenge to an Arizona ballot initiative declaring English “ ‘the official language of the State of Arizona.’ ” *Id.*, at 48. After the District Court declared the initiative unconstitutional, Arizona’s Governor announced that she would not pursue an appeal. Instead, the principal sponsor of the ballot initiative—the Arizonans for Official English Committee—sought to defend the measure in the Ninth Circuit. *Id.*, at 55–56, 58. Analogizing the sponsors to the Arizona Legislature, the Ninth Circuit held that the Committee was “qualified to defend [the initiative] on appeal,” and affirmed the District Court. *Id.*, at 58, 61.

Before finding the case mooted by other events, this Court expressed “grave doubts” about the Ninth Circuit’s standing analysis. *Id.*, at 66. We reiterated that “[s]tanding to defend on appeal in the place of an original defendant . . . demands that the litigant possess ‘a direct stake in the outcome.’ ” *Id.*, at 64 (quoting *Diamond*, 476 U. S., at 62). We recognized that a legislator authorized by state law to represent the State’s interest may satisfy standing requirements, as in *Karcher*, *supra*, at 82, but noted that the Arizona committee and its members were “not elected representatives, and we [we]re aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.” *Arizonans for Official English*, *supra*, at 65.

Petitioners argue that, by virtue of the California Supreme Court’s decision, they *are* authorized to act “ ‘as agents of the people’ of California.” Brief for Petitioners 15 (quoting *Arizonans for Official English*, *supra*, at 65). But that Court never described petitioners as “agents of the people,” or of anyone else. Nor did the Ninth Circuit. The Ninth Circuit asked—and the California Supreme Court answered—only whether petitioners had “the authority to assert the State’s interest in the initiative’s validity.” 628 F. 3d, at 1193; 52 Cal. 4th, at 1124, 265 P. 3d, at 1005. All that the California Supreme Court decision stands for is that, so far as California is concerned, petitioners may argue in defense of Proposition 8. This “does not mean that the proponents become de facto public officials”; the authority they enjoy is “simply the authority to participate as parties in a court action and to assert legal arguments in defense of the state’s interest in the validity of the initiative measure.” *Id.*, at 1159, 265 P. 3d, at 1029. That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under our precedents.

And petitioners are plainly not agents of the State—“formal” or otherwise, see *post*, at 7. As an initial matter, petitioners’ newfound claim of agency is inconsistent with their representations to the District Court. When the proponents sought to intervene in this case, they did not purport to be agents of California. They argued instead that “no other party in this case w[ould] adequately represent *their interests as official proponents*.” Motion to Intervene in No. 09–2292 (ND Cal.), p. 6 (emphasis added). It was their “unique legal status” as official proponents—not an agency relationship with the people of California—that petitioners claimed “endow[ed] them with a significantly protectable interest” in ensuring that the District Court not “undo[] all that they ha[d] done in obtaining . . . enactment” of Proposition 8. *Id.*, at 10, 11.

More to the point, the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. “An essential element of agency is the principal’s right to control the agent’s actions.” 1 Restatement (Third) of Agency §1.01, Comment *f* (2005) (hereinafter Restatement). Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California’s attorney general, they are not elected at regular intervals—or elected at all. See Cal. Const., Art. V, §11. No provision

provides for their removal. As one *amicus* explains, “the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it.” Brief for Walter Dellinger 23.

....

Neither the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State, and they plainly do not qualify as such.

IV

The dissent eloquently recounts the California Supreme Court’s reasons for deciding that state law authorizes petitioners to defend Proposition 8. See *post*, at 3–5. We do not “disrespect[]” or “disparage[]” those reasons. *Post*, at 12. Nor do we question California’s sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply. But as the dissent acknowledges, see *post*, at 1, standing in federal court is a question of federal law, not state law. And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.

The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers. “Refusing to entertain generalized grievances ensures that . . . courts exercise power that is judicial in nature,” *Lance*, 549 U. S., at 441, and ensures that the Federal Judiciary respects “the proper—and properly limited—role of the courts in a democratic society,” *DaimlerChrysler Corp. v. Cuno*, 547 U. S. 332, 341 (2006) (internal quotation marks omitted). States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.

* * *

We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.

Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.

It is so ordered.

III. COURTS

John M. MISTRETTA, Petitioner,
v.
UNITED STATES

Nos. 87-7028, 87-1904.

Supreme Court of the United States

Argued Oct. 5, 1988.

Decided Jan. 18, 1989.

[BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, MARSHALL, STEVENS, O'CONNOR, and KENNEDY, B., joined, and in all but n. 11 of which BRENNAN, J., joined. SCALIA, J., filed a dissenting opinion.]

Justice BLACKMUN delivered the opinion of the Court.

In this litigation, we granted certiorari before judgment in the United States Court of Appeals for the Eighth Circuit in order to consider the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission. The Commission is a body created under the Sentencing Reform Act of 1984 (Act), as amended, 18 U.S.C. §3551 et seq. (1982 ed., Supp. IV), and 28 U.S.C. §§991-998 (1982 ed., Stipp. IV). The United States District Court for the Western District of Missouri ruled that the Guidelines were constitutional. *United States v. Johnson*, 682 F.Supp. 1033 (W.D.Mo.1988).

I
A
Background

For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine. This indeterminate- sentencing system was supplemented by the utilization of parole, by which an offender was returned to society under the "guidance and control" of a parole officer. See *Zerbst v. Kidwell*, 304 U.S. 359, 363, 58 S.Ct. 872, 874, 82 L.Ed. 1399 (1938).

Both indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society. It obviously required the judge and the parole officer to make their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation. As a result, the court and the officer were in positions to exercise, and usually did

exercise, very broad discretion. See Kadish, *The Advocate and the Expert--Counsel in the Peno-Correctional Process*, 45 *Minn.L.Rev.* 803, 812-813 (1961). This led almost inevitably to the conclusion on the part of a reviewing court that the sentencing judge "sees more and senses more" than the appellate court; thus, the judge enjoyed the "superiority of his nether position," for that court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal. See Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 *Syracuse L.Rev.* 635, 663 (1971). See *Dorszynski v. United States*, 418 U.S. 424, 431, 94 S.Ct. 3042, 3047, 41 L.Ed.2d 855 (1974). The decision whether to parole was also "predictive and discretionary." *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). The correction official possessed almost absolute discretion over the parole decision. See, e.g., *Brest v. Ciccone*, 371 F.2d 981, 982-983 (CA8 1967); *Rifai v. United States Parole Comm'n*, 586 F.2d 695 (CA9 1978).

Historically, federal sentencing--the function of determining the scope and extent of punishment--never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government. Congress, of course, has the power to fix the sentence for a federal crime, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 5 L.Ed. 37 (1820), and the scope of judicial discretion with respect to a sentence is subject to congressional control. *Ex parte United States*, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916). Congress early abandoned fixed-sentence rigidity, however, and put in place a system of ranges within which the sentencer could choose the precise punishment. See *United States v. Grayson*, 438 U.S. 41, 45-46, 98 S.Ct. 2610, 2613-14, 57 L.Ed.2d 582 (1978). Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. This broad discretion was further enhanced by the power later granted the judge to suspend the sentence and by the resulting growth of an elaborate probation system. Also, with the advent of parole, Congress moved toward a "three-way sharing" of sentencing responsibility by granting corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge. Thus, under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment. See *Williams v. New York*, 337 U.S. 241, 248, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949). See also *Geraghty v. United States Parole Comm'n*, 719 F.2d 1199, 1211 (CA3 1983), cert. denied, 465 U.S. 1103, 104 S.Ct. 1602, 80 L.Ed.2d 133 (1984); *United States v. Addonizio*, 442 U.S. 178, 190, 99 S.Ct. 2235, 2243, 60 L.Ed.2d 805 (1979); *United States v. Brown*, 381 U.S. 437, 443, 85 S.Ct. 1707, 1712, 14 L.Ed.2d 484 (1965) ("[I]f a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will").

Serious disparities in sentences, however, were common. Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases. See N. Morris, *The Future of Imprisonment* 24-43 (1974); F. Allen, *The Decline of the Rehabilitative Ideal* (1981). In 1958, Congress authorized the creation of judicial sentencing institutes and joint councils, see 28 U.S.C. §334, to formulate standards and criteria for sentencing. In 1973, the United States Parole Board adopted guidelines that established a "customary range" of confinement. See *United States Parole Comm'n v. Geraghty*,

445 U.S. 388, 391, 100 S.Ct. 1202, 1206, 63 L.Ed.2d 479 (1980). Congress in 1976 endorsed this initiative through the Parole Commission and Reorganization Act, 18 U.S.C. §§4201-4218, an attempt to envision for the Parole Commission a role, at least in part, ¹⁰ moderate the disparities in the sentencing practices of individual judges." *United States v. Addonizio*, 442 U.S., at 189, 99 S.Ct., at 2242. That Act, however, did not disturb the division of sentencing responsibility among the three Branches. The judge continued to exercise discretion and to set the sentence within the statutory range fixed by Congress, while the prisoner's actual release date generally was set by the Parole Commission.

This proved to be no more than a way station. Fundamental and widespread dissatisfaction with the uncertainties and the disparities continued to be expressed. Congress had wrestled with the problem for more than a decade when, in 1984, it enacted the sweeping reforms that are at issue here.

B The Act

The Act, as adopted, revises the old sentencing process in several ways:

1. It rejects imprisonment as a means of promoting rehabilitation, 28 U.S.C. §994(k), and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals, 18 U.S.C. §3553(a)(2).
2. It consolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer. This is done by creating the United States Sentencing Commission, directing that Commission to devise guidelines to be used for sentencing, and prospectively abolishing the Parole Commission. 28 U.S.C. §§991, 994, and 995(a)(1).
3. It makes all sentences basically determinate. A prisoner is to be released at the completion of his sentence reduced only by any credit earned by good behavior while in custody. 18 U.S.C. §§3624(a) and (b).
4. It makes the Sentencing Commission's guidelines binding on the courts, although it preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines. §§3553(a) and (b). The Act also requires the court to state its reasons for the sentence imposed and to give "the specific reason" for imposing a sentence different from that described in the guideline. §3553(c).
5. It authorizes limited appellate review of the sentence. It permits a defendant to appeal a sentence that is above the defined range, and it permits the Government to appeal a sentence that is below that range. It also permits either side to appeal an incorrect application of the guideline. §§3742(a) and (b).

Thus, guidelines were meant to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors, "among others." 28 U.S.C. §§994(b), (c), and (d). The maximum of the range ordinarily may not exceed the minimum, by more than the greater of 25% or six months, and each sentence is to be within the limit provided by existing law. §§994(a) and (b)(2).

C

The Sentencing Commission

The Commission is established "as an independent commission in the judicial branch of the United States." §991 (a). It has seven voting members (one of whom is the Chairman) appointed by the President "by and with the advice and consent of the Senate." "At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial. Conference of the United States." Ibid. No more than four members of the Commission shall be members of the same political party. The Attorney General, or his designee, is an ex officio non-voting member. The Chairman and other members of the Commission are subject to removal by the President "only for neglect of duty or malfeasance in office or for other good cause shown." Ibid. Except for initial staggering of terms, a voting member serves for six years and may not serve more than two full terms. §§992(a) and (b)

D

The Responsibilities of the Commission

In addition to the duty the Commission has to promulgate determinative- sentence guidelines, it is under an obligation Periodically to "review and revise" the guidelines. §994(o). It is to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." Ibid. It must report to Congress "any amendments of the guidelines." §994(p). It is to make recommendations to Congress whether the grades or maximum penalties should be modified. §994(r). It must submit to Congress at least annually an analysis of the operation of the guidelines. §994(w). It is to issue "general policy statements" regarding their application. §994(a)(2). And it has the power to "establish general policies as are necessary to carry out the purposes" of the legislation, §995(a)(1); to "monitor the performance of probation officers" with respect to the guidelines, §995(a)(9); to "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel" and others, §995(a)(18); and to "perform such other functions as are required to permit Federal courts to meet their responsibilities" as to sentencing, §995(a)(22).

We note, in passing, that the monitoring function is not without its burden. Every year, with respect to each of more than 40,000 sentences, the federal courts must forward, and the Commission must review, the presentence report, the guideline worksheets, the tribunal's sentencing statement, and any written plea agreement.

II This Litigation

On December 10, 1987, John M. Mistretta (petitioner) and another were indicted in the United States District Court for the Western District of Missouri on three counts centering in a cocaine sale. See App. to Pet. for Cert. in No. 87-1904, p. 16a. Mistretta moved to have the promulgated Guidelines ruled unconstitutional on the grounds that the Sentencing Commission was constituted in violation of the established doctrine of separation of powers, and that Congress delegated excessive authority to the Commission to structure the Guidelines. As has been noted, the District Court was not persuaded by these contentions.

The District Court rejected petitioner's delegation argument on the ground that, despite the language of the statute, the Sentencing Commission "should be judicially characterized as having Executive Branch status," 682 F.Supp., at 1035, and that the Guidelines are similar to substantive rules promulgated by other agencies. *Id.*, at 1034-1035. The court also rejected petitioner's claim that the Act is unconstitutional because it requires Article III federal judges to serve on the Commission. *Id.*, at 1035. The court stated, however, that its opinion "does not imply that I have no serious doubts about some parts of the Sentencing Guidelines and the legality of their anticipated operation." *Ibid.*

Petitioner had pleaded guilty to the first count of his indictment (conspiracy and agreement to distribute cocaine, in violation of 21 U.S.C. §§846 and 841(b)(1)(B)). The Government thereupon moved to dismiss the remaining counts. That motion was granted. App. to Pet. for Cert. in No. 87-1904, p. 33a. Petitioner was sentenced under the Guidelines to 18 months' imprisonment, to be followed by a 3-year term of supervised release. *Id.*, at 30a, 35a, 37a. The court also imposed a \$1,000 fine and a \$50 special assessment. *Id.*, at 31a, 40a.

Petitioner filed a notice of appeal to the Eighth Circuit, but both petitioner and the United States, pursuant to this Court's Rule 18, petitioned for certiorari before judgment. Because of the "imperative public importance" of the issue, as prescribed by the Rule, and because of the disarray among the Federal District Courts, we granted those petitions. 486 U.S. 1054, 108 S.Ct. 2818, 100 L.Ed.2d 920 (1988).

III Delegation of Power

Petitioner argues that in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine. We do not agree.

** *

In light of our approval of these broad delegations, we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to

meet constitutional requirements. . . .

IV Separation of Powers

Having determined that Congress has set forth sufficient standards for the exercise of the Commission's delegated authority, we turn to Mistretta's claim that the Act violates the constitutional principle of separation of powers.

This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 685-696, 108 S.Ct. 2597, 2616-2622, 101 L.Ed.2d 569 (1988); *Bowsher v. Synar*, 478 U.S., at 725, 106 S.Ct. at 3188. Madison, in writing about the principle of separated powers, said: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist No. 47*, p. 324 (J. Cooke ed. 1961).

In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison's view of the appropriate relationship among the three coequal Branches. Accordingly, we have recognized, as Madison admonished at the founding, that while our Constitution mandates that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others," *Humphrey's Executor v. United States*, 295 U.S. 602, 629, 55 S.Ct. 869, 874, 79 L.Ed. 1611 (1935), the Framers did not require--and indeed rejected--the notion that the three Branches must be entirely separate and distinct. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977) (rejecting as archaic complete division of authority among the three Branches); *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (affirming Madison's flexible approach to separation of powers). Madison, defending the Constitution against charges that it established insufficiently separate Branches, addressed the point directly. Separation of powers, he wrote, "d[oes] not mean that these [three] departments ought to have no partial agency in, or no controul over the acts of each other," but rather "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted." *The Federalist No. 47*, pp. 325-326 (J. Cooke ed. 1961) (emphasis in original). See *Nixon v. Administrator of General Services*, 433 U.S., at 442, n. 5, 97 S.Ct. at 2789, n. 5. Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which "would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 121, 96 S.Ct. 612, 683, 46 L.Ed.2d 659 (1976). In a passage now commonplace in our cases, Justice Jackson summarized the pragmatic, flexible view of differentiated governmental power to which we are heir:

"While the Constitution diffuses power the better to secure liberty, it also contemplates

that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (concurring opinion).

In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny--the accumulation of excessive authority in a single Branch-- lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch. "[T]he greatest security," wrote Madison, "against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." *The Federalist* No. 51, p. 349 (J. Cooke ed. 1961). Accordingly, as we have noted many times, the Framers "built into the tripartite Federal Government ... a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Vale*^o, 424 U.S., at 122, 96 S.Ct., at 684. See also *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983).

It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." *Ibid.* Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. For example, just as the Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power, so too have we invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch. *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (Congress may not exercise removal power over officer performing executive functions); *INS v. Chadha*, *supra* (Congress may not control execution of laws except through Art. I procedures); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (Congress may not confer Art. III power on Art. I judge). By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment. *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (upholding judicial appointment of independent counsel); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (upholding agency's assumption of jurisdiction over state-law counterclaims).

In *Nixon v. Administrator of General Services*, *supra*, upholding, against a separation-of-powers challenge, legislation providing for the General Services Administration to control Presidential papers after resignation, we described our separation-of-powers inquiry as focusing "on the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions." 433 U.S., at 443, 97 S.Ct., at 2790 (citing *United States v. Nixon*, 418 U.S., at 711-712, 94 S.Ct., at 3109- 3110). In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial

Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches," *Morrison v. Olson*, 487 U.S., at 680-681, 108 S.Ct., at 2613, and, second, that no provision of law "impermissibly threatens the institutional integrity of the Judicial Branch." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S., at 851, 106 S.Ct., at 3258.

Mistretta argues that the Act suffers from each of these constitutional infirmities. He argues that Congress, in constituting the Commission as it did, effected an unconstitutional accumulation of power within the Judicial Branch while at the same time undermining the Judiciary's independence and integrity. Specifically, petitioner claims that in delegating to an independent agency within the Judicial Branch the power to promulgate sentencing guidelines, Congress unconstitutionally has required the Branch, and individual Article III judges, to exercise not only their judicial authority, but legislative authority--the making of sentencing policy--as well. Such rulemaking authority, petitioner contends, may be exercised by Congress, or delegated by Congress to the Executive, but may not be delegated to or exercised by the Judiciary. Brief for Petitioner 21.

At the same time, petitioner asserts, Congress unconstitutionally eroded the integrity and independence of the Judiciary by requiring Article III judges to sit on the Commission, by requiring that those judges share their rulemaking authority with nonjudges, and by subjecting the Commission's members to appointment and removal by the President. According to petitioner, Congress, consistent with the separation of powers, may not upset the balance among the Branches by co-opting federal judges into the quintessentially political work of establishing sentencing guidelines, by subjecting those judges to the political whims of the Chief Executive, and by forcing judges to share their power with nonjudges. *Id.*, at 15-35.

"When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." *Bowsher v. Synar*, 478 U.S., at 736, 106 S.Ct., at 3194 (opinion concurring in judgment). Although the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches, we conclude, upon close inspection, that petitioner's fears for the fundamental structural protections of the Constitution prove, at least in this case, to be "more smoke than fire," and do not compel us to invalidate Congress' considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing.

A

Location of the Commission

The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an "independent" body comprised of seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines. 28 U.S.C. §991(a). Our constitutional principles of separated powers are not violated, however, by mere anomaly or

innovation. Setting to one side, for the moment, the question whether the composition of the Sentencing Commission violates the separation of powers, we observe that Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary.

According to express provision of Article III, the judicial power of the United States is limited to "Cases" and "Controversies." See *Muskrat v. United States*, 219 U.S. 346, 356, 31 S.Ct. 250, 253, 55 L.Ed. 246 (1911). In implementing this limited grant of power, we have refused to issue advisory opinions or to resolve disputes that are not justiciable. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct.1942, 20 L.Ed.2d 947 (1968); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 14 L.Ed. 40 (1852). These doctrines help to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes "traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S., at 97, 88 S.Ct., at 1951; see also *United States Parole Comm'n v. Geraghty*, 445 U.S., at 396, 100 S.Ct., at 1208. As a general principle, we stated as recently as last Term that " 'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.' " *Morrison v. Olson*, 487 U.S., at 677, 108 S.Ct., at 2612, quoting *Buckley v. Valeo*, 424 U.S., at 123, 96 S.Ct., at 684, citing in turn *United States v. Ferreira*, *supra*, and *Hayburn's Case*, 2 Dall. 409 (1792).

Nonetheless, we have recognized significant exceptions to this general rule and have approved the assumption of some nonadjudicatory activities by the Judicial Branch. In keeping with Justice Jackson's *Youngstown* admonition that the separation of powers contemplates the integration of dispersed powers into a workable Government, we have recognized the constitutionality of a "twilight area in which the activities of the separate Branches merge. In his dissent in *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926), Justice Brandeis explained that the separation of powers "left to each [Branch] power to exercise, in some respects, functions in their nature executive, legislative and judicial." *Id.*, at 291, 47 S.Ct., at 84.

That judicial rulemaking, at least with respect to some subjects, falls within this twilight area is no longer an issue for dispute. None of our cases indicate that rulemaking per se is a function that may not be performed by an entity within the Judicial Branch, either because rulemaking is inherently nonjudicial or because it is a function exclusively committed to the Executive Branch. On the contrary, we specifically have held that Congress, in some circumstances, may confer rulemaking authority on the Judicial Branch. In *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941), we upheld a challenge to certain rules promulgated under the Rules Enabling Act of 1934, which conferred upon the Judiciary the power to promulgate federal rules of civil procedure. See 28 U.S.C. §2072. We observed: "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States." 312 U.S., at 9-10, 61 S.Ct., at

424 (footnote omitted). This passage in *Sibbach* simply echoed what had been our view since *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43, 6 L.Ed. 253 (1825), decided more than a century earlier, where Chief Justice Marshall wrote for the Court that rulemaking power pertaining to the Judicial Branch may be "conferred on the judicial department." Discussing this delegation of rulemaking power, the Court found Congress authorized

"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment.

"That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer." *Id.*, at 22.

See also *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). Pursuant to this power to delegate rulemaking authority to the Judicial Branch, Congress expressly has authorized this Court to establish rules for the conduct of its own business and to prescribe rules of procedure for lower federal courts in bankruptcy cases, in other civil cases, and in criminal cases, and to revise the Federal Rules of Evidence. See generally J. Weinstein, *Reform of Court Rule-Making Procedures* (1977).

Our approach to other nonadjudicatory activities that Congress has vested either in federal courts or in auxiliary bodies within the Judicial Branch has been identical to our approach to judicial rulemaking: consistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary. Following this approach, we specifically have upheld not only Congress' power to confer on the Judicial Branch the rulemaking authority contemplated in the various enabling Acts, but also to vest in judicial councils authority to "make all necessary orders for the effective and expeditious administration of the business of the courts." *Chandler v. Judicial Council*, 398 U.S. 74, 86, n. 7, 90 S.Ct. 1648, 1654, n. 7, 26 L.Ed.2d 100 (1970), quoting 28 U.S.C. §332 (1970 ed.). Though not the subject of constitutional challenge, by established practice we have recognized Congress' power to create the Judicial Conference of the United States, the Rules Advisory Committees that it oversees, and the Administrative Office of the United States Courts whose myriad responsibilities include the administration of the entire probation service. These entities, some of which are comprised of judges, others of judges and nonjudges, still others of nonjudges only, do not exercise judicial power in the constitutional sense of deciding cases and controversies, but they share the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary. Thus, although the judicial power of the United States is limited by express provision of Article III to "Cases" and "Controversies," we have never held, and have clearly disavowed in practice, that the Constitution prohibits Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties that, in the words of Chief Justice Marshall, are "necessary and proper ...

for carrying into execution all the judgments which the judicial department has power to pronounce." *Wayman v. Southard*, 10 Wheat, at 22. Because of their close relation to the central mission of the Judicial Branch, such extrajudicial activities are consonant with the integrity of the Branch and are not more appropriate for another Branch.

In light of this precedent and practice, we can discern no separation-of-powers impediment to the placement of the Sentencing Commission within the Judicial Branch. As we described at the outset, the sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch. See, e.g., *United States v. Addonizio*, 442 U.S., at 188-189, 99 S.Ct., at 2242. For more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases and have exercised special authority to determine the sentencing factors to be applied in any given case. Indeed, the legislative history of the Act makes clear that Congress' decision to place the Commission within the Judicial Branch reflected Congress' "strong feeling" that sentencing has been and should remain "primarily a judicial function." Report, at 159. That Congress should vest such rulemaking in the Judicial Branch, far from being "incongruous" or vesting within the Judiciary responsibilities that more appropriately belong to another Branch, simply acknowledges the role that the Judiciary always has played, and continues to play, in sentencing.

Given the consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress, we find that the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure under the various enabling Acts. Such guidelines, like the Federal Rules of Criminal and Civil Procedure, are court rules--rules, to paraphrase Chief Justice Marshall's language in *Wayman*, for carrying into execution judgments that the Judiciary has the power to pronounce. Just as the rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases. In other words, the Commission's functions, like this Court's function in promulgating procedural rules, are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch.

We do not believe, however, that the significantly political nature of the Commission's work renders unconstitutional its placement within the Judicial Branch. Our separation-of-powers analysis does not turn on the labeling of an activity as "substantive" as opposed to "procedural," or "political" as opposed to "judicial." See *Bowsher v. Synar*, 478 U.S., at 749, 106 S.Ct., at 3200 ("[G]overnmental power cannot always be readily characterized with only one...label") (opinion concurring in judgment). Rather, our inquiry is focused on the "unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S., at 857, 106 S.Ct., at 3261. In this case, the "practical consequences" of locating the Commission within the Judicial Branch pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the

Branch the political or quasi-legislative power of the Commission with the judicial power of the courts.

First, although the Commission is located in the Judicial Branch, its powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis. Whatever constitutional problems might arise if the powers of the Commission were vested in a court, the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch. The Commission, on which members of the Judiciary may be a minority, is an independent agency in every relevant sense. In contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit either within the 180-day waiting period, see §235(a)(1)(B)(ii)(III) of the Act, 98 Stat. 2032, or at any time. In contrast to a court, the Commission's members are subject to the President's limited powers of removal. In contrast to a court, its rulemaking is subject to the notice and comment requirements of the Administrative Procedure Act, 28 U.S.C. §994(x). While we recognize the continuing vitality of Montesquieu's admonition: " 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul,' " *The Federalist* No. 47, p. 326 (J. Cooke ed. 1961) (Madison), quoting Montesquieu, because Congress vested the power to promulgate sentencing guidelines in an independent agency, not a court, there can be no serious argument that Congress combined legislative and judicial power within the Judicial Branch.

Second, although the Commission wields rulemaking power and not the adjudicatory power exercised by individual judges when passing sentence, the placement of the Sentencing Commission in the Judicial Branch has not increased the Branch's authority. Prior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them. The Sentencing Commission does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations. Accordingly, in placing the Commission in the Judicial Branch, Congress cannot be said to have aggrandized the authority of that Branch or to have deprived the Executive Branch of a power it once possessed. Indeed, because the Guidelines have the effect of promoting sentencing within a narrower range than was previously applied, the power of the Judicial Branch is, if anything, somewhat diminished by the Act. And, since Congress did not unconstitutionally delegate its own authority, the Act does not unconstitutionally diminish Congress' authority. Thus, although Congress has authorized the Commission to exercise a greater degree of political judgment than has been exercised in the past by any one entity within the Judicial Branch, in the unique context of sentencing, this authorization does nothing to upset the balance of power among the Branches.

In sum, since substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch, and the methodology of rulemaking has been and remains appropriate to that Branch, Congress' considered decision to combine these functions in an independent Sentencing Commission and to locate that Commission within the Judicial Branch

does not violate the principle of separation of powers.

B Composition of the Commission

We now turn to petitioner's claim that Congress' decision to require at least three federal judges to serve on the Commission and to require those judges to share their authority with nonjudges undermines the integrity of the Judicial Branch.

The Act provides in part: "At least three of [the Commission's] members shall be Federal judges selected [by the President] after considering a list of six judges recommended to the President by the Judicial Conference of the United States." 28 U.S.C. §991(a). Petitioner urges us to strike down the Act on the ground that its requirement of judicial participation on the Commission unconstitutionally conscripts individual federal judges for political service and thereby undermines the essential impartiality of the Judicial Branch. We find Congress' requirement of judicial service somewhat troublesome, but we do not believe that the Act impermissibly interferes with the functioning of the Judiciary.

The text of the Constitution contains no prohibition against the service of active federal judges on independent commissions such as that established by the Act. The Constitution does include an Incompatibility Clause applicable to national legislators:

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const., Art. I, §6, cl. 2.

No comparable restriction applies to judges, and we find it at least inferentially meaningful that at the Constitutional Convention two prohibitions against plural officeholding by members of the Judiciary were proposed, but did not reach the floor of the Convention for a vote.

Our inferential reading that the Constitution does not prohibit Article III judges from undertaking extrajudicial duties finds support in the historical practice of the Founders after ratification. Our early history indicates that the Framers themselves did not read the Constitution as forbidding extrajudicial service by federal judges. The first Chief Justice, John Jay, served simultaneously as Chief Justice and as Ambassador to England, where he negotiated the treaty that bears his name. Oliver Ellsworth served simultaneously as Chief Justice and as Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt.

All these appointments were made by the President with the "Advice and Consent" of the Senate. Thus, at a minimum, both the Executive and Legislative Branches acquiesced in the assumption of extrajudicial duties by judges. In addition, although the records of Congress contain no *reference* to the confirmation debate, Charles Warren, in his history of this Court,

reports that the Senate specifically rejected by a vote of 18 to 8 a resolution proposed during the debate over Jay's nomination to the effect that such extrajudicial service was "contrary to the spirit of the Constitution." 1 C. Warren, *The Supreme Court in United States History* 119 (rev. ed. 1937). This contemporaneous practice by the Founders themselves is significant evidence that the constitutional principle of separation of powers does not absolutely prohibit extrajudicial service. See *Bowsher v. Synar*, 478 U.S., at 723-724, 106 S.Ct., at 3187 (actions by Members of the First Congress provide contemporaneous and weighty evidence about the meaning of the Constitution).

Subsequent history, moreover, reveals a frequent and continuing, albeit controversial, practice of extrajudicial service. In 1877, five Justices served on the Election Commission that resolved the hotly contested Presidential election of 1876, where Samuel J. Tilden and Rutherford B. Hayes were the contenders. Justices Nelson, Fuller, Brewer, Hughes, Day, Roberts, and Van Devanter served on various arbitral commissions. Justice Roberts was a member of the commission organized to investigate the attack on Pearl Harbor. Justice Jackson was one of the prosecutors at the Nuremberg trials; and Chief Justice Warren presided over the commission investigating the assassination of President Kennedy. Such service has been no less a practice among lower court federal judges. While these extrajudicial activities spawned spirited discussion and frequent criticism, and although some of the judges who undertook these duties sometimes did so with reservation and may have looked back on their service with regret, "traditional ways of conducting government ... give meaning" to the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S., at 610, 72 S.Ct., at 897 (concurring opinion). Our 200-year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity.

Furthermore, although we have not specifically addressed the constitutionality of extrajudicial service, two of our precedents reflect at least an early understanding by this Court that the Constitution does not preclude judges from assuming extrajudicial duties in their individual capacities. . .

In light of the foregoing history and precedent, we conclude that the principle of separation of powers does not absolutely prohibit Article III judges from serving on commissions such as that created by the Act. The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs. Such power as these judges wield as Commissioners is not judicial power; it is administrative power derived from the enabling legislation. Just as the nonjudicial members of the Commission act as administrators, bringing their experience and wisdom to bear on the problems of sentencing disparity, so too the judges, uniquely qualified on the subject of sentencing, assume a wholly administrative role upon entering into the deliberations of the Commission. In other words, the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.

This is not to suggest, of course, that every kind of extrajudicial service under every circumstance necessarily accords with the Constitution. That the Constitution does not

absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.

With respect to the Sentencing Commission, we understand petitioner to argue that the service required of at least three judges presents two distinct threats to the integrity of the Judicial Branch. Regardless of constitutionality, this mandatory service, it is said, diminishes the independence of the Judiciary. See Brief for Petitioner 28. It is further claimed that the participation of judges on the Commission improperly lends judicial prestige and an aura of judicial impartiality to the Commission's political work. The involvement of Article III judges in the process of policymaking, petitioner asserts, "[w]eakens confidence in the disinterestedness of the judicatory functions." Ibid. quoting F. Frankfurter, *Advisory Opinions*, in 1 *Encyclopedia of the Social Sciences* 475, 478 (1930).

In our view, petitioner significantly overstates the mandatory nature of Congress' directive that at least three members of the Commission shall be federal judges, as well as the effect of this service on the practical operation of the Judicial Branch. Service on the Commission by any particular judge is voluntary. The Act does not conscript judges for the Commission. No Commission member to date has been appointed without his consent and we have no reason to believe that the Act confers upon the President any authority to force a judge to serve on the Commission against his will. Accordingly, we simply do not face the question whether Congress may require a particular judge to undertake the extrajudicial duty of serving on the Commission. In *Chandler v. Judicial Council*, 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970), we found "no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to administer 'the business of the courts within [each] circuit.'" *Id.*, at 86, 90 S.Ct., at 1654, n. 7, quoting 28 U.S.C. §332 (1970 ed.). Indeed, Congress has created numerous nonadjudicatory bodies, such as the Judicial Conference, that are composed entirely, or in part, of federal judges. See 28 U.S.C. §§331, 332; see generally Meador, *The Federal Judiciary and Its Future Administration*, 65 *Va.L.Rev.* 1031 (1979). Accordingly, absent a more specific threat to judicial independence, the fact that Congress has included federal judges on the Commission does not itself threaten the integrity of the Judicial Branch.

Moreover, we cannot see how the service of federal judges on the Commission will have a constitutionally significant practical effect on the operation of the Judicial Branch. We see no reason why service on the Commission should result in widespread judicial recusals. That federal judges participate in the promulgation of guidelines does not affect their or other judges' ability impartially to adjudicate sentencing issues. Cf. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1946) (that this Court promulgated the Federal Rules of Civil Procedure did not foreclose its consideration of challenges to their validity). While in the abstract a proliferation of commissions with congressionally mandated judiciary participation might threaten judicial independence by exhausting the resources of the Judicial Branch, that danger is far too remote for consideration here.

We are somewhat more troubled by petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Although it is a judgment that is not without difficulty, we conclude that the participation of federal judges on the Sentencing Commission does not threaten, either in fact or in appearance, the impartiality of the Judicial Branch. We are drawn to this conclusion by one paramount consideration: that the Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch. In our view, this is an essentially neutral endeavor and one in which judicial participation is peculiarly appropriate. Judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law. Rather, judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business--that of passing sentence on every criminal defendant. To this end, Congress has provided, not inappropriately, for a significant judicial voice on the Commission.

Justice Jackson underscored in *Youngstown* that the Constitution anticipates "reciprocity" among the Branches. 343 U.S., at 635, 72 S.Ct., at 870. As part of that reciprocity and as part of the integration of dispersed powers into a workable government, Congress may enlist the assistance of judges in the creation of rules to govern the Judicial Branch. Our principle of separation of powers anticipates that the coordinate Branches will converse with each, other on matters of vital common interest. While we have some reservation that Congress required such a dialogue in this case, the Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing. In this case, at least, where the subject lies so close to the heart of the judicial function and where purposes of the Commission are not inherently partisan, such enlistment is not coercion or co-optation, but merely assurance of judicial participation.

Finally, we reject petitioner's argument that the mixed nature of the Commission violates the Constitution by requiring Article III judges to share judicial power with nonjudges. As noted earlier, the Commission is not a court and exercises no judicial power. Thus, the Act does not vest Article III power in nonjudges or require Article III judges to share their power with nonjudges.

C
Presidential Control

The Act empowers the President to appoint all seven members of the Commission with the advice and consent of the Senate. The Act further provides that the President shall make his choice of judicial appointees to the Commission after considering a list of six judges recommended by the Judicial Conference of the United States. The Act also grants the President authority to remove members of the Commission, although "only for neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. §991(a).

Mistretta argues that this power of Presidential appointment and removal prevents the Judicial Branch from performing its constitutionally assigned functions. See *Nixon v. Administrator of General Services*, 433 U.S., at 443, 97 S.Ct., at 2790. Although we agree with petitioner that the independence of the Judicial Branch must be "jealously guarded" against outside interference, see *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S., at 60, 102 S.Ct., at 2866, and that, as Madison admonished at the founding, "neither of [the Branches] ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers," *The Federalist* No. 48, p. 332 (J. Cooke ed. 1961), we do not believe that the President's appointment and removal powers over the Commission afford him influence over the functions of the Judicial Branch or undue sway over its members.

The notion that the President's power to appoint federal judges to the Commission somehow gives him influence over the Judicial Branch or prevents, even potentially, the Judicial Branch from performing its constitutionally assigned functions is fanciful. We have never considered it incompatible with the functioning of the Judicial Branch that the President has the power to elevate federal judges from one level to another or to tempt judges away from the bench with Executive Branch positions. The mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary. Were the impartiality of the Judicial Branch so easily subverted, our constitutional system of tripartite Government would have failed long ago. We simply cannot imagine that federal judges will comport their actions to the wishes of the President for the purpose of receiving an appointment to the Sentencing Commission.

The President's removal power over Commission members poses a similarly negligible threat to judicial independence. The Act does not, and could not under the Constitution, authorize the President to remove, or in any way diminish the status of Article III judges, as judges. Even if removed from the Commission, a federal judge appointed to the Commission would continue, absent impeachment, to enjoy tenure "during good Behaviour" and a full judicial salary. U.S. Const., Art. III, §1. Also, the President's removal power under the Act is limited. In order to safeguard the independence of the Commission from executive control, Congress specified in the Act that the President may remove the Commission members only for good cause. Such congressional limitation on the President's removal power, like the removal provisions upheld in *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), and *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), is specifically crafted to prevent the President from exercising "coercive influence" over

independent agencies. See *Morrison*, 487 U.S., at 688, 108 S.Ct., at 2617; *Humphrey's Executor*, 295 U.S., at 630, 55 S.Ct., at 874- 875.

In other words, since the President has no power to affect the tenure or compensation of Article III judges, even if the Act authorized him to remove judges from the Commission at will, he would have no power to coerce the judges in the exercise of their judicial duties. In any case, Congress did not grant the President unfettered authority to remove Commission members. Instead, precisely to ensure that they would not be subject to coercion even in the exercise of their nonjudicial duties, Congress insulated the members from Presidential removal except for good cause. Under these circumstances, we see no risk that the President's limited removal power will compromise the impartiality of Article III judges serving on the Commission and, consequently, no risk that the Act's removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies.

V

We conclude that in creating the Sentencing Commission--an unusual hybrid in structure and authority--Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold that the Act is constitutional.

The judgment of United States District Court for the Western District of Missouri is affirmed.

It is so ordered.

Justice SCALIA, dissenting.

While the products of the Sentencing Commission's labors have been given the modest name "Guidelines," see 28 U.S.C. §994(a)(1) (1982 ed., Supp. IV); *United States Sentencing Commission Guidelines Manual* (June 15, 1988), they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed, 18 U.S.C. §3742 (1982 ed., Supp. IV). I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws.

I

There is no doubt that the Sentencing Commission has established significant, legally binding prescriptions governing application of governmental power against private individuals--indeed, application of the ultimate governmental power, short of capital punishment. Statutorily permissible sentences for particular crimes cover as broad a range as zero years to life, see, e.g.,

18 U.S.C. §1201 (1982 ed. and Supp. IV) (kidnaping), and within those ranges the Commission was given broad discretion to prescribe the "correct" sentence, 28 U.S.C. §994(b)(2) (1982 ed., Supp. IV). Average prior sentences were to be a starting point for the Commission's inquiry, §994(m), but it could and regularly did deviate from those averages as it thought appropriate. It chose, for example, to prescribe substantial increases over average prior sentences for white-collar crimes such as public corruption, antitrust violations, and tax evasion. Guidelines, at 2.31, 2.133, 2.140. For antitrust violations, before the Guidelines only 39% of those convicted served any imprisonment, and the average imprisonment was only 45 days, *id.*, at 2.133, whereas the Guidelines prescribe base sentences (for defendants with no prior criminal conviction) ranging from 2-to-8 months to 10- to-16 months, depending upon the volume of commerce involved. See *id.*, at 2.131., 5.2.

The Commission also determined when probation was permissible, imposing a strict system of controls because of its judgment that probation had been used for an "inappropriately high percentage of offenders guilty of certain economic crimes." *Id.*, at 1.8. Moreover, the Commission had free rein in determining whether statutorily authorized fines should be imposed in addition to imprisonment, and if so, in what amounts. It ultimately decided that every nonindigent offender should pay a fine according to a schedule devised by the Commission. *Id.*, at 5.18. Congress also gave the Commission discretion to determine whether 7 specified characteristics of offenses, and 11 specified characteristics of offenders, "have any relevance," and should be included among the factors varying the sentence. 28 U.S.C. §§994(c), (d) (1982 ed., Supp. IV). Of the latter, it included only three among the factors required to be considered, and declared the remainder not ordinarily relevant. Guidelines, at 5.29-5.31.

It should be apparent from the above that the decisions made by the Commission are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments. This fact is sharply reflected in the Commission's product, as described by the dissenting Commissioner:

"Under the guidelines, the judge could give the same sentence for abusive sexual contact that puts the child in fear as for unlawfully entering or remaining in the United States. Similarly, the guidelines permit equivalent sentences for the following pairs of offenses: drug trafficking and a violation of the Wild Free-Roaming Horses and Burros Act; arson with a destructive device and failure to surrender a cancelled naturalization certificate; operation of a common carrier under the influence of drugs that causes injury and alteration of one motor vehicle identification number; illegal trafficking in explosives and trespass; interference with a flight attendant and unlawful conduct relating to contraband cigarettes; aggravated assault and smuggling \$11,000 worth of fish." Dissenting View of Commissioner Paul 11. Robinson on the Promulgation of the Sentencing Guidelines by the United States Sentencing Commission 6-7 (May 1, 1987) (citations omitted).

Petitioner's most fundamental and far-reaching challenge to the Commission is that Congress' commitment of such broad policy responsibility to any institution is an unconstitutional delegation of legislative power. It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional

delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn sine die.

But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. As Chief Justice Taft expressed the point for the Court in the landmark case of *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed. 624 (1928), the limits of delegation "must be fixed according to common sense and the inherent necessities of the governmental co-ordination." Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the "necessities" of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political--including, for example, whether the Nation is at war, See *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), or whether for other reasons "emergency is instinct in the situation," *Amalgamated Meat Cutters and Butcher Workmen of North America v. Connally*, 337 F.Supp. 737, 752 (DC 1971) (three-judge court)--it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law. As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a "public interest" standard? See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-217, 63 S.Ct. 997, 1009-1010, 87 L.Ed. 1344 (1943); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25, 53 S.Ct. 45, 48, 77 L.Ed. 138 (1932).

In short, I fully agree with the Court's rejection of petitioner's contention that the doctrine of unconstitutional delegation of legislative authority has been violated because of the lack of intelligible, congressionally prescribed standards to guide the Commission.

II

Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation. The major one, it seems to me, is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.

The whole theory of lawful congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone

else; but rather that a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine--up to a point--how small or how large that degree shall be. Thus, the courts could be given the power to say precisely what constitutes a "restraint of trade," see *Standard Oil. Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), or to adopt rules of procedure, see *Sibbach v. Wilson & Co.*, 312 U.S. 1, 22, 61 S.Ct. 422, 429, 85 L.Ed. 479 (1941), or to prescribe by rule the manner in which their officers shall execute their judgments, *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1, 45, 6 L.Ed. 253 (1825), because that "lawmaking" was ancillary to their exercise of judicial powers. And the Executive could be given the power to adopt policies and rules specifying in detail what radio and television licenses will be in the "public interest, convenience or necessity," because that was ancillary to the exercise of its executive powers in granting and policing licenses and making a "fair and equitable allocation" of the electromagnetic spectrum. See *Federal Radio Comm'n v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 285, 53 S.Ct. 627, 636, 77 L.Ed. 1166 (1933). Or to take examples closer to the case before us: Trial judges could be given the power to determine what factors justify a greater or lesser sentence within the statutorily prescribed limits because that was ancillary to their exercise of the judicial power of pronouncing sentence upon individual defendants. And the President, through the Parole Commission subject to his appointment and removal, could be given the power to issue Guidelines specifying when parole would be available, because that was ancillary to the President's exercise of the executive power to hold and release federal prisoners. See 18 U.S.C. §§4203(a)(1) and (b); 28 CFR §2.20 (1988).

As Justice Harlan wrote for the Court in *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892):

"The true distinction...is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Id.*, at 693-694, 12 S.Ct., at 505 (emphasis added), quoting *Cincinnati, W. & Z.R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852).

" 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' " *Id.*, at 694, 12 S.Ct. at 505 (emphasis added), quoting *Moers v. Reading*, 21 Pa. 188, 202 (1853).

In *United States v. Grimaud*, 220 U.S. 506, 517, 31 S.Ct. 480, 483, 55 L.Ed. 563 (1911), which upheld a statutory grant of authority to the Secretary of Agriculture to make rules and regulations governing use of the public forests he was charged with managing, the Court said:

"From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations--not for the government of their departments, but for administering the laws which did govern. None of these statutes

could confer legislative power."

Or, finally, as Chief Justice Taft described it in *Hampton & Co.*, 276 U.S., at 406, 48 S.Ct., at 351:

"The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations."

The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the degree of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to amount to a delegation of legislative powers. I say "so-called excessive delegation" because although that convenient terminology is often used, what is really at issue is whether there has been any delegation of legislative power, which occurs (rarely) when Congress authorizes the exercise of executive or judicial power without adequate standards. Strictly speaking, there is no acceptable delegation of legislative power. As John Locke put it almost 300 years ago, "Wile power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands." J. Locke, *Second Treatise of Government* 87 (R. Cox ed.1982) (emphasis added). Or as we have less epigrammatically said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, supra, 143 U.S. at 692,,12 S.Ct., at 504. In the present case, however, a pure delegation of legislative power is precisely what we have before us. It is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation.

The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law. It is divorced from responsibility for execution of the law not only because the Commission is not said to be "located in the Executive Branch" (as I shall discuss presently, I doubt whether Congress can "locate" an entity within one Branch or another for constitutional purposes by merely saying so); but, more importantly, because the Commission neither exercises any executive power on its own, nor is subject to the control of the President who does. The only functions it performs, apart from prescribing the law, 28 U.S.C. §§994(a)(1), (3) (1982 ed., Supp. IV), conducting the investigations useful and necessary for prescribing the law, e.g., §§995(a)(13), (15), (16), (21), and clarifying the intended application of the law that it prescribes, e.g., §§994(a)(2), 995(a)(10), are data collection and intragovernmental advice giving and education, e.g., §§995(a)(8), (9), (12), (17), (18), (20). These latter activities--similar to functions performed by congressional agencies and even congressional staff-- neither determine nor affect private rights, and do not constitute an exercise of governmental power. See

Humphrey's Executor v. United States, 295 U.S. 602, 628, 55 S.Ct. 869, 874, 79 L.Ed. 1611 (1935). And the Commission's law-Making is completely divorced from the exercise of judicial powers since, not being a court, it has no judicial powers itself, nor is it subject to the control of any other body with judicial powers. The power to make law at issue here, in other words, is not ancillary but quite naked. The situation is no different in principle from what would exist if Congress gave the same power of writing sentencing laws to a congressional agency such as the General Accounting Office, or to members of its staff.

The delegation of lawmaking authority to the Commission is, in short, unsupported by any legitimating theory to explain why it is not a delegation of legislative power. To disregard structural legitimacy is wrong in itself--but since structure has purpose, the disregard also has adverse practical consequences. In this case, as suggested earlier, the consequence is to facilitate and encourage judicially uncontrollable delegation. Until our decision last Term in *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), it could have been said that Congress could delegate lawmaking authority only at the expense of increasing the power of either the President or the courts. Most often, as a practical matter, it would be the President, since the judicial process is unable to conduct the investigations and make the political assessments essential for most policymaking. Thus, the need for delegation would have to be important enough to induce Congress to aggrandize its primary competitor for political power, and the recipient of the policymaking authority, while not Congress itself, would at least be politically accountable. But even after it has been accepted, pursuant to *Morrison*, that those exercising executive power need not be subject to the control of the President, Congress would still be more reluctant to augment the power of even an independent executive agency than to create an otherwise powerless repository for its delegation. Moreover, assembling the full-time senior personnel for an agency exercising executive powers is more difficult than borrowing other officials (or employing new officers on a short- term basis) to head an organization such as the Sentencing Commission.

By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that we set--not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government. The only governmental power the Commission possesses is the power to make law; and it is not the Congress.

III

The strange character of the body that the Court today approves, and its incompatibility with our constitutional institutions, is apparent from that portion of the Court's opinion entitled "Location of the Commission." This accepts at the outset that the Commission is a "body within the Judicial Branch," ante, at 661, and rests some of its analysis upon that asserted reality.

Separation-of-powers problems are dismissed, however, on the ground that "[the Commission's] powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis," since the Commission "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch," ante, at 666. In light of the latter concession, I am at a loss to understand why the Commission is "within the Judicial Branch" in any sense that has relevance to today's discussion. I am sure that Congress can divide up the Government any way it wishes, and employ whatever terminology it desires, for non constitutional purposes--for example, perhaps the statutory designation that the Commission is "within the Judicial Branch" places it outside the coverage of certain laws which say they are inapplicable to that Branch, such as the Freedom of Information Act, see 5 U.S.C. §552(1) (1982 ed., Supp. IV). For such statutory purposes, Congress can define the term as it pleases. But since our subject here is the Constitution, to admit that that congressional designation "has [no] meaning for separation-of-powers analysis" is to admit that the Court must therefore decide for itself where the Commission is located for purposes of separation-of-powers analysis.

It would seem logical to decide the question of which Branch an agency belongs to on the basis of who controls its actions: If Congress, the Legislative Branch; if the President, the Executive Branch; if the courts (or perhaps the judges), the Judicial Branch. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 727-732, 106 S.Ct. 3181, 3188-3191, 92 L.Ed.2d 583 (1986). In *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), we approved the concept of an agency that was controlled by (and thus within) none of the Branches. We seem to have assumed, however, that that agency (the old Federal Trade Commission, before it acquired many of its current functions) exercised no governmental power whatever, but merely assisted Congress and the courts in the performance of their functions. See *Id.*, at 628, 55 S.Ct., at 874. Where no governmental power is at issue, there is no strict constitutional impediment to a "branchless" agency, since it is only "[a]! legislative Powers," Art. I, §1, "[t]he executive Power," Art. II, §1, and "[t]he judicial Power," Art. III, §1, which the Constitution divides into three departments. (As an example of a "branchless" agency exercising no governmental powers, one can conceive of an Advisory Commission charged with reporting to all three Branches, whose members are removable only for cause and are thus subject to the control of none of the Branches.) Over the years, however, *Humphrey's Executor* has come in general contemplation to stand for something quite different--not an "independent agency" in the sense of an agency independent of all three Branches, but an "independent agency" in the sense of an agency within the Executive Branch (and thus authorized to exercise executive powers) independent of the control of the President.

We approved that concept last Term in *Morrison*. See 487 U.S., at 688-691, 108 S.Ct., at 2617-2619. I dissented in that case, essentially because I thought that concept illogical and destructive of the structure of the Constitution. I must admit, however, that today's next step--recognition of an independent agency in the Judicial Branch-- makes *Morrison* seem, by comparison, rigorously logical. "The Commission," we are told, "is an independent agency in every relevant sense." Ante, at 666. There are several problems with this. First, once it is acknowledged that an "independent agency" may be within any of the three Branches, and not merely within the Executive, then there really is no basis for determining what Branch such an agency belongs to, and thus what governmental powers it may constitutionally be given, except (what the Court today uses) Congress' say- so. More importantly, however, the concept of an

"independent agency" simply does not translate into the legislative or judicial spheres. Although the Constitution says that "[t]he executive Power shall be vested in a President of the United States of America," Art. II, § 1, it was never thought that the President would have to exercise that power personally. He may generally authorize others to exercise executive powers, with full effect of law, in his place. See, e.g., *Wolsey v. Chapman*, 101 U.S. 755, 25 L.Ed. 915 (1880); *Williams v. United States*, 1 How. 290, 11 L.Ed. 135 (1843). It is already a leap from the proposition that a person who is not the President may exercise executive powers to the proposition we accepted in *Morrison* that a person who is neither the President nor subject to the President's control may exercise executive powers. But with respect to the exercise of judicial powers (the business of the Judicial Branch) the platform for such a leap does not even exist. For unlike executive power, judicial and legislative powers have never been thought delegable. A judge may not leave the decision to his law clerk, or to a master. See *United States v. Raddatz*, 447 U.S. 667, 683, 100 S.Ct. 2406, 2416, 65 L.Ed.2d 424 (1980); cf. *Runkle v. United States*, 122 U.S. 543, 7 S.Ct. 1141, 30 L.Ed. 1167 (1887). Senators and Members of the House may not send delegates to consider and vote upon bills in their place. See Rules of the House of Representatives, Rule VIII(3); Standing Rules of the United States Senate, Rule XII. Thus, however well established may be the "independent agencies" of the Executive Branch, here we have an anomaly beyond equal: an independent agency exercising governmental power on behalf of a Branch where all governmental power is supposed to be exercised personally by the judges of courts.

Today's decision may aptly be described as the Humphrey's Executor of the Judicial Branch, and I think we will live to regret it. Henceforth there may be agencies "within the Judicial Branch" (whatever that means), exercising governmental powers, that are neither courts nor controlled by courts, nor even controlled by judges. If an "independent agency" such as this can be given the power to fix sentences previously exercised by district courts, I must assume that a similar agency can be given the powers to adopt rules of procedure and rules of evidence previously exercised by this Court. The bases for distinction would be thin indeed.

* * *

Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence, see *Morrison*, supra; *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much--how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers themselves considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document. That is the meaning of the statements concerning acceptable commingling made by Madison in defense of the proposed Constitution, and now routinely used as an excuse for disregarding it. When he said, as the Court correctly quotes, that separation of powers " 'd[oes] not mean that these [three] departments ought to have no partial agency in, or no controul over the acts of each other,' " ante, at 659, quoting *The Federalist No. 47*, pp. 325-326 (J. Cooke ed.1961), his point was that the commingling specifically provided for in the structure that he and his colleagues had designed--the Presidential veto over legislation, the Senate's confirmation

of executive and judicial officers, the Senate's ratification of treaties, the Congress' power to impeach and remove executive and judicial officers--did not violate a proper understanding of separation of powers. He would be aghast, I think, to hear those words used as justification for ignoring that carefully designed structure so long as, in the changing view of the Supreme Court from time to time, "too much commingling" does not occur. Consideration of the degree of commingling that a particular disposition produces may be appropriate at the margins, where the outline of the framework itself is not clear; but it seems to me far from a marginal question whether our constitutional structure allows for a body which is not the Congress, and yet exercises no governmental powers except the making of rules that have the effect of laws.

I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress. It may well be that in some circumstances such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.

I respectfully dissent from the Court's decision, and would reverse the judgment of the District Court.

Gerald J. YOUNG, George Cariste, Sol N. Klayminc and Nathan Helfand,
Petitioners

v.

UNITED STATES ex rel. VUITTON ET FILS S.A., et al.

Nos. 85-1329, 85-6207.

Supreme Court of the United States

Argued Jan. 13, 1987.

Decided May 26, 1987.

Justice BRENNAN delivered the opinion of the Court with respect to Parts I, II, III-A, and IV, and an opinion with respect to Part HI-B, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join.

Petitioners in these cases were found guilty of criminal contempt by a jury, pursuant to 18 U.S.C. §401(3), for their violation of the District Court's injunction prohibiting infringement of respondent's trademark. They received sentences ranging from six months to five years. On appeal to the Court of Appeals for the Second Circuit, petitioners urged that the District Court erred in appointing respondent's attorneys, rather than a disinterested attorney, to prosecute the contempt. The Court of Appeals affirmed, 780 F.2d 179 (CA2 1985), and we granted certiorari, 477 U.S. 903, 106 S.Ct. 3270, 91 L.Ed.2d 561 (1986). We now reverse, exercising our supervisory power, and hold that counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order.

I

The injunction that petitioners violated in these cases is a result of the settlement of a lawsuit brought in December 1978, in the District Court for the Southern District of New York, by Louis Vuitton, S.A., a French leather goods manufacturer, against Sol Klayminc, his wife Sylvia, his son Barry (the Klaymincs), and their family-owned businesses, Karen Bags, Inc., Jade Handbag Co., Inc., and Jak Handbag, Inc. Vuitton alleged in its suit that the Klaymincs were manufacturing imitation Vuitton goods for sale and distribution. Vuitton's trademark was found valid in *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769 (CA9 1981), and Vuitton and the Klaymincs then entered into a settlement agreement in July 1982. Under this agreement, the Klaymincs agreed to pay Vuitton \$100,000 in damages, and consented to the entry of a permanent injunction prohibiting them from, inter alia, "manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product bearing any simulation, reproduction, counterfeit, copy, or colorable imitation" of Vuitton's registered trademark. App. to Pet. for Cert. 195-A to 196-A.

In early 1983, Vuitton and other companies concerned with possible trademark infringement were contacted by a Florida investigation firm with a proposal to conduct an

undercover "sting" operation. The firm was retained, and Melvin Weinberg and Gunner Askeland, two former Federal Bureau of Investigation agents, set out to pose as persons who were interested in purchasing counterfeit goods. Weinberg expressed this interest to petitioner Nathan Helfand, who then discussed with Klayminc and his wife the possibility that Weinberg and Askeland might invest in a Haitian factory devoted to the manufacture of counterfeit Vuitton and Gucci goods. Klayminc signed documents that described the nature of the factory operation and that provided an estimate of the cost of the counterfeited goods. In addition, Klayminc delivered some sample counterfeit Vuitton bags to Helfand for Weinberg and Askeland's inspection.

Four days after Helfand met with Klayminc, on March 31, 1983, Vuitton attorney J. Joseph Bainton requested that the District Court appoint him and his colleague Robert P. Devlin as special counsel to prosecute a criminal contempt action for violation of the injunction against infringing Vuitton's trademark. App. 18. Bainton's affidavit in support of this request recounted the developments with Helfand and Klayminc and pointed out that he and Devlin previously had been appointed by the court to prosecute Sol Klayminc for contempt of an earlier preliminary injunction in the Vuitton lawsuit. Bainton also indicated that the next step of the "sting" was to be a meeting among Sol and Barry Klayminc, Weinberg, and Askeland, at which Sol was to deliver 25 counterfeit Vuitton handbags. Bainton sought permission to conduct and videotape this meeting, and to continue to engage in undercover investigative activity.

The court responded to Bainton on the day of this request. It found probable cause to believe that petitioners were engaged in conduct contumacious of the court's injunctive order, and appointed Bainton and Devlin to represent the United States in the investigation and prosecution of such activity, as proposed in Bainton's affidavit. *Id.*, at 27. A week after Bainton's appointment, on April 6, the court suggested that Bainton inform the United States Attorney's Office of his appointment and the impending investigation. Bainton did so, offering to make available any tape recordings or other evidence, but the Chief of the Criminal Division of that Office expressed no interest beyond wishing Bainton good luck.

Over the course of the next Month, more than 100 audio and video tapes were made of meetings and telephone conversations between petitioners and investigators. On the basis of this evidence, Bainton requested, and the District Court signed, an order on April 26 directing petitioners to show cause why they and other parties should not be cited for contempt for either violating or aiding and abetting the violation of the court's July 1982 permanent injunction. App. to Pet. for Cert. 205-A. Petitioners' pretrial motions opposing the order to show cause and the appointment of Bainton and Devlin as special prosecutors were denied, *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 592 F.Supp. 734 (SDNY 1984), and two of the defendants subsequently entered guilty pleas. Sol Klayminc ultimately was convicted, following a jury trial, of criminal contempt under 18 U.S.C. §401(3), and the other petitioners were convicted of aiding and abetting that contempt. The trial court denied their post-trial motions. *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 602 F.Supp. 1052 (SDNY 1985).

On appeal to the Court of Appeals for the Second Circuit petitioners argued, *inter alia*, that the appointment of Bainton and Devlin as special prosecutors violated their right to be prosecuted only by an impartial prosecutor. The court rejected their contention, 780 F.2d 179

(1985), citing its decision in *Musidor, B.V. v. Great American Screen*, 658 F.2d 60 (1981), cert. denied, 455 U.S. 944, 102 S.Ct. 1440, 71 L.Ed.2d 656 (1982). It suggested that an interested attorney will often be the only source of information about contempts occurring outside the court's presence, 780 F.2d, at 183, and stated that the supervision of contempt prosecutions by the judge is generally sufficient to prevent the "danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations...." *Id.*, at 184. Furthermore, the court stated that the authority to prosecute encompasses the authority to engage in necessary investigative activity such as the "sting" conducted in this case. *Id.*, at 184-185. The Court of Appeals therefore affirmed petitioners' contempt convictions.

II A

Petitioners first contend that the District Court lacked authority to appoint any private attorney to prosecute the contempt action against them, and that, as a result, only the United States Attorney's Office could have permissibly brought such a prosecution. We disagree. While it is true that Federal Rule of Criminal Procedure 42(b) does not provide authorization for the appointment of a private attorney, it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt.

By its terms, Rule 42(b) speaks only to the procedure for providing notice of criminal contempt. The court is required to "state the essential facts constituting the criminal contempt charged and describe it as such." This notice must be given by the judge in open court, "or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest." The Rule's reference to the appointment of a private attorney to submit a show cause order assumes a pre-existing practice of private prosecution of contempts, but does not itself purport to serve as authorization for that practice. Rule 42(b) simply requires that, when a private prosecutor is appointed, sufficient notice must be provided that the contempt proceeding is criminal in nature.

The Rule's assumption that private attorneys may be used to prosecute contempt actions reflects the longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function. As this Court declared in *Michaelson v. United States ex rel. Chicago, St. P., M., & O.R. Co.*, 266 U.S. 42, 45 S.Ct. 18, 69 L.Ed. 162 (1924):

"That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once became possessed of the power." *Id.*, at 65-66, 45 S.Ct., at 19-20.

The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches. "If a party can make himself a judge of the validity of orders which have been

issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls The judicial power of the United States' would be a mere mockery." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450, 31 S.Ct. 492, 501, 55 L.Ed. 797 (1911). As a result, "there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience." *Ibid.* Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated. The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be "mere boards of arbitration whose judgments and decrees would be only advisory." *Ibid.*

B

Petitioners contend that the ability of courts to initiate contempt prosecutions is limited to the summary punishment of in-court contempts that interfere with the judicial process. They argue that out-of-court contempts, which require prosecution by a party other than the court, are essentially conventional crimes, prosecution of which may be initiated only by the Executive Branch.

The underlying concern that gave rise to the contempt power was not, however, merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial. See *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 333, 24 S.Ct. 665, 668, 48 L.Ed. 997 (1904) (contempt power "has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary course of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors") (emphasis added); *Ex parte Robinson*, 19 Wall. 505, 510, 22 L.Ed. 205 (1874) (existence of contempt power "essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice") (emphasis added); *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821) (courts by their creation vested with power "to impose silence, respect, and decorum in their presence, and submission to their lawful mandates") (emphasis added).

The distinction between in-court and out-of-court contempts has been drawn not to define when a court has or has not the authority to initiate prosecution for contempt, but for the purpose of prescribing what procedures must attend the exercise of that authority. As we said in *Bloom v. Illinois*, 391 U.S. 194, 204, 88 S.Ct. 1477, 1483, 20 L.Ed.2d 522 (1968), "[N]efore the 19th century was out, a distinction had been carefully drawn between contempts occurring within the view of the court, for which a hearing and formal presentation of evidence were dispensed with, and all other contempts where more normal adversary procedures were required." Thus, for instance, this Court has found that defendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves, *Gompers*, *supra*, 221 U.S., at 444, 31 S.Ct., at 499; must be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses, *Cooke v. United States*, 267 U.S. 517, 537, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925); must be given a public trial before an unbiased judge, *In re Oliver*,

333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); and must be afforded a jury trial for serious contempts, Bloom, supra. Congress also has regulated the manner in which courts exercise their power to prosecute contempts, narrowing the class of contempts subject to summary punishment, Act of Mar. 2, 1831, 4 Stat. 487. Furthermore, Rule 42 itself distinguishes between contempt committed in the presence of the court, which may be summarily punished, and all other contempts, which may be punished only upon notice and hearing.

The manner in which the court's prosecution of contempt is exercised therefore may be regulated by Congress, Michaelson, 266 U.S., at 65-66, 45 S.Ct., at 19-20, and by this Court through constitutional review, Bloom, supra, 391 U.S., at 201-208, 88 S.Ct., at 1481-1485, or supervisory power, Cheff v. Schnackenberg, 384 U.S. 373, 384, 86 S.Ct. 1523, 1526, 16 L.Ed.2d 629 {1966). However, while the exercise of the contempt power is subject to reasonable regulation, "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative." Michaelson, supra, 266 U.S., at 66, 45 S.Ct., at 20. Thus, while the prosecution of in-court and out-of-court contempts must proceed in a different manner, they both proceed at the instigation of the court.

The fact that we have come to regard criminal contempt as "a crime in the ordinary sense," Bloom, supra, 391 U.S., at 201, 88 S.Ct., at 1481, does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage. Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings. See, e.g., In re Debs, 158 U.S. 564, 596, 15 S.Ct. 900, 911, 39 L.Ed. 1092 {1895) (no jury trial in criminal contempt actions because a court in such a case is "only securing to suitors the rights which it has adjudged them entitled to"). That criminal procedure protections are now required in such prosecutions should not obscure the fact that these proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings.

Petitioners' assertion that the District Court lacked authority to appoint a private attorney to prosecute the contempt action in these cases is thus without merit. While contempt proceedings are sufficiently criminal in nature to warrant the imposition of many procedural • protections, their fundamental purpose is to preserve respect for the judicial system itself. As a result, courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such proceedings when the need arises.

C

While a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by the principle that "only '[t]he least possible power adequate to the end proposed' should be used in contempt cases." United States v. Wilson, 421 U.S. 309, 319, 95 S.Ct. 1802, 1808, 44 L.Ed.2d 186 (1975) (quoting Anderson v. Dunn, 6 Wheat., at 231). We have suggested, for instance, that, when confronted with a witness who

refuses to testify, a trial judge should first consider the feasibility of prompting testimony through the imposition of civil contempt, utilizing criminal sanctions only if the civil remedy is deemed inadequate. *Shillitani v. United States*, 384 U.S. 364, 371, n. 9, 86 S.Ct. 1531, 1536, n. 9, 16 L.Ed.2d 622 (1966).

This principle of restraint in contempt counsels caution in the exercise of the power to appoint a private prosecutor. We repeat that the rationale for the appointment authority is necessity. If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution. The logic of this rationale is that a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. Such a procedure ensures that the court will exercise its inherent power of self-protection only as a last resort.

In practice, courts can reasonably expect that the public prosecutor will accept the responsibility for prosecution. Indeed, the United States Attorney's Manual §9-39.318 (1984) expressly provides: "In the great majority of cases the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance by the U.S. Attorney of the court's request to prosecute a mere formality...." Referral will thus enhance the prospect that investigative activity will be conducted by trained prosecutors pursuant to Justice Department guidelines.

In this case, the District Court did not first refer the case to the United States Attorney's Office before the appointment of Bainton and Devlin as special prosecutors. We need not address the ramifications of that failure, however. Even if a referral had been made, we hold, in the exercise of our supervisory power, that the court erred in appointing as prosecutors counsel • for an interested party in the underlying civil litigation.

Justice SCALIA, concurring in the judgment.

I agree with the Court that the District Court's appointment of J. Joseph Bainton and Robert P. Devlin as special counsel to prosecute petitioners for contempt of an injunction earlier issued by that court was invalid, and that that action requires reversal of petitioners' convictions. In my view, however, those appointments were defective because of a failing more fundamental than that relied upon by the Court. Prosecution of individuals who disregard court orders (except orders necessary to protect the courts' ability to function) is not an exercise of "[t]he judicial power of the United States," U.S. Const, Art. III, §§1, 2. Since that is the only grant of power that has been advanced as authorizing these appointments, they were void. And since we cannot know whether petitioners would have been prosecuted had the matter been referred to a proper prosecuting authority, the convictions are likewise void.

I

With the possible exception of the power to appoint inferior federal officers, which is

irrelevant to the present cases, the only power the Constitution permits to be vested in federal courts is "[t]he judicial power of the United States." Art. III, §1. That is accordingly the only kind of power that federal judges may exercise by virtue of their Article III commissions. *Muskrat v. United States*, 219 U.S. 346, 354-356, 31 S.Ct. 250, 252-253, 55 L.H. 246 (1911); *United States v. Ferreira*, 13 How, 40, 14 L.Ed. 42 (1852).

The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. See Art. III §2. That includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them--which would be quite incompatible with the task of neutral adjudication. It is accordingly well established that the judicial power does not generally include the power to prosecute crimes. See *United States v. Cox*, 342 F.2d 167 (CA5) (en banc), cert. denied, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965), and authorities cited therein; 342 F.2d, at 182 (Brown, J., concurring); *id.*, at 185 (Wisdom, J., concurring); see generally *United States v. Thompson*, 251 U.S. 407, 413-417, 40 S.Ct. 289, 291-293, 64 L.Ed. 333 (1920). Rather, since the prosecution of law violators is part of the implementation of the laws, it is--at least to the extent that it is publicly exercised--executive power, vested by the Constitution in the President. Art. II, §2, cl. 1. See *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138, 96 S.Ct. 612, 691, 46 L.Ed.2d 659 (1976).

These well-settled general principles are uncontested. The Court asserts, however, that there is a special exception for prosecutions of criminal contempt, which are the means of securing compliance with court orders. Unless these can be prosecuted by the courts themselves, the argument goes, efficaciousness of judicial judgments will be at the mercy of the Executive, an arrangement presumably too absurd to contemplate. *Ante*, at 2131.

Far from being absurd, however, it is a carefully designed and critical element of our system of Government. There are numerous instances in which the Constitution leaves open the theoretical possibility that the actions of one Branch may be brought to nought by the actions or inactions of another. Such dispersion of power was central to the scheme of forming a Government with enough power to serve the expansive purposes set forth in the preamble of the Constitution, yet one that would "secure the blessings of liberty" rather than use its power tyrannically. Congress, for example, is dependent on the Executive and the courts for enforcement of the laws it enacts. Even complete failure by the Executive to prosecute law violators, or by the courts to convict them, has never been thought to authorize congressional prosecution and trial. The Executive, in its turn, cannot perform its function of enforcing the laws if Congress declines to appropriate the necessary funds for that purpose; or if the courts *decline* to entertain its valid prosecutions. Yet no one suggests that some doctrine of necessity authorizes the Executive to raise money for its operations without congressional appropriation, or to jail malefactors without conviction by a court of law. Why, one must wonder, are the courts alone immune from this interdependence?

The Founding Fathers, of a certainty, thought that they were not. It is instructive to compare the Court's claim that "[c]ourts cannot be at the mercy of another branch in deciding whether [contempt] proceedings should be initiated," *ante*, at 2131, with the views expressed in one of the most famous passages from *The Federalist*:

"[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.... The judiciary ... has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The Federalist No. 78, pp. 522-523 (J. Cooke ed. 1961) (A. Hamilton)

Even as a purely analytic proposition the Court's thesis is faulty, because it proves too much. If the courts must be able to investigate and prosecute contempt of their judgments, why must they not also be able to arrest and punish those whom they have adjudicated to be in contempt? Surely the Executive's refusal to enforce a judgment of contempt would impair the efficacy of the court's acts at least as much as its failure to investigate and prosecute a contempt. Yet no one has ever supposed that the Judiciary has an inherent power to arrest and incarcerate.

II

The Court appeals to a "longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function." Ante, at 2131. Except, however, for a line of cases beginning in 1895 with *In re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092, whose holding and rationale we have since repudiated, no holding of this Court has ever found inherent judicial power to punish those violating court judgments with contempt, much less to appoint officers to prosecute such contempts. Our first reference to the special status of the federal courts' contempt powers appeared in *United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812), where the question presented was whether circuit courts had the power to decide common-law criminal cases. Congress had not conferred such power, but the prosecution argued that it was part of the National Government's inherent power to preserve its own existence. *Id.*, at 33-34, The Court ruled that such an argument could establish, at most, that Congress had inherent power to pass criminal laws, not that the federal courts had inherent power without legislation to adjudge common-law crimes. At the end of its discussion, the Court noted:

"Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt--imprison for contumacy-- enforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all. others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers." *Id.*, at 34.

Thus, the holding of *Hudson* was against the existence of broad inherent powers in the federal courts. Its discussion recognized as inherent only those powers "necessary to the exercise of all others," that is, necessary to permit the courts to function, among which it included the contempt power when used to prevent interference with the conduct of judicial business. It made

no mention of the enforcement of judgments, much less of an investigative or prosecutory authority.

Nine years later, in *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821), the Court reiterated its view that the contempt power was an inherent component of the judicial power. That case presented an issue more closely related to the questions of the source and scope of the federal courts' contempt power, although still not directly on point: whether the House of Representatives could direct its Sergeant at Arms to seek out a person who had disrupted its proceedings, bring him before the House to be tried for contempt, and hold him in custody until completion of the proceedings. The Court noted that "there is no power given by the constitution to either House to punish for contempts, except when committed by their own members," *id.*, at 225, and that

"if this power ... is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; ... the executive, and every co- ordinate, and even subordinate, branch of government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness." *Id.*, at 228.

Nevertheless, the Court upheld the House's action, concluding that any other course "leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it." *Ibid.*

It was in the course of recognizing this limited power of self-defense in the House that the Court pronounced the dictum cited in today's opinion that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." *Id.*, at 227. Read in the context of the case, it seems to me likely that all the Court meant by "mandates" was orders necessary to the conduct of a trial, such as subpoenas. In any event, the statement was not a carefully considered opinion as to the outer limits of the federal courts' inherent contempt powers. As was the case in *Hudson*, moreover, the statement did not suggest that the courts should play any role in the contempt process other than that of neutral adjudicator, and was dictum not only because the judicial contempt power was not at issue but because the Judiciary Act of 1789 had already conferred the authority said to be inherently possessed. § 17, 1 Stat. 83.

I recognize, however, that the narrow principle of necessity underlying *Anderson*--that the Legislative, Executive, and Judicial Branches must each possess those powers necessary to protect the functioning of its own processes, although those implicit powers may take a form that appears to be nonlegislative, nonexecutive, or nonjudicial, respectively--does have logical application to the federal courts' contempt powers. But that principle would at most require that courts be empowered to prosecute for contempt those who interfere with the orderly conduct of their business or disobey orders necessary to the conduct of that business (such as subpoenas). It would not require that they be able to prosecute and punish, not merely disruption of their

functioning, but disregard of the product of their functioning, their judgments. The correlative of the latter power, in the congressional context, would be an inherent power on the part of Congress to prosecute and punish disobedience of its laws--which neither Anderson nor any rational person would suggest. I can imagine no basis, except self-love, for limiting this extension of the necessity doctrine to the courts alone. And even if illogically limited to the courts it is pernicious enough. In light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those to whom they apply, the notion of judges' in effect • making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth much more vividly than Anderson could ever have imagined the prospect of "the most tyrannical licentiousness." Anderson, *supra*, at 228.

Our only holdings conferring an inherent contempt power to enforce judgments emanate from *In re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895), whose outcome and reasoning we have disapproved. There a Circuit Court, which had enjoined union officers and organizers from engaging in activities disruptive of interstate rail traffic, held them in contempt for failing to comply with the injunction and sentenced them to jail for terms from three to six months. This Court rejected the argument that they had thereby been deprived of their right to a jury trial, stating:

"[T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." *Id.*, at 594-595, 15 S.Ct., at 910.

At the time, many considered *Debs* a dangerous decision, see Dunbar, *Government by Injunction*, 13 L.Q.Rev. 347 (1897); Gregory, *Government by Injunction*, 11 Harv.L.Rev. 487 (1898); Lewis, *Strikes and Courts of Equity*, 46 Am.L.Reg. 1 (1898); Lewis, *A Protest Against Administering Criminal Law by Injunction*, 42 Am.L.Reg. 879 (1894); and the opinion continued to be criticized long after it was handed down. See *Green v. United States*, 356 U.S. 165, 193-216, especially 196, and n. 6, 78 S.Ct. 632, 648-660, especially 649, and n. 6, 2 L.Ed.2d 672 (1958) (Black, J., dissenting). Ultimately, its holding was repudiated in *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), where we ruled that courts are required to afford persons charged with criminal contempt a jury trial to the same extent they are required to afford a jury trial in other criminal cases. But *Bloom* repudiated more than *Debs'* holding. It specifically rejected *Debs'* rationale that courts must have self-contained power to punish disobedience of their judgments, because 'To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.' " 391 U.S., at 208, 88 S.Ct., at 1485, quoting *Debs*, *supra*, 158 U.S., at 595, 15 S.Ct., at 910. The *Bloom* Court, to the contrary, "place[d] little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily and [was] not persuaded that the additional time and expense possibly involved in submitting serious

contempts to juries will seriously handicap the effective functioning of the courts." Bloom, *supra*, 391 U.S., at 208-209, 88 S.Ct., at 1485-1486.

The Court argues that Bloom does not control these cases, because "Nile fact that we have come to regard criminal contempt as 'a crime in the ordinary sense,' Bloom, *supra*, at 201, 88 S.Ct., at 1481, does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage." Ante, at 2133. To this argument it could be added that Bloom did not draw the distinction relied on here between the narrow Anderson necessity principle, that the courts must be able to conduct their business free of interference, and the broad necessity principle, that courts must be able to do anything required to give effect to their decisions.

While both these points are true, it seems to me that Bloom is nonetheless highly relevant to the present cases. First, it eliminates this Court's only holdings that the courts must have autonomous power to hold litigants in contempt as a means of enforcing their judgments. And second, it makes clear that the argument from necessity to the existence of an inherent power must be restrained by the totality of the Constitution, lest it swallow up the carefully crafted guarantees of liberty. 391 U.S., at 209, 88 S.Ct., at 1486. While this principle may have varying application to the jury-trial and separation-of-powers guarantees, it is inconceivable to me that it would not prevent so flagrant a violation of the latter as permitting a judge to promulgate a rule of behavior, prosecute its violation, and adjudicate whether the violation took place. That arrangement is no less fundamental, a threat to liberty than is deprivation of a jury trial, since "there is no liberty if the power of judging be not separated from the legislative and executive powers." 1 Montesquieu, *Spirit of the Laws* 181, as quoted in *The Federalist* No. 78, p. 523 (J. Cooke ed. 1961). Moreover, as a practical matter the impairment of judicial power produced by requiring the Executive to prosecute contempts is no more substantial than the impairment produced by requiring a jury. The power to acquit is as decisive as the power not to prosecute; and a jury may abuse the former power with impunity, whereas a United States Attorney must litigate regularly before the judges whose violated judgments he ignores.

Finally, the Court suggests that the various procedural protections that the Constitution requires us to provide contemnners undercut the separation-of- powers argument against judicial prosecution. Ante, at 2133, n. 9. The reverse argument--that the structural provisions of the Constitution were not only sufficient but indeed were the only sure mechanism for protecting liberty--was made against adoption of a Bill of Rights. Ultimately, the people elected to have both checks. The Court is right that disregard of one of these raises less of a prospect of "tyrannical licentiousness" than disregard of both. But that is no argument for disregard of either.

I would therefore hold that the federal courts have no power to prosecute contemnners for disobedience of court judgments, and no derivative power to appoint an attorney to conduct contempt prosecutions. That is not to say, of course, that the federal courts may not impose criminal sentences for such contempts. But they derive that power from the same source they derive the power to pass on other crimes which it has never been contended they may prosecute: a statute enacted by Congress criminalizing the conduct which has been on the books in one form or another since the Judiciary Act of 1789, *supra*, at 2131. See 18 U.S.C. §401.

IV

I agree with the Court that the District Judge's error in appointing Bannon and Devlin to prosecute these contempts requires reversal of the convictions. The very argument given for permitting a court to appoint an attorney to prosecute contempts--that the United States Attorney might exercise his prosecutorial discretion not to pursue the contemnners--makes clear that that is the result required. In light of the discretion our system allows to prosecutors, which is so broad that we ordinarily find decisions not to prosecute unreviewable, see *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), it would be impossible to conclude with any certainty that these prosecutions would have been brought had the court simply referred the matter to the Executive Branch.

MISSOURI, et al., Petitioners
v.
Kalima JENKINS et al.

No. 88-1150.

Supreme Court of the United States

Argued Oct. 30, 1989.

Decided April 18, 1990.

[WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts HI and IV, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C.J., and O'CONNOR and SCALIA, JJ., joined.]

Justice WHITE delivered the opinion of the Court.

The United States District Court for the Western District of Missouri imposed an increase in the property taxes levied by the Kansas City, Missouri, School District (KCMSD) to ensure funding for the desegregation of KCMSD's public schools. We granted certiorari to consider the State of Missouri's argument that the District Court lacked the power to raise local property taxes. For the reasons given below, we hold that the District Court abused its discretion in imposing the tax increase. We also hold, however, that the modifications of the District Court's order made by the Court of Appeals do satisfy equitable and constitutional principles governing the District Court's power.

I

In 1977, KCMSD and a group of KCMSD students filed a complaint alleging that the State of Missouri and surrounding school districts had operated a segregated public school system in the Kansas City metropolitan area. The District Court realigned KCMSD as a party defendant, *School Dist. of Kansas City v. Missouri*, 460 F.Supp. 421 (WD Mo.1978), and KCMSD filed a cross-claim against the State, seeking indemnification for any liability that might be imposed on KCMSD for intradistrict segregation. After a lengthy trial, the District Court found that KCMSD and the State had operated a segregated school system within the KCMSD. *Jenkins v. Missouri*, 593 F.Supp. 1485 (1984).

The District Court thereafter issued an order detailing the remedies necessary to eliminate the vestiges of segregation and the financing necessary to implement those remedies. *Jenkins v. Missouri*, 639 F.Supp. 19 (1985). The District Court originally estimated the total cost of the desegregation remedy to be almost \$88 million over three years, of which it expected the State to pay \$67,592,072 and KCMSD to pay \$20,140,472. *Id.*, at 43-44. The court concluded, however,

that several provisions of Missouri law would prevent KCMSD from being able to pay its share of the obligation. *Id.*, at 44. The Missouri Constitution limits local property taxes to \$1.25 per \$100 of assessed valuation unless a majority of the voters in the district approve a higher levy, up to \$3.25 per \$100; the levy may be raised above \$3.25 per \$100 only if two-thirds of the voters agree. Mo. Const., Art. X, §§11(b), (c). The "Hancock Amendment" requires property tax rates to be rolled back when property is assessed at a higher valuation to ensure that taxes will not be increased solely as a result of reassessments. Mo. Const., Art. X, §22(a); Mo.Rev.Stat. §137.073.2 (1986). The Hancock Amendment thus prevents KCMSD from obtaining any revenue increase as a result of increases in the assessed valuation of real property. "Proposition C" allocates one cent of every dollar raised by the state sales tax to a schools trust fund and requires school districts to reduce property taxes by an amount equal to 50% of the previous year's sales tax receipts in the district. Mo.Rev.Stat. §164.013.1 (Supp.1988). However, the trust fund is allocated according to a formula that does not compensate KCMSD for the amount lost in property tax revenues, and the effect of Proposition C is to divert nearly half of the sales taxes collected in KCMSD to other parts of the State.

The District Court believed that it had the power to order a tax increase to ensure adequate funding of the desegregation plan, but it hesitated to take this step. It chose instead to enjoin the effect of the Proposition C rollback to allow KCMSD to raise an additional \$4 million for the coming fiscal year. The court ordered KCMSD to submit to the voters a proposal for an increase in taxes sufficient to pay for its share of the desegregation remedy in following years. *Jenkins v. Missouri*, 639 F.Supp., at 45.

The Court of Appeals for the Eighth Circuit affirmed the District Court's findings of liability and remedial order in most respects. *Jenkins v. Missouri*, 807 F.2d 657 (1986) (in banc). The Court of Appeals agreed with the State, however, that the District Court had failed to explain adequately why it had imposed most of the cost of the desegregation plan on the State. *Id.*, at 684, 685. The Eighth Circuit ordered the District Court to divide the cost equally between the State and KCMSD. *Id.*, at 685. We denied certiorari. *Kansas City, Missouri, School Dist. v. Missouri*, 484 U.S. 816, 108 S.Ct. 70, 98 L.Ed.2d 34 (1987).

Proceedings before the District Court continued during the appeal. In its original remedial order, the District Court had directed KCMSD to prepare a study addressing the usefulness of "magnet schools" to promote desegregation. *Jenkins v. Missouri*, supra, at 34-35. A year later, the District Court approved KCMSD's proposal to operate six magnet schools during the 1986-1987 school year. The court again faced the problem of funding, for KCMSD's efforts to persuade the voters to approve a tax increase had failed, as had its efforts to seek funds from the Kansas City Council and the state legislature. Again hesitating to impose a tax increase itself, the court continued its injunction against the Proposition C rollback to enable KCMSD to raise an additional \$6.5 million. App. 13-8-142.

In November 1986, the District Court endorsed a marked expansion of the magnet school program. It adopted in substance a KCMSD proposal that every high school, every middle school, and half of the elementary schools in KCMSD become magnet schools by the 1991-1992 school year. It also approved the \$142,736,025 budget proposed by KCMSD for implementation of the magnet school plan, as well as the expenditure of \$52,858,301 for additional capital

improvements. App. to Pet. for Cert. 120a-124a.

The District Court next considered, as the Court of Appeals had directed, how to shift the cost of desegregation to KCMSD. The District Court concluded that it would be "clearly inequitable" to require the population of KCMSD to pay half of the desegregation cost, and that "even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan." *Id.*, at 112a. The court reasoned that the State should pay for most of the desegregation cost under the principle that " 'the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out,' " *id.* at 111a, and that apportionment of damages between the State and KCMSD according to fault was supported by the doctrine of comparative fault in tort, which had been adopted by the Missouri Supreme Court in *Gustafson v. Benda*, 661 S.W.2d 11 (1983). The District Court then held that the State and KCMSD were 75% and 25% at fault, respectively, and ordered them to share the cost of the desegregation remedy in that proportion. To ensure complete funding of the remedy, the court also held the two tortfeasors jointly and severally liable for the cost of the plan. App. to Pet. for Cert. 113a.

Three months later, the District Court adopted a plan requiring \$187,450,334 in further capital improvements. 672 F.Supp. 400, 408 (WD Mo.1987). By then it was clear that KCMSD would lack the resources to pay for its 25% share of the desegregation cost. KCMSD requested that the District Court order the State to pay for any amount that KCMSD could not meet. The District Court declined to impose a greater share of the cost on the State, but it accepted that KCMSD had "exhausted all available means of raising additional revenue." *Id.*, at 411. Finding itself with "no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan," *ibid.*, and believing that the "United States Supreme Court has stated that a tax may be increased if 'necessary to raise funds adequate to ... operate and maintain without racial discrimination a public school system,' " *id.*, at 412 (quoting *Griffin v. Prince Edward County School Bd.*, 377 U.S. 218, 233, 84 S.Ct. 1226, 1234, 12 L.Ed.2d 256 (1964)), the court ordered the KCMSD property tax levy raised from \$2.05 to \$4.00 per \$100 of assessed valuation through the 1991-1992 fiscal year. 672 F.Supp., at 412-413. KCMSD was also directed to issue \$150 million in capital improvement bonds. *Id.*, at 413. A subsequent order directed that the revenues generated by the property tax increase be used to retire the capital improvement bonds. App. to Pet. for Cert. 63a.

The State appealed, challenging the scope of the desegregation remedy, the allocation of the cost between the State and KCMSD, and the tax increase. A group of local taxpayers (Clark Group) and Jackson County, Missouri, also appealed from an order of the District Court denying their applications to intervene as of right. A panel of the Eighth Circuit affirmed in part and reversed in part. 855 F.2d 1295 (1988). With respect to the would-be intervenors, the Court of Appeals upheld the denial of intervention. *Id.*, at 1316-1317. The scope of the desegregation order was also upheld against all the State's objections, *id.*, at 1301-1307, as was the allocation of costs, *id.*, at 1307-1308.

Turning to the property tax increase, the Court of Appeals rejected the State's argument that a federal court lacks the judicial power to order a tax increase. The Court of Appeals agreed with the District Court that *Griffin v. Prince Edward County School Bd.*, *supra*, 377 U.S., at 233,

84 S.Ct., at 1234, had established the District Court's authority to order county officials to levy taxes. Accepting also the District Court's conclusion that state law prevented KCMSD from raising funds sufficient to implement the desegregation remedy, the Court of Appeals held that such state-law limitations must fall to the command of the Constitution. 855 F.2d, at 1313.

Although the Court of Appeals thus "affirm[ed] the actions that the [District] [C]ourt has taken to this point," *id.*, at 1314, it agreed with the State that principles of federal/state comity required the District Court to use "minimally obtrusive methods to remedy constitutional violations." *Ibid.* The Court of Appeals thus required that in the future, the District Court should not set the property tax rate itself but should authorize KCMSD to submit a levy to the state tax collection authorities and should enjoin the operation of state laws hindering KCMSD from adequately funding the remedy. The Court of Appeals reasoned that permitting the school board to set the levy itself would minimize disruption of state laws and processes and would ensure maximum consideration of the views of state and local officials. *Ibid.*

The judgment of the Court of Appeals was entered on August 19, 1988. On September 16, 1988, the State filed with the Court of Appeals a document styled "State Appellants' Petition for Rehearing En Bane." App. 489-502. Jackson County also filed a "Petition ... for Rehearing by Court En Banc," *id.*, at 458-469, and Clark Group filed a "Petition for Rehearing En Banc with Suggestions in Support." *Id.*, at 470-488. On October 14, 1988, the Court of Appeals denied the petitions with an order stating as follows: "There are now three petitions for rehearing en bane pending before the Court. It is hereby ordered that all petitions for rehearing en bane are denied." App. to Pet. for Cert. 53a. The mandate of the Court of Appeals issued on October 14.

The State, Jackson County, and Clark Group filed petitions for certiorari within 90 days of the October 14, 1988, order. The State's petition argued that the remedies imposed by the District Court were excessive in scope and that the property tax increase violated Article III, the Tenth Amendment, and principles of federal/state comity. We denied the petitions of Jackson County and Clark Group. 490 U.S. 1034, 109 S.Ct. 1931, 104 L.Ed.2d 403 (1989). We granted the State's petition, limited to the question of the property tax increase, but we requested the parties to address whether the petition was timely filed. 490 U.S. 1034, 109 S.Ct. 1930, 104 L.Ed.2d 402 (1989).

III

We turn to the tax increase imposed by the District Court. The State urges us to hold that the tax increase violated Article III, the Tenth Amendment, and principles of federal/state comity. We find it unnecessary to reach the difficult constitutional issues, for we agree with the State that the tax increase contravened the principles of comity that must govern the exercise of the District Court's equitable discretion in this area.

It is accepted by all the parties, as it was by the courts below, that the imposition of a tax increase by a federal court was an extraordinary event. In assuming for itself the fundamental and delicate power of taxation the District Court not only intruded on local authority but circumvented it altogether. Before taking such a drastic step the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task. We have emphasized that although the "remedial powers of an equity court must be adequate to the task, .. they are not unlimited," *Whitcomb v. Chavis*, 403 U.S. 124, 161, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363 (1971), and one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions. Especially is this true where, as here, those institutions are ready, willing, and--but for the operation of state law curtailing their powers--able to remedy the deprivation of constitutional rights themselves.

The District Court believed that it had no alternative to imposing a tax increase. But there was an alternative, the very one outlined by the Court of Appeals: it could have authorized or required KCMSD to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented KCMSD from exercising this power. 855 F.2d, at 1314; see *infra*, at 1664. The difference between the two approaches is far more than a matter of form. Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems.

As *Brown v. Board of Education*, 349 U.S. 294, 299, 75 S.Ct. 753, 755-756, 99 L.Ed. 1083 (1955), observed, local authorities have the "primary responsibility for elucidating, assessing, and solving" the problems of desegregation. See also *Milliken v. Bradley*, 433 U.S. 267, 281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977). This is true as well of the problems of financing desegregation, for no matter has been more consistently placed upon the shoulders of local government than that of financing public schools. As was said in another context, 'Mlle very complexity of the problems of financing and managing a ... public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that ... 'the legislature's efforts to tackle the problems' should be entitled to respect." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 1301, 36 L.Ed.2d 16 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-547, 92 S.Ct. 1724, 1731-1732, 32 L.Ed.2d 285 (1972)). By no means should a district court grant local government *carte blanche*, cf. *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), but local officials should at least have the opportunity to devise their own solutions to these problems. Cf. *Sixty- seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 196, 92 S.Ct. 1477, 1483, 32 L.Ed.2d 1 (1972) (*per curiam*).

The District Court therefore abused its discretion in imposing the tax itself. The Court of Appeals should not have allowed the tax increase to stand and should have reversed the District Court in this respect. See *Langnes V. Green*, 282 U.S. 531, 541-542, 51 S.Ct. 243, 247, 75 L.Ed. 520 (1931).

IV

We stand on different ground when we review the modifications to the District Court's order made by the Court of Appeals. As explained *supra*, at 1658, the Court of Appeals held that the District Court in the future should authorize KCMSD to submit a levy to the state tax collection authorities adequate to fund its budget and should enjoin the operation of state laws that would limit or reduce the levy below that amount. 855 F.2d, at 1314.

The State argues that the funding ordered by the District Court violates principles of equity and comity because the remedial order itself was excessive. As the State puts it, "[t]he only reason that the court below needed to consider an unprecedented tax increase was the equally unprecedented cost of its remedial programs." Brief for Petitioners 42. We think this argument aims at the scope of the remedy rather than the manner in which the remedy is to be funded and thus falls outside our limited grant of certiorari in this case. As we denied certiorari on the first question presented by the State's petition, which did challenge the scope of the remedial order, we must resist the State's efforts to argue that point now. We accept, without approving or disapproving, the Court of Appeals' conclusion that the District Court's remedy was proper. See *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 215, 67 S.Ct. 752, 754, 91 L.Ed. 849 (1947).

The State has argued here that the District Court, having found the State and KCMSD jointly and severally liable, should have allowed any monetary obligations that KCMSD could not meet to fall on the State rather than interfere with state law to permit KCMSD to meet them. Under the circumstances of this case, we cannot say it was an abuse of discretion for the District Court to rule that KCMSD should be responsible for funding its share of the remedy. The State strenuously opposed efforts by respondents to make it responsible for the cost of implementing the order and had secured a reversal of the District Court's earlier decision placing on it all of the cost of substantial portions of the order. See 807 F.2d, at 684-685. The District Court declined to require the State to pay for KCMSD's obligations because it believed that the Court of Appeals had ordered it to allocate the costs between the two governmental entities. See 672 F.Supp., at 411. Furthermore, if the District Court had chosen the route now suggested by the State, implementation of the remedial order might have been delayed if the State resisted efforts by KCMSD to obtain contribution.

It is true that in *Milliken v. Bradley*, 433 U.S., at 291, 97 S.Ct., at 2763, we stated that the enforcement of a money judgment against the State did not violate principles of federalism because "[t]he District Court ... neither attempted to restructure local governmental entities nor ... mandat[ed] a particular method or structure of state or local financing." But we did not there state that a district court could never set aside state laws preventing local governments from raising funds sufficient to satisfy their constitutional obligations just because those funds could also be obtained from the States. To the contrary, 42 U.S.C. §1983, on which respondents' complaint is based, is authority enough to require each tortfeasor to pay its share of the cost of the remedy if it can, and apportionment of the cost is part of the equitable power of the District Court. Cf. *Milliken v. Bradley*, *supra*, at 289-290, 97 S.Ct., at 2761-2762.

We turn to the constitutional issues. The modifications ordered by the Court of Appeals cannot be assailed as invalid under the Tenth Amendment. "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." 433 U.S., at 291, 97 S.Ct., at 2762. "The Fourteenth Amendment ... was avowedly directed against the power of the States," *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 42, 109 S.Ct. 2273, 2303, 105 L.Ed.2d 1 (1989) (SCALIA, J., concurring in part and dissenting in part), and so permits a federal court to disestablish local government institutions that interfere with its commands. Cf. *New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 109 S.Ct. 1433, 103 L.Ed.2d 717 (1989); *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 1393-1394, 12 L.Ed.2d 506 (1964).

Finally, the State argues that an order to increase taxes cannot be sustained under the judicial power of Article III. Whatever the merits of this argument when applied to the District Court's own order increasing taxes, a point we have not reached, see *supra*, at 1664, a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court. We held as much in *Griffin v. Prince Edward County School Bd.*, 377 U.S., at 233, 84 S.Ct., at 1234, where we stated that a District Court, faced with a county's attempt to avoid desegregation of the public schools by refusing to operate those schools, could "require the [County] Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system...." *Griffin* followed a long and venerable line of cases in which this Court held that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations. See, e.g., *Louisiana ex rel. Hubert v. Mayor and Council of New Orleans*, 215 U.S. 170, 30 S.Ct. 40, 54 L.Ed. 144 (1909); *Graham v. Folsom*, 200 U.S. 248, 26 S.Ct. 245, 50 L.Ed. 464 (1906); *Wolff v. New Orleans*, 103 U.S. 358, 26 L.Ed. 395 (1881); *United States v. New Orleans*, 98 U.S. 381, 25 L.Ed. 225 (1879); *Heine v. Levee Commissioners*, 19 Wall. 655, 657, 22 L.Ed. 223 (1874); *City of Galena v. Amy*, 5 Wall. 705, 18 L.Ed. 560 (1867); *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L.Ed. 403 (1867); *Board of Commissioners of Knox County v. Aspinwall*, 24 How. 376, 16 L.Ed. 735 (1861).

The State maintains, however, that even under these cases, the federal judicial power can go no further than to require local governments to levy taxes as authorized under state law. In other words, the State argues that federal courts cannot set aside state-imposed limitations on local taxing authority because to do so is to do more than to require the local government "to exercise the power that is theirs." We disagree. This argument was rejected as early as *Von Hoffman v. City of Quincy*, *supra*. There the holder of bonds issued by the city sought a writ of mandamus against the city requiring it to levy taxes sufficient to pay interest coupons then due. The city defended based on a state statute that limited its power of taxation, and the Circuit Court refused to mandamus the city. This Court reversed, observing that the statute relied on by the city was passed after the bonds were issued and holding that because the city had ample authority to levy taxes to pay its bonds when they were issued, the statute impaired the contractual entitlements of the bondholders, contrary to Art. I, § 10, cl. 1, of the Constitution, under which a State may not pass any law impairing the obligation of contracts. The statutory limitation, therefore, could be disregarded and the city ordered to levy the necessary taxes to pay its bonds.

It is therefore clear that a local government with taxing authority may be ordered to levy

taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation. In *Von Hoffman*, the limitation was disregarded because of the Contract Clause. Here, the KCMSD may be ordered to levy taxes despite the statutory limitations on its authority in order to compel the discharge of an obligation imposed on KCMSD by the Fourteenth Amendment. To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them. However wide the discretion of local authorities in fashioning desegregation remedies may be, "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *North Carolina Bd. of Education v. Swann*, 402 U.S. 43, 45, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971). Even though a particular remedy may not be required in every case to vindicate constitutional guarantees, where (as here) it has been found that a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy.

Accordingly, the judgment of the Court of Appeals is affirmed insofar as it required the District Court to modify its funding order and reversed insofar as it allowed the tax increase imposed by the District Court to stand. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, with whom THE CHIEF JUSTICE, Justice O'CONNOR, and Justice SCALIA join, concurring in part and concurring in the judgment.

In agreement with the Court that we have jurisdiction to decide this case, I join Parts I and II of the opinion. I agree also that the District Court exceeded its authority by attempting to impose a tax. The Court is unanimous in its holding, that the Court of Appeals' judgment affirming "the actions that the [district] court has taken to this point," 855 F.2d 1295, 1314 (CA8 1988), must be reversed. This is consistent with our precedents and the basic principles defining judicial power.

In my view, however, the Court transgresses these same principles when it goes further, much further, to embrace by broad dictum an expansion of power in the Federal Judiciary beyond all precedent. Today's casual embrace of taxation imposed by the unelected, life-tenured Federal Judiciary disregards fundamental precepts for the democratic control of public institutions. I cannot acquiesce in the majority's statements on this point, and should there arise an actual dispute over the collection of taxes as here contemplated in a case that is not, like this one, premature, we should not confirm the outcome of premises adopted with so little constitutional justification. The Court's statements, in my view, cannot be seen as necessary for its judgment, or as precedent for the future, and I cannot join Parts III and IV of the Court's opinion.

Whatever the Court thinks of the Court of Appeals' opinion, the District Court on remand appears to have thought it was under no compulsion to disturb its existing order establishing the \$4 property tax rate through fiscal year 1991-1992 unless and until it became necessary to raise property taxes even higher. The Court's discussion today, and its stated approval of the "method for future funding" found "preferable" by the Court of Appeals, is unnecessary for the decision in this case. As the Court chooses to discuss the question of future taxation, however, I must state my respectful disagreement with its analysis and conclusions on this vital question.

The premise of the Court's analysis, submit, is infirm. Any purported distinction between direct imposition of a tax by the federal court and an order commanding the school district to impose the tax is but a convenient formalism where the court's action is predicated on elimination of state-law limitations on the school district's taxing authority. As the Court describes it, the local KCMSD possesses plenary taxing powers, which allow it to impose any tax it chooses if not "hinder[ed]" by the Missouri Constitution and state statutes. Ante, at 1666. This puts the conclusion before the premise. Local government bodies in Missouri, as elsewhere, must derive their power from a sovereign, and that sovereign is the State of Missouri. See Mo. Const., Art. X, §1 (political subdivisions may exercise only "[tax] power granted to them" by Missouri General Assembly). Under Missouri law, the KCMSD has power to impose a limited property tax levy up to \$1.25 per \$100 of assessed value. The power to exact a higher rate of property tax remains with the people, a majority of whom must agree to empower the KCMSD to increase the levy up to \$3.75 per \$100, and two-thirds of whom must agree for the levy to go higher. See Mo. Const., Art. X, §§11(h), (c). The Missouri Constitution states that "[p]roperty taxes and other local taxes ... may not be increased above the limitations specified herein without direct voter approval as provided by this constitution." Mo. Const., Art. X, §16.

For this reason, I reject the artificial suggestion that the District Court may, by "prevent[ing] ... officials from applying state law that would interfere with the willing levy of property taxes by KCMSD," ante, at 1666, n. 20, cause the KCMSD to exercise power under state law. State laws, including taxation provisions legitimate and constitutional in themselves, define the power of the KCMSD. Cf. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 695, 99 S.Ct. 3055, 3079, 61 L.Ed.2d 823 (1979) (whether a state agency "may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful"). Absent a change in state law, no increase in property taxes could take place in the KCMSD without a federal court order. It makes no difference that the KCMSD stands "ready, willing, and ... able" to impose a tax not authorized by state law. Ante, at 1663. Whatever taxing power the KCMSD may exercise outside the boundaries of state law would derive from the federal court. The Court never confronts the judicial authority to issue an order for this purpose. Absent a change in state law, the tax is imposed by federal authority under a federal decree. The question is whether a district court possesses a power to tax under federal law, either directly or through delegation to the KCMSD.

II

Article III of the Constitution states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The description of the judicial power nowhere includes the word "tax" or anything that resembles it. This reflects the Framers' understanding that taxation was not a proper area for judicial involvement. "The judiciary ... has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." The Federalist No. 78, p. 523 (J. Cooke ed. 1961) (A. Hamilton).

Our cases throughout the years leave no doubt that taxation is not a judicial function. Last Term we rejected the invitation to cure an unconstitutional tax scheme by broadening the class of those taxed. We said that such a remedy "could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Davis v. Michigan Dept. of Treasiry*, 489 U.S. 803, 818, 109 S.Ct. 1500, 1509, 103 L.Ed.2d 891 (1989). Our statement in *Davis* rested on the explicit holding in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d 66 (1961), in which we reversed a judgment directing a District Court to decree a valid tax in place of an invalid one that the State had attempted to enforce:

"The effect of the Court's remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." *Id.*, at 752, 81 S.Ct., at 874.

The nature of the District Court's order here reveals that it is not a proper exercise of the judicial power. The exercise of judicial power involves adjudication of controversies and imposition of burdens on those who are parties before the Court. The order at issue here is not of this character. It binds the broad class of all. KCMSD taxpayers. It has the purpose and direct effect of extracting money from persons who have had no presence or representation in the suit. For this reason, the District Court's direct order imposing a tax was more than an abuse of discretion, for any attempt to collect the taxes from the citizens would have been a blatant denial of due process.

Taxation by a legislature raises no due process concerns, for the citizens' "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Co. v. Colorado State Bd. of Equalization*, 239 U.S. 441, 445, 36 S.Ct. 141, 142, 60 L.Ed. 372 (1915). The citizens who are taxed are given notice and a hearing through their representatives, whose power is a direct manifestation of the citizens' consent. A true exercise of judicial power provides due process of another sort. Where money is extracted from parties by a court's judgment, the adjudication itself provides the notice and opportunity to be heard that due process demands before a citizen may be deprived of property.

The order here provides neither of these protections. Where a tax is imposed by a governmental body other than the legislature, even an administrative agency to which the legislature has delegated taxing authority, due process requires notice to the citizens to be taxed and some opportunity to be heard. See, e.g., *Londoner v. Denver*, 210 U.S. 373, 385-386, 28 S.Ct. 708, 713-714, 52 L.Ed. 1103 (1908). The citizens whose tax bills would have been doubled under the District Court's direct tax order would not have had these protections. The taxes were imposed by a District Court that was not "representative" in any sense, and the individual citizens of the KCMSD whose property (they later learned) was at stake were neither served with process nor heard in court. The method of taxation endorsed by today's dicta suffers the same flaw, for a district court order that overrides the citizens' state-law protection against taxation without referendum approval can in no sense provide representational due process. No one suggests the KCMSD taxpayers are parties.

A judicial taxation order is but an attempt to exercise a power that always has been thought legislative in nature. The location of the federal taxing power sheds light on today's attempt to approve judicial taxation at the local level. Article 1, §1, states that "all legislative Powers herein granted shall be vested in 'a Congress of the United States, which shall consist of a Senate and House of Representatives.'" (Emphasis added.) The list of legislative powers in Article 1, §8, cl. 1, begins with the statement that "[t]he Congress shall have Power To lay and collect Taxes...." As we have said, "[t]axation is a legislative function, and Congress ... is the sole organ for levying taxes." *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336, 340, 94 S.Ct. 1146, 1149, 39 L.Ed.2d 370 (1974) (citing Article 1, §8, cl. 1).

True, today's case is not an instance of one branch of the Federal Government invading the province of another. It is instead one that brings the weight of federal authority upon a local government and a State. This does not detract, however, from the fundamental point that the Judiciary is not free to exercise all federal power; it may exercise only the judicial power. And the important effects of the taxation order discussed here raise additional federalism concerns that counsel against the Court's analysis.

In perhaps the leading case concerning desegregation remedies, *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), we upheld a prospective remedial plan, not a "money judgment," ante, at 1665, against a State's claim that principles of federalism had been ignored in the plan's implementation. In so doing the Court emphasized that the District Court had "neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing." 433 U.S., at 291, 97 S.Ct., at 2763. No such assurances emerge from today's decision, which endorses federal-court intrusion into these precise matters. Our statement in a case decided more than 100 years ago should apply here.

"This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." *Rees v. City of Watertown*, 19 Wall. 107, 116-117, 22 L.Ed. 72 (1874).

The confinement of taxation to the legislative branches, both in our Federal and State Governments, was not random. It reflected our ideal that the power of taxation must be under the control of those who are taxed. This truth animated all our colonial and revolutionary history.

"Your Memorialists conceive it to be a fundamental Principle ... without which Freedom can no Where exist, that the People are not subject to any Taxes but such as are laid on them by their own Consent, or by those who are legally appointed to represent them: Property must become too precarious for the Genius of a free People which can be taken from them at the Will of others, who cannot know what Taxes such people can bear, or the easiest Mode of raising them; and who are not under that Restraint, which is the greatest Security against a burthensome Taxation, when the Representatives themselves must be affected by every tax imposed on the People." Virginia Petitions to King and Parliament, December 18, 1764, reprinted in *The Stamp Act Crisis* 41 (E. Morgan ed. 1952).

The power of taxation is one that the Federal Judiciary does not possess. In our system "the legislative department alone has access to the pockets of the people," *The Federalist* No. 48, p. 334 (J. Cooke ed. 1961) (J. Madison), for it is the Legislature that is accountable to them and represents their will. The authority that would levy the tax at issue here shares none of these qualities. Our Federal Judiciary, by design, is not representative or responsible to the people in a political sense; it is independent. Federal judges do not depend on the popular will for their office. They may not even share the burden of taxes they attempt to impose, for they may live outside the jurisdiction their orders affect. And federal judges have no fear that the competition for scarce public resources could result in a diminution of their salaries. It is not surprising that imposition of taxes by an authority so insulated from public communication or control can lead to deep feelings of frustration, powerlessness, and anger on the part of taxpaying citizens.

The operation of tax systems is among the most difficult aspects of public administration. It is not a function the Judiciary as an institution is designed to exercise. Unlike legislative bodies, which may hold hearings on how best to raise revenues, all subject to the views of constituents to whom the Legislature is accountable, the Judiciary must grope ahead with only the assistance of the parties, or perhaps random amici curiae. Those hearings would be without principled direction, for there exists no body of juridical axioms by which to guide or review them. On this questionable basis, the Court today would give authority for decisions that affect the life plans of local citizens, the revenue available for competing public needs, and the health of the local economy.

Day-to-day administration of the tax must be accomplished by judicial trial and error, requisitioning the staff of the existing tax authority, or the hiring of a staff under the direction of the judge. The District Court orders in this case suggest the pitfalls of the first course. See App. to Pet. for Cert. 55a (correcting order for assessment of penalties for nonpayment that "mistakenly" assessed penalties on an extra tax year); *id.*, at 57a ("clarify[ing]" the inclusion of savings and loan institutions, estates, trusts, and beneficiaries in the court's income tax surcharge and enforcement procedures). Forcing citizens to make financial decisions in fear of the fledgling judicial tax collector's next misstep must detract from the dignity and independence of

the federal courts.

The function of hiring and supervising a staff for what is essentially a political function has other complications. As part of its remedial order, for example, the District Court ordered the hiring of a "public information specialist," at a cost of \$30,000. The purpose of the position was to "solicit community support and involvement" in the District Court's desegregation plan. See *id.*, at 191a. This type of order raises a substantial question whether a district court may extract taxes from citizens who have no right of representation and then use the funds for expression with which the citizens may disagree. Cf. *Aboud v. Detroit Bd. of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

The Court relies on dicta from *Griffin v. Prince Edward County School Bd.*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) to support its statements on judicial taxation. In *Griffin*, the Court faced an unrepentant and recalcitrant school board that attempted to provide financial support for white schools while refusing to operate schools for black schoolchildren. We stated that the District Court could "require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." *Id.*, at 233, 84 S.Ct., at 1234 (emphasis added). There is no occasion in this case to discuss the full implications of *Griffin*'s observation, for it has no application here. *Griffin* endorsed the power of a federal court to order the local authority to exercise existing authority to tax.

This case does not involve an order to a local government with plenary taxing power to impose a tax, or an order directed at one whose taxing power has been limited by a state law enacted in order to thwart a federal court order. An order of this type would find support in the *Griffin* dicta, and present a closer question than the one before us. Yet that order might implicate as well the "perversion of the normal legislative process" that we have found troubling in other contexts. See *Spallone v. United States*, 493 U.S. 265, 280, 110 S.Ct. 625, 634, 107 L.Ed.2d 644 (1990). A legislative vote taken under judicial compulsion blurs lines of accountability by making it appear that a decision was reached by elected representatives when the reality is otherwise. For this reason, it is difficult to see the difference between an order to tax and direct judicial imposition of a tax.

The Court asserts that its understanding of *Griffin* follows from cases in which the Court upheld the use of mandamus to compel local officials to collect taxes that were authorized under state law in order to meet bond obligations. See *ante*, at 1665-1666. But as discussed, *supra*, at 1669-1670, there was no state authority in this case for the KCMSD to exercise. In this situation, there could be no authority for a judicial order touching on taxation. See *United States v. County of Macon*, 99 U.S. 582, 591, 25 L.Ed. 331 (1879) (where the statute empowering the corporation to issue bonds contains a limit on the taxing power, federal court has no power of mandamus to compel a levy in excess of that power; "We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation").

The Court cites a single case, *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L.Ed. 403 (1867), for the proposition that a federal court may set aside state taxation limits that interfere

with the remedy sought by the district court. But the Court does not heed Von Hoffman's holding. There a municipality had authorized a tax levy in support of a specific bond obligation, but later limited the taxation authority in a way that impaired the bond obligation. The Court held the subsequent limitation itself unconstitutional, a violation of the Contracts Clause. Once the limitation was held invalid, the original specific grant of authority remained. There is no allegation here, nor could there be, that the neutral tax limitations imposed by the people of Missouri are unconstitutional. Compare Tr. of Oral Arg. 41 ("nothing in the record to suggest" that tax limitation was intended to frustrate desegregation) with *Griffin*, supra, 377 U.S., at 221, 84 S.Ct., at 1228 (State Constitution amended as part of state and school district plan to resist desegregation). The majority appears to concede that the Missouri tax law does not violate a specific provision of the Constitution, stating instead that state laws may be disregarded on the basis of a vague "reason based in the Constitution." Ante, at 1666. But this broad suggestion does not follow from the holding in *Von Hoffman*.

Examination of the "long and venerable line of cases," ante, at 1665, cited by the Court to endorse judicial taxation reveals the lack of real support for the Court's rationale. One group of these cases holds simply that the common-law writ of mandamus lies to compel a local official to perform a clear duty imposed by state law. See *United States v. New Orleans*, 98 U.S. 381, 25 L.Ed. 225 (1879) (reaffirming legislative nature of the taxing power and the availability of mandamus to compel officers to levy a tax where they were required by state law to do so); *City of Galena v. Amy*, 5 Wall. 705, 18 L.Ed. 560 (1867) (mandamus to state officials to collect a tax authorized by state law in order to fund a state bond obligation); *Board of Commissioners of Knox County v. Aspinwall*, 24 How. 376, 16 L.Ed. 735 (1861) (state statute gave tax officials authority to levy the tax needed to satisfy a bond obligation and explicitly required them to do so; mandamus was proper to compel performance of this "plain duty" under state law). These common-law mandamus decisions do not purport to involve the Federal Constitution or remedial powers.

A second set of cases, including the *Von Hoffman* case relied upon by the Court, invalidates on Contracts Clause grounds statutory limitations on taxation power passed subsequent to grants of tax authority in support of bond obligations. See *Louisiana ex rel. Hubert v. Mayor and Council of New Orleans*, 215 U.S. 170, 30 S.Ct. 40, 54 L.Ed. 144 (1909) (state law authorized municipal tax in support of bond obligation; subsequent legislation removing the authority is invalid under Contracts Clause, and mandamus will lie against municipal official to collect the tax); *Graham v. Folsom*, 200 U.S. 248, 26 S.Ct. 245, 50 L.Ed. 464 (1906) (where state municipality enters into a bond obligation based on delegated state power to collect a tax, State may not by subsequent abolition of the municipality remove the taxing power; such an act is itself invalid as a violation of the Contracts Clause); *Wolff v. New Orleans*, 103 U.S. 358, 26 L.Ed. 395 (1881) (same). These cases, like *Von Hoffman*, are inapposite because there is no colorable argument that the provision of the Missouri Constitution limiting property tax assessments itself violates the Federal Constitution.

A third group of cases involving taxation and municipal bonds is more relevant. These cases hold that where there is no state or municipal taxation authority that the federal court may by mandamus command the officials to exercise, the court is itself without authority to order taxation. In some of these cases, the officials charged with administering the tax resigned their

positions, and the Court held that no judicial remedy was available. See *Heine v. Levee Commissioners*, 19 Wall. 655, 22 L.Ed. 223 (1874) (where the levee commissioners had resigned their office no one remained on whom the mandamus could operate). In *Heine*, the Court held that it had no equitable power to impose a tax in order to prevent the plaintiff's right from going without a remedy.

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or National.... It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee." *Id.*, at 660-661.

Other cases state more broadly that absent state authority for a tax levy, the exercise of which may be compelled by mandamus, the federal court is without power to impose any tax. See *Meriwether v. Garrett*, 102 U.S. 472, 26 L.Ed. 197 (1880) (where State repealed municipal charter, federal court had no authority to impose taxes, which may be collected only under authority from the legislature); *id.*, at 515 (Field, J., concurring in judgment) ("The levying of taxes is not a judicial act. It has no elements of one"); *United States v. County of Macon*, 99 U.S. 582, 25 L.Ed. 331 (1879) (no authority to compel a levy higher than state law allowed outside situation where a subsequent limitation violated Contracts Clause); *Rees v. City of Watertown*, 19 Wall. 107, 22 L.Ed. 72 (1874) (holding mandamus unavailable where officials have resigned, and that tax limitation in effect when bond obligation was undertaken may not be exceeded by court order).

With all respect, it is this third group of cases that applies. The majority would limit these authorities to a narrow "exceptio[n]" for cases where local officers resigned. *Ante*, at 1666, n. 20. This is not an accurate description. Rather, the cases show that where a limitation on the local authority's taxing power is not a subsequent enactment itself in violation of the Contracts Clause, a federal court is without power to order a tax levy that goes beyond the authority granted by state law. The Court states that the KCMSD was "invested with authority to collect and disburse the property tax." *Ibid.* Invested by whom? It is plain that the KCMSD had no such power under state law. That being so, the authority to levy a higher tax would have to come from the federal court. The very cases cited by the majority show that a federal court has no such authority.

At bottom, today's discussion seems motivated by the fear that failure to endorse judicial taxation power might in some extreme circumstance leave a court unable to remedy a constitutional violation. As I discuss below, I do not think this possibility is in reality a significant one. More important, this possibility is nothing more or less than the necessary consequence of any limit on judicial power. If, however, judicial discretion is to provide the sole limit on judicial remedies, that discretion must counsel restraint. Ill-considered entry into the volatile field of taxation is a step that may place at risk the legitimacy that justifies judicial

independence.

Ed PLAUT, et ux., et al., Petitioners,
v.
SPENDTHRIFT FARM, INC., et al.

No. 93-1121.

Supreme Court of the United States

Argued Nov. 30, 1994.

Decided April 18, 1995.

[Justice Breyer concurred in judgment and filed opinion. Justice Stevens dissented and filed opinion, in which Justice Ginsburg joined.]

Justice SCALIA delivered the opinion of the Court.

The question presented in this case is whether §27A(b) of the Securities Exchange Act of 1934, to the extent that it requires federal courts to reopen final judgments in private civil actions under § 10(b) of the Act, contravenes the Constitution's separation of powers or the Due Process Clause of the Fifth Amendment.

I

In 1987, petitioners brought a civil action against respondents in the United States District Court for the Eastern District of Kentucky. The complaint alleged that in 1983 and 1984 respondents had committed fraud and deceit in the sale of stock in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. The case was mired in pretrial proceedings in the District Court until June 20, 1991, when we decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321. *Lampf* held that "Mitigation instituted pursuant to §10(b) and Rule I Ob-5 must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.*, at 364, 111 S.Ct., at 2782. We applied that holding to the plaintiff-respondents in *Lampf* itself, found their suit untimely, and reinstated a summary judgment previously entered in favor of the defendant-petitioners. *Ibid.* On the same day we decided *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), in which a majority of the Court held, albeit in different opinions, that a new rule of federal law that is applied to the parties in the case announcing the rule must be applied as well to all cases pending on direct review. See *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 92, 113 S.Ct. 2510, 2514-2515, 125 L.Ed.2d 74 (1993). The joint effect of *Lampf* and *Beam* was to mandate application of the 1-year/3-year limitations period to petitioners' suit. The District Court, finding that petitioners' claims were untimely under the *Lampf* rule, dismissed their action with prejudice on August 13, 1991. Petitioners filed no appeal; the judgment accordingly became final 30 days later. See 28 U.S.C. §2107(a) (1988 ed., Stipp. V); *Griffith v. Kentucky*, 479 U.S. 314, 321, n. 6, 107 S.Ct. 708, 712, n. 6, 93 L.Ed.2d 649 (1987).

On December 19, 1991, the President signed the Federal Deposit Insurance Corporation Improvement Act of 1991, 105 Stat. 2236. Section 476 of the Act--a section that had nothing to do with FDIC improvements--became §27A of the Securities Exchange Act of 1934, and was later codified as 15 U.S.C. §78aa- 1 (1988 ed., Supp. V). It provides:

"(a)Effect on pending causes of action

"The limitation period for any private civil action implied under section 78j(b) of this title [§10(b) of the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

"(b)Effect on dismissed causes of action

"Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991--

"(1) which was dismissed as time barred subsequent to June 19, 1991, and

"(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

"shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991."

On February 11, 1992, petitioners returned to the District Court and filed a motion to reinstate the action previously dismissed with prejudice. The District Court found that the conditions set out in §§27A(b)(1) and (2) were met, so that petitioners' motion was required to be granted by the terms of the statute. It nonetheless denied the motion, agreeing with respondents that §27A(b) is unconstitutional. Memorandum Opinion and Order, Civ. Action No. 87-438 (ED Ky., Apr. 13, 1992). The United States Court of Appeals for the Sixth Circuit affirmed. 1 F.3d 1487 (1993). We granted certiorari. 511 U.S. 1141, 114 S.Ct. 2161, 128 L.Ed.2d 885 (1994).

III

Respondents submit that §27A(b) violates both the separation of powers and the Due Process Clause of the Fifth Amendment. Because the latter submission, if correct, might dictate a similar result in a challenge to state legislation under the Fourteenth Amendment, the former is the narrower ground for adjudication of the constitutional questions in the case, and we therefore consider it first. *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) {Brandeis, J., concurring}. We conclude that in §27A(b) Congress has exceeded its authority by requiring the federal courts to exercise "[t]he judicial Power of the United States," U.S. Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.

Our decisions to date have identified two types of legislation that require federal courts to exercise the judicial power in a manner that Article III forbids. The first appears in *United States v. Klein*, 13 Wall. 128, 20 L.Ed. 519 {1872}, where we refused to give effect to a statute that was

said "[to] prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.*, 13 Wall., at 146. Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress "amend[s] applicable law." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441, 112 S.Ct. 1407, 1414, 118 L.Ed.2d 73 (1992). Section 27A(b) indisputably does set out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively). The second type of unconstitutional restriction upon the exercise of judicial power identified by past cases is exemplified by *Hayburn's Case*, 2 Dall. 409 (1792), which stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. See, e.g., *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948). Yet under any application of §27A(b) only courts are involved; no officials of other departments sit in direct review of their decisions. Section 27A(b) therefore offends neither of these previously established prohibitions.

We think, however, that §27A(b) offends a postulate of Article III just as deeply rooted in our law as those we have mentioned. Article III establishes a "judicial department" with the "province and duty to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy--with an understanding, in short, that "a judgment conclusively resolves the case" because "a judicial Power' is one to render dispositive judgments." Easterbrook, *Presidential Review*, 40 Case W.Res.L.Rev. 905, 926 (1990). By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.

A

The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression. In the 17th and 18th centuries colonial assemblies and legislatures functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments. G. Wood, *The Creation of the American Republic 1776-1787*, pp. 154-155 (1969). Often, however, they chose to correct the judicial process through special bills or other enacted legislation. It was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial or appeal. M. Clarke, *Parliamentary Privilege in the American Colonies* 49-51 (1943). See, e.g., *Judicial Action by the Provincial Legislature of Massachusetts*, 15 *Harv.L.Rev.* 208 (1902) (collecting documents from 1708-1709); *5 Laws of New Hampshire, Including Public and Private Acts, Resolves, Votes, Etc., 1784-1792* (Metcalf ed. 1916). Thus, as described in our discussion of *Hayburn's Case*, *supra*, at 6-7, such legislation bears not on the problem of interbranch review but on the problem of finality of judicial judgments.

The vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies increased the frequency of legislative correction of judgments. Wood, *supra*, at 155-

156, 407-408. See also *INS v. Chadha*, 462 U.S. 919, 961, 103 S.Ct. 2764, 2789, 77 L.Ed.2d 317 (1983) (Powell, J., concurring). "The period 1780-1787 ... was a period of 'constitutional reaction' " to these developments, "which ... leaped suddenly to its climax in the Philadelphia Convention." E. Corwin, *The Doctrine of Judicial Review* 37 (1914). Voices from many quarters, official as well as private, decried the increasing legislative interference with the private-law judgments of the courts. In 1786, the Vermont Council of Censors issued an "Address of the Council of Censors to the Freemen of the State of Vermont" to fulfill the council's duty, under the State Constitution of 1784, to report to the people " 'whether the legislative and executive branches of government have assumed to themselves, or exercised, other or greater powers than they are entitled to by the Constitution.' " Vermont State Papers 1779-1786, pp. 531, 533 (Slade ed. 1823). A principal method of usurpation identified by the censors was "[t]he instances...of judgments being vacated by legislative acts." *Id.*, at 540. The council delivered an opinion

"that the General Assembly, in all the instances where they have vacated judgments, recovered in due course of law, (except where the particular circumstances of the case evidently made it necessary to grant a new trial) have exercised a power not delegated, or intended to be delegated, to them, by the Constitution.... It supercedes the necessity of any other law than the pleasure of the Assembly, and of any other court than themselves: for it is an imposition on the suitor, to give him the trouble of obtaining, after several expensive trials, a final judgment agreeably to the known established laws of the land; if the Legislature, by a sovereign act, can interfere, reverse the judgment, and decree in such manner, as they, unfettered by rules, shall think proper." *Ibid.*

So too, the famous report of the Pennsylvania Council of Censors in 1784 detailed the abuses of legislative interference with the courts at the behest of private interests and factions. As the General Assembly had (they wrote) made a custom of "extending their deliberations to the eases of individuals," the people had "been taught to consider an application to the legislature, as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law." The censors noted that because "favour and partiality have, from the nature of public bodies of men, predominated in the distribution of this relief ... [these dangerous procedures have been too often recurred to, since the revolution." Report of the Committee of the Council of Censors 6 (Bailey ed. 1784).

This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution. See Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 *Am.Hist.Rev.* 511, 514-517 (1925). The Convention made the critical decision to establish a judicial department independent of the Legislative Branch by providing that "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them. Madison's *Federalist No. 48*, the famous description of the

process by which "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex," referred to the report of the Pennsylvania Council of Censors to show that in that State "eases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." The Federalist No. 48, pp. 333, 337 (J. Cooke ed. 1961). Madison relied as well on Jefferson's Notes on the State of Virginia, which mentioned, as one example of the dangerous concentration of governmental powers into the hands of the legislature, that "the Legislature ... in many instances decided rights which should have been left to judiciary controversy." *Id.*, at 336 (emphasis deleted).

If the need for separation of legislative from judicial power was plain, the principal effect to be accomplished by that separation was even plainer. As Hamilton wrote in his exegesis of Article III, § I, in The Federalist No. 81:

"It is not true that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorises the revisal of a judicial sentence, by a legislative act.... A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases." The Federalist No. 81, p. 545 (J. Cooke ed. 1961).

The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated," but the power of "[t]he interpretation of the laws" would be "the proper and peculiar province of the courts." The Federalist No. 78, pp. 523, 525. See also Corwin, *The Doctrine of Judicial Review*, at 42. The Judiciary would be, "from the nature of its functions, ... the [department] least dangerous to the political rights of the constitution," not because its acts were subject to legislative correction, but because the binding effect of its acts was limited to particular cases and controversies. Thus, "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: ... so long as the judiciary remains truly distinct from both the legislative and executive." *Id.*, No. 78, at 522.

Judicial decisions in the period immediately after ratification of the Constitution confirm the understanding that it forbade interference with the final judgments of courts. In *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), the Legislature of Connecticut had enacted a statute that set aside the final judgment of a state court in a civil case. Although the issue before this Court was the construction of the Ex Post Facto Clause, Art. I, §10, Justice Iredell (a leading Federalist who had guided the Constitution to ratification in North Carolina) noted that

"the Legislature of [Connecticut] has been in the uniform, uninterrupted, habit of exercising a general superintending power over its courts of law, by granting new trials. It may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions.... The power ... is judicial in its nature; and whenever it is exercised, as in

the present instance, it is an exercise of judicial, not of legislative, authority." *Id.*, 3 Dall., at 398.

The state courts of the era showed a similar understanding of the separation of powers, in decisions that drew little distinction between the federal and state constitutions. To choose one representative example from a multitude: In *Bates v. Kimball*, 2 Chipman 77 (Vt.1824), a special Act of the Vermont Legislature authorized a party to appeal from the judgment of a court even though, under the general law, the time for appeal had expired. The court, noting that the unappealed judgment had become final, set itself the question "Have the Legislature power to vacate or annul an existing judgment between party and party?" *Id.*, at 83. The answer was emphatic: "The necessity of a distinct and separate existence of the three great departments of government ... had been proclaimed and enforced by ... Blackstone, Jefferson and Madison," and had been "sanctioned by the people of the United. States, by being adopted in terms more or less explicit, into all their written constitutions." *Id.*, at 84. The power to annul a final judgment, the court held (citing *Hayburn's Case*, 2 Dall., at 410), was "an assumption of Judicial power," and therefore forbidden. *Bates v. Kimball*, *supra*, at 90. For other examples, see *Merrill v. Sherburne*, 1 N.H. 199 (1818) (legislature may not vacate a final judgment and grant a new trial); *Lewis v. Webb*, 3 Greenleaf 299 (Me.1825) (same); T. Cooley, *Constitutional Limitations* 95-96 (1868) (collecting cases); J. Sutherland, *Statutory Construction* 18- 19 (J. Lewis ed. 1904) (same).

By the middle of the 19th century, the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases was so well understood and accepted that it could survive even *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 (1857). In his First Inaugural Address, President Lincoln explained why the political branches could not, and need not, interfere with even that infamous judgment:

"I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit.... And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice." 4 R. Basler, *The Collected Works of Abraham Lincoln* 268 (1953) (First Inaugural Address 1861).

And the great constitutional scholar Thomas Cooley addressed precisely the question before us in his 1868 treatise:

"If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry." Cooley, *supra*, at 94-95.

B

Section 27A(b) effects a clear violation of the separation-of-powers principle we have just discussed. It is, of course, retroactive legislation, that is, legislation that prescribes what the law was at an earlier time, when the act whose effect is controlled by the legislation occurred--in this case, the filing of the initial Rule 10b-5 action in the District Court. When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." The Federalist No. 81, at 545. Our decisions stemming from Hayburn's Case--although their precise holdings are not strictly applicable here, see *supra*, at 1452-1453--have uniformly provided fair warning that such an act exceeds the powers of Congress. See, e.g., *Chicago & Southern Air Lines, Inc.*, 333 U.S., at 113, 68 S.Ct., at 437 ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *United States v. O'Grady*, 22 Wall. 641, 647-648, 22 L.Ed. 772 (1875) ("Judicial jurisdiction implies the power to hear and determine a cause, and ... Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal"); *Gordon v. United States*, 117 U.S.Appx. 697, 700- 704 (1864) (opinion of Taney, C.J.) (judgments of Article III courts are "final and conclusive upon the rights of the parties"); *Hayburn's Case*, 2 Dall., at 411 (opinion of Wilson and Blair, JJ., and Peters, D.J.) ("[R]evision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts"); *id.*, at 413 (opinion of Iredell, J., and Sitgreaves, D.J.) ("[N]o decision of any court of the United States can, under any circumstances, ... be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested"). See also *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 431, 15 L.Ed. 435 (1856) ("[I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby.... This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it"). Today those clear statements must either be honored, or else proved false.

It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. See *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Landgraf v. USI Film Products*, 511 U.S. 244, 273-280, 114 S.Ct. 1483, 1501-1505, 128 L.Ed.2d 229 (1994). Since that is so, petitioners argue, federal courts must apply the "new" law created by §27A(b) in finally adjudicated cases as well; for the line that separates lower court judgments that are pending on appeal (or may still be appealed), from lower-court judgments that are final, is determined by statute, see, e.g., 28 U.S.C. §2107(a) (30-day time limit for appeal to federal court of appeals), and so cannot possibly be a constitutional line. But a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial department composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department

as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy*, supra, 1 Cranch, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes. See, e.g., *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976).

To be sure, §27A(b) reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit. We do not see how that makes any difference. The separation-of-powers violation here, if there is any, consists of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner--viz., with particular rather than general effect--that is unusual (though, we must note, not impossible) for a legislature. To be sure, a general statute such as this one may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism; but it is legislative interference with judicial judgments nonetheless. Not favoritism, nor even corruption, but power is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.

It is irrelevant as well that the final judgments reopened by §27A(b) rested on the bar of a statute of limitations. The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits. See, e.g., *Fed. Rule Civ. Proc. 41(b)*; *United States v. Oppenheimer*, 242 U.S. 85, 87-88, 37 S.Ct. 68, 69-69, 61 L.Ed. 161 (1916). Petitioners suggest, directly or by implication, two reasons why a merits judgment based on this particular ground may be uniquely subject to congressional nullification. First, there is the fact that the length and indeed even the very existence of a statute of limitations upon a federal cause of action is entirely subject to congressional control. But virtually all of the reasons why a final judgment on the merits is rendered on a federal claim are subject to congressional control. Congress can eliminate, for example, a particular element of a cause of action that plaintiffs have found it difficult to establish; or an evidentiary rule that has often excluded essential testimony; or a rule of offsetting wrong (such as contributory negligence) that has often prevented recovery. To distinguish statutes of limitations on the ground that they are mere creatures of Congress is to distinguish them not at all. The second supposedly distinguishing characteristic of a statute of limitations is that it can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired. See, e.g., *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). But that also does not set statutes of limitations apart. To mention

only one other broad category of judgment-producing legal rule: Rules of pleading and proof can similarly be altered after the cause of action arises, *Landgraf v. USI Film Products*, supra, 511 U.S., at 275, and n. 29, 114 S.Ct. at 1502, and n. 29, and even, if the statute clearly so requires, after they have been applied in a case but before final judgment has been entered. Petitioners' principle would therefore lead to the conclusion that final judgments rendered on the basis of a stringent (or, alternatively, liberal) rule of pleading or proof may be set aside for retrial under a new liberal (or, alternatively, stringent) rule of pleading or proof. This alone provides massive scope for undoing final judgments and would substantially subvert the doctrine of separation of powers.

The central theme of the dissent is a variant on these arguments. The dissent maintains that *Lampf* "announced" a new statute of limitations, post, at 1466, in an act of "judicial ... lawmaking," post, at 1467, that "changed the law," post, at 1468. That statement, even if relevant, would be wrong. The point decided in *Lampf* had never before been addressed by this Court, and was therefore an open question, no matter what the lower courts had held at the time. But the more important point is that *Lampf* as such is irrelevant to this case. The dissent itself perceives that "[w]e would have the same issue to decide had Congress enacted the *Lampf* rule," and that the *Lampf* rule's genesis in judicial lawmaking rather than, shall we say, legislative lawmaking, "should not affect the separation-of-powers analysis." Post, at 1467. Just so. The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves. The separation-of-powers question before us has nothing to do with *Lampf*, and the dissent's attack on *Lampf* has nothing to do with the question before us.

C

Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed. The closest analogue that the Government has been able to put forward is the statute at issue in *United States v. Sioux Nation*, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980). That law required the Court of Claims "In]otwithstanding any other provision of law ... [to] review on the merits, without regard to the defense of res judicata or collateral estoppel," a Sioux claim for just compensation from the United States--even though the Court of Claims had previously heard and rejected that very claim. We considered and rejected separation-of-powers objections to the statute based upon *Hayburn's Case* and *United States v. Klein*. See 448 U.S., at 391-392, 100 S.Ct., at 2728-2729. The basis for our rejection was a *line* of precedent (starting with *Cherokee Nation v. United States*, 270 U.S. 476, 46 S.Ct. 428, 70 L.Ed. 694 (1926)) that stood, we said, for the proposition that "Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States." *Sioux Nation*, 448 U.S., at 397, 100 S.Ct., at 2731. And our holding was as narrow as the precedent on which we had relied: "In sum, ... Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers." *Id.*, at 407, 100 S.Ct., at 2737.

The Solicitor General suggests that even if *Sioux Nation* is read in accord with its holding, it nonetheless establishes that Congress may require Article III courts to reopen their final judgments, since "if *res judicata* were compelled by Article III to safeguard the structural independence of the courts, the doctrine would not be subject to waiver by any party litigant." Brief for United States 27 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-851, 106 S.Ct. 3245, 3256-3257, 92 L.Ed.2d 675 (1986)). But the proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases. Certainly one such doctrine consists of the "judicial Power" to disregard an unconstitutional statute, see *Marbury*, 1 Cranch, at 177; yet none would suggest that a litigant may never waive the defense that a statute is unconstitutional. See, e.g., *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 414, 102 S.Ct. 1137, 1144, 71 L.Ed.2d 250 (1982). What may follow from our holding that the judicial power unalterably includes the power to render final judgments is not that waivers of *res judicata* are always impermissible, but rather that, as many Federal Courts of Appeals have held, waivers of *res judicata* need not always be accepted--that trial courts may in appropriate cases raise the *res judicata* bar on their own motion. See, e.g., *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470, 475 (CA7 1991); *In re Medomak Canning*, 922 F.2d 895, 904 (CA1 1990); *Holloway Constr. Co. v. United States Dept. of Labor*, 891 F.2d 1211, 1212 (CA6 1989). Waiver subject to the control of the courts themselves would obviously raise no issue of separation of powers, and would be precisely in accord with the language of the decision that the Solicitor General relies upon. We held in *Schor* that, although a litigant had consented to bring a state-law counterclaim before an Article I tribunal, 478 U.S., at 849, 106 S.Ct., at 3255, we would nonetheless choose to consider his Article III challenge, because "when these Article III limitations are at issue, notions of consent and waiver cannot be dispositive," *id.*, at 851, 106 S.Ct., at 3257 (emphasis added). See also *Freytag v. Commissioner*, 501 U.S. 868, 878-879, 111 S.Ct. 2631, 2638-2639, 115 L.Ed.2d 764 (1991) (finding a "rare cas[e] in which we should exercise our discretion" to hear a waived claim based on the Appointments Clause, Art. H, §2, cl. 2).

Petitioners also rely on a miscellany of decisions upholding legislation that altered rights fixed by the final judgments of non-Article III courts, see, e.g., *Sampeyreac v. United States*, 7 Pet. 222, 238, 8 L.Ed. 665 (1833); *Freeborn v. Smith*, 2 Wall. 160, 17 L.Ed. 922 (1865), or administrative agencies, *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 60 S.Ct. 600, 84 L.Ed. 814 (1940), or that altered the prospective effect of injunctions entered by Article III courts, *Wheeling & Belmont Bridge Co.*, 18 How., at 421. These cases distinguish themselves; nothing in our holding today calls them into question. Petitioners rely on general statements from some of these cases that legislative annulment of final judgments is not an exercise of judicial power. But even if it were our practice to decide cases by weight of prior dicta, we would find the many dicta that reject congressional power to revise the judgments of Article III courts to be the more instructive authority. See *supra*, at 1456-1457.

Finally, petitioners liken §27A(b) to Federal Rule of Civil Procedure 60(b), which authorizes courts to relieve parties from a final judgment for grounds such as excusable neglect, newly discovered evidence, fraud, or "any other reason justifying relief..." We see little resemblance. Rule 60(b), which authorizes discretionary judicial revision of judgments in the listed situations and in other " 'extraordinary circumstances,' " *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988), does not

impose any legislative mandate to reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power, "firmly established in English practice long before the foundation of our Republic," to set aside a judgment whose enforcement would work inequity. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 1000, 88 L.Ed. 1250 (1944). Thus, Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is always a denial of property without due process; but they are irrelevant to the claim that legislative instruction to reopen impinges upon the independent constitutional authority of the courts.

The dissent promises to provide "[a] few contemporary examples" of statutes retroactively requiring final judgments to be reopened, "to demonstrate that [such statutes] are ordinary products of the exercise of legislative power." *Post*, at 1471. That promise is not kept. The relevant retroactivity, of course, consists not of the requirement that there be set aside a judgment that has been rendered prior to its being setting aside--for example, a statute passed today which says that all default judgments rendered in the future may be reopened within 90 days after their entry. In that sense, all requirements to reopen are "retroactive," and the designation is superfluous. Nothing we say today precludes a law such as that. The finality that a court can pronounce is no more than what the law in existence at the time of judgment will permit it to pronounce. If the law then applicable says that the judgment may be reopened for certain reasons, that limitation is built into the judgment itself, and its finality is so conditioned. The present case, however, involves a judgment that Congress subjected to a reopening requirement which did not exist when the judgment was pronounced. The dissent provides not a single clear prior instance of such congressional action.

The dissent cites, first, Rule 60(b), which it describes as a "familiar remedial measure." *Ibid.* As we have just discussed, Rule 60(b) does not provide a new remedy at all, but is simply the recitation of pre-existing judicial power. The same is true of another of the dissent's examples, 28 U.S.C. §2255, which provides federal prisoners a statutory motion to vacate a federal sentence. This procedure "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis." *United States v. Hayman*, 342 U.S. 205, 218, 72 S.Ct. 263, 271, 96 L.Ed. 232 (1952) (quoting the 1948 Reviser's Note to §2255). It is meaningless to speak of these statutes as applying "retroactively," since they simply codified judicial practice that pre-existed. Next, the dissent cites the provision of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C.App. §520(4), which authorizes courts, upon application, to reopen judgments against members of the Armed Forces entered while they were on active duty. It could not be clearer, however, that this provision was not retroactive. It says: "If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service ... such judgment may ... be opened...." (Emphasis added.)

The dissent's perception that retroactive reopening provisions are to be found all about us is perhaps attributable to its inversion of the statutory presumption regarding retroactivity. Thus, it asserts that Rule 60(b) must be retroactive, since "[n]ot a single word in its text suggests that it does not apply to judgments entered prior to its effective date." *Post*, at 1471-1472. This

reverses the traditional rule, confirmed Only last Term, that statutes do not apply retroactively unless Congress expressly states that they do. See *Landgraf*, supra, 511 U.S., at 277-280, 114 S.Ct. at 1502-1504. The dissent adds that "the traditional construction of remedial measures ... support[s] construing [Rule 60(b)] to apply to past as well as future judgments." Post, at 1472. But reliance on the vaguely remedial purpose of a statute to defeat the presumption against retroactivity was rejected in the companion cases of *Landgraf*, see 511 U.S., at 284-286, and n. 37, 114 S.Ct., at 1507-1508, and it 37 and *Rivers v. Roadway Express*, 511 U.S., at 309-313, 114 S.Ct., at 1517-1520. Cf. *Landgraf*, supra, 511 U.S., at 297, 114 S.Ct., at 1488-1489 (Blackmun, J., dissenting) ("This presumption [against retroactive legislation] need not be applied to remedial legislation...") (citing *Sampeyreac*, 7 Pet., at 238).

The dissent sets forth a number of hypothetical horrors flowing from our assertedly "rigid holding"--for example, the inability to set aside a civil judgment that has become final during a period when a natural disaster prevented the timely filing of a certiorari petition. Post, at 1474. That is horrible not because of our holding, but because the underlying statute itself enacts a "rigid" jurisdictional bar to entertaining untimely civil petitions. Congress could undoubtedly enact prospective legislation permitting, or indeed requiring, this Court to make equitable exceptions to an otherwise applicable rule of finality, just as district courts do pursuant to Rule 60(b). It is no indication whatever of the invalidity of the constitutional rule which we announce, that it produces unhappy consequences when a legislature lacks foresight, and acts belatedly to remedy a deficiency in the law. That is a routine result of constitutional rules. See, e.g., *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (Ex Post Facto Clause precludes post-offense statutory extension of a criminal sentence); *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (Contract Clause prevents retroactive alteration of contract with state bondholders); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589- 590, 601-602, 55 S.Ct. 854, 863-864, 868-869, 79 L.Ed. 1593 (1935) (Takings Clause invalidates a bankruptcy law that abrogates a vested property interest). See also *United States v. Security Industrial Bank*, 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982).

Finally, we may respond to the suggestion of the concurrence that this case should be decided more narrowly. The concurrence is willing to acknowledge only that "sometimes Congress lacks the power under Article I to reopen an otherwise closed court judgment," post, at 1463. In the present context, what it considers critical is that §27A(b) is "exclusively retroactive" and "appli[es] to a limited number of individuals." *Ibid.* If Congress had only "provid[ed] some of the assurances against 'singling out' that ordinary legislative activity normally provides--say, prospectivity and general applicability--we might have a different case." Post, at 1465.

This seems to us wrong in both fact and law. In point of fact, §27A(b) does not "single out" any defendant for adverse treatment (or any plaintiff for favorable treatment). Rather, it identifies a class of actions (those filed pre-Lampf, timely under applicable state law, but dismissed as time barred post-Lampf) which embraces many plaintiffs and defendants, the precise number and identities of whom we even now do not know. The concurrence's contention that the number of covered defendants "is too small (compared with the number of similar, uncovered firms) to distinguish meaningfully the law before us from a similar law aimed at a

single closed case," post, at 1465, renders the concept of "singling out" meaningless.

More importantly, however, 'the concurrence's point seems to us wrong in law. To be sure, the class of actions identified by §27A(b) could have been more expansive (e.g., all actions that were or could have been filed pre-Lampf) and the provision could have been written to have prospective as well as retroactive effect (e.g., "all post-Lampf dismissed actions, plus all future actions under Rule 10b-5, shall be timely if brought within 30 years of the injury"). But it escapes us how this could in any way cause the statute to be any less an infringement upon the judicial power. The nub of that infringement consists not of the Legislature's acting in a particularized and hence (according to the concurrence) nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized (e.g., "we hereby set aside all hitherto entered judicial orders"), or that it is not accompanied by an "almost" violation of the Bill of Attainder Clause, or an "almost" violation of any other constitutional provision

Ultimately, the concurrence agrees with our judgment only "[b]ecause the law before us embodies risks of the very sort that our Constitution's 'separation of powers' prohibition seeks to avoid." Post, at 1466. But the doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict. It is interesting that the concurrence quotes twice, and cites without quotation a third time, the opinion of Justice Powell in *INS v. Chadha*, 462 U.S., at 959, 103 S.Ct. at 2788. But Justice Powell wrote only for himself in that case. He alone expressed dismay that "[t]he Court's decision ... apparently will invalidate every use of the legislative veto," and opined that "[t]he breadth of this holding gives one pause." *Ibid.* It did not give pause to the six-Justice majority, which put an end to the long-simmering interbranch dispute that would otherwise have been indefinitely prolonged. We think legislated invalidation of judicial judgments deserves the same categorical treatment accorded by *Chadha* to congressional invalidation of executive action. The delphic alternative suggested by the concurrence (the setting aside of judgments is all right so long as Congress does not "impermissibly tr[y] to apply, as well as make, the law," post, at 1463-1464) simply prolongs doubt and multiplies confrontation. Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.

* * *

We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so. Section 27A(b) is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment. The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHARLES B. MILLER, SUPERINTENDENT, PENDLETON CORRECTIONAL
FACILITY, et al., PETITIONERS

v.

RICHARD A. FRENCH, et al. UNITED STATES, PETITIONER

v.

RICHARD A. FRENCH, et al.

Nos. 99-224 and 99-582

SUPREME COURT OF THE UNITED STATES

April 18, 2000, Argued

June 19, 2000, * Decided

Justice O'CONNOR delivered the opinion of the Court.

The Prison Litigation Reform Act of 1995 (PLRA) establishes standards for the entry and termination of prospective relief in civil actions challenging prison conditions. §§ 801-810, 110 Stat. 1321-66 to 1321-77. If prospective relief under an existing injunction does not satisfy these standards, a defendant or intervenor is entitled to "immediate termination" of that relief. 18 U.S.C. § 3626(b)(2) (1994 ed., Supp. IV). And under the PLRA's "automatic stay" provision, a motion to terminate prospective relief "shall operate as a stay" of that relief during the period beginning 30 days after the filing of the motion (extendable to up to 90 days for "good cause") and ending when the court rules on the motion. §§ 3626(e)(2), (3). The superintendent of the Pendleton Correctional Facility, which is currently operating under an ongoing injunction to remedy violations of the Eighth Amendment regarding conditions of confinement, filed a motion to terminate prospective relief under the PLRA. Respondent prisoners moved to enjoin the operation of the automatic stay provision of § 3626(e)(2), arguing that it is unconstitutional. The District Court enjoined the stay, and the Court of Appeals for the Seventh Circuit affirmed. We must decide whether a district court may enjoin the operation of the PLRA's automatic stay provision and, if not, whether that provision violates separation of powers principles.

I

A

This litigation began in 1975, when four inmates at what is now the Pendleton Correctional Facility brought a class action under Rev. Stat. § 1979, 42 U.S.C. § 1983, on behalf of all persons who were, or would be, confined at the facility against the predecessors in office of petitioners (hereinafter State). 1 Record, Doc. No. 1, p. 2. After a trial, the District Court found that living conditions at the prison violated both state and federal law, including the Eighth Amendment's prohibition against cruel and unusual punishment, and the court issued an

injunction to correct those violations. *French v. Owens*, 538 F. Supp. 910 (SD Ind. 1982), *affd* in part, vacated and remanded in part, 777 F.2d 1250 (CA7 1985). While the State's appeal was pending, this Court decided *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984), which held that the Eleventh Amendment deprives federal courts of jurisdiction over claims for injunctive relief against state officials based on state law. Accordingly, the Court of Appeals for the Seventh Circuit remanded the action to the District Court for reconsideration. 777 F.2d at 1251. On remand, the District Court concluded that most of the state law violations also ran afoul of the Eighth Amendment, and it issued an amended remedial order to address those constitutional violations. The order also accounted for improvements in living conditions at the Pendleton facility that had occurred in the interim. *Ibid*.

The Court of Appeals affirmed the amended remedial order as to those aspects governing overcrowding and double ceiling, the use of mechanical restraints, staffing, and the quality of food and medical services, but it vacated those portions pertaining to exercise and recreation, protective custody, and fire and occupational safety standards. 777 F.2d at 1258. This ongoing injunctive relief has remained in effect ever since, with the last modification occurring in October 1988, when the parties resolved by joint stipulation the remaining issues related to fire and occupational safety standards. 1 Record, Doc. No. 14.

B

In 1996, Congress enacted the PLRA. As relevant here, the PLRA establishes standards for the entry and termination of prospective relief in civil actions challenging conditions at prison facilities. Specifically, a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A) (1994 ed., Supp. IV). The same criteria apply to existing injunctions, and a defendant or intervenor may move to terminate prospective relief that does not meet this standard. See § 3626(b)(2). In particular, § 3626(b)(2) provides:

"In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."

A court may not terminate prospective relief, however, if it "makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means necessary to correct the violation." § 3626(b)(3). The PLRA also requires courts to rule "promptly" on motions to terminate prospective relief, with mandamus available to remedy a court's failure to do so. § 3626(e)(1).

Finally, the provision at issue here, § 3626(e)(2), dictates that, in certain circumstances, prospective relief shall be stayed pending resolution of a motion to terminate. Specifically,

subsection (e)(2), entitled "Automatic Stay," states:

"Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period --

"(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); . . . and

"(B) ending on the date the court enters a final order ruling on the motion."

As one of several 1997 amendments to the PLRA, Congress permitted courts to postpone the entry of the automatic stay for not more than 60 days for "good cause," which cannot include general congestion of the court's docket. § 123, 111 Stat. 2470, codified at 18 U.S.C. § 3626(e)(3).

C

On June 5, 1997, the State filed a motion under § 3626(b) to terminate the prospective relief governing the conditions of confinement at the Pendleton Correctional Facility. I Record, Doc. No. 16. In response, the prisoner class moved for a temporary restraining order, or preliminary injunction to enjoin the operation of the automatic stay, arguing that § 3626(e)(2) is unconstitutional as both a violation of the Due Process Clause of the Fifth Amendment and separation of powers principles. The District Court granted the prisoners' motion, enjoining the automatic stay. See *id.* Doc. No. 23; see also *French v. Duckworth*, 178 F.3d 437, 440-441 (CA7 1999). The State appealed, and the United States intervened pursuant to 28 U.S.C. § 2403(a) to defend the constitutionality of § 3626(e)(2).

The Court of Appeals for the Seventh Circuit affirmed the District Court's order, concluding that although § 3626(e)(2) precluded courts from exercising their equitable powers to enjoin operation of the automatic stay, the statute, so construed, was unconstitutional on separation of powers grounds. [. . .] Over the dissent of three judges, the court denied rehearing en banc. See 178 F.3d at 448-453 (Easterbrook, *J.*, dissenting from denial of rehearing en banc).

We granted certiorari, 528 U.S. 1045 (1999), to resolve a conflict among the Courts of Appeals as to whether § 3626(e)(2) precludes federal courts, in the exercise of their traditional equitable authority, to enjoin operation of the PLRA's automatic stay provision and, if not, to review the Court of Appeals' judgment that § 3626(e)(2), so construed, is unconstitutional. Compare *Ruiz v. Johnson*, 178 F.3d 385 (CA5 1999) (holding that district courts retain the equitable discretion to suspend the automatic stay and that § 3626(e)(2) is therefore constitutional); *Hadix v. Johnson*, 144 F.3d 925 (CA6 1998) (same), with 178 F.3d 437 (CA7 1999) (case below).

II

We address the statutory question first. Both the State and the prisoner class agree, as did the majority and dissenting judges below, that § 3626(e)(2) precludes a district court from exercising its equitable powers to enjoin the automatic stay. The Government argues, however, that § 3626(e)(2) should be construed to leave intact the federal courts' traditional equitable discretion to "stay the stay," invoking two canons of statutory construction. First, the Government contends that we should not interpret a statute as displacing courts' traditional equitable authority to preserve the status quo pending resolution on the merits "absent the clearest command to the contrary." *Califano v. Yamasaki*, 442 U.S. 682, 705, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979). Second, the Government asserts that reading § 3626(e)(2) to remove that equitable power would raise serious separation of powers questions, and therefore should be avoided under the canon of constitutional doubt. Like the Court of Appeals, we do not lightly assume that Congress meant to restrict the equitable powers of the federal courts, and we agree that constitutionally doubtful constructions should be avoided where "fairly possible." *Communications Workers v. Beck*, 487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). But where Congress has made its intent clear, "we must give effect to that intent." *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215, 8 L. Ed. 2d 440, 82 S. Ct. 1328 (1962).

Thus, although we should not construe a statute to displace courts' traditional equitable authority absent the "clearest command," *Califano v. Yamasaki*, 442 U.S. at 705, or an "inescapable inference" to the contrary, *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 90 L. Ed. 1332, 66 S. Ct. 1086 (1946), we are convinced that Congress' intent to remove such discretion is unmistakable in § 3626(e)(2). And while this construction raises constitutional questions, the canon of constitutional doubt permits us to avoid such questions only where the saving construction is not "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96, 85 L. Ed. 2d 64, 105 S. Ct. 1785 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 77 L. Ed. 1265, 53 S. Ct. 620 (1933)); see also *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998) (constitutional doubt canon does not apply where the statute is unambiguous); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841, 92 L. Ed. 2d 675, 106 S. Ct. 3245 (1986) (constitutional doubt canon "does not give a court the prerogative to ignore the legislative will"). Like the Court of Appeals, we find that § 3626(e)(2) is unambiguous, and accordingly, we cannot adopt JUSTICE BREYER's "more flexible interpretation" of the statute. *Post*, at 3. Any construction that preserved courts' equitable discretion to enjoin the automatic stay would effectively convert the PLRA's mandatory stay into a discretionary one. Because this would be plainly contrary to Congress' intent in enacting the stay provision, we must confront the constitutional issue.

III

The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this "very structure" of the Constitution that exemplifies the concept of separation of powers. *INS v. Chadha*, 462 U.S. 919, 946, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983). While the boundaries between the three branches are not "hermetically" sealed," see *id.* at 951, the Constitution prohibits one branch from encroaching on the central prerogatives of another, see *Loving v. United States*, 517 U.S. 748, 757, 135 L. Ed. 2d 36, 116 S. Ct. 1737 (1996); *Buckley v. Falco*, 424 U.S. 1, 121-122, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (*per curiam*). The powers of the Judicial Branch are set forth in Article III, § 1, which states that the "judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as Congress may from time to time ordain and establish," and provides that these federal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office. As we explained in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. at 218-219, Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy."

Respondent prisoners contend that § 3626(e)(2) encroaches on the central prerogatives of the Judiciary and thereby violates the separation of powers doctrine. It does this, the prisoners assert, by legislatively suspending a final judgment of an Article III court in violation of *Plaut* and *Hayburn's Case*, 2 Dalt. 409 (1792). According to the prisoners, the remedial order governing living conditions at the Pendleton Correctional Facility is a final judgment of an Article III court, and § 3626(e)(2) constitutes an impermissible usurpation of judicial power because it commands the district court to suspend prospective relief under that order, albeit temporarily. An analysis of the principles underlying *Rayburn's Case* and *Plaut*, as well as an examination of § 3626(e)(2)'s interaction with the other provisions of § 3626, makes clear that § 3626(e)(2) does not offend these separation of powers principles.

Hayburn's Case arose out of a 1792 statute that authorized pensions for veterans of the Revolutionary War. See Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. The statute provided that the circuit courts were to review the applications and determine the appropriate amount of the pension, but that the Secretary of War had the discretion either to adopt or reject the courts' findings. *Hayburn's Case*, *supra*, at 408-410. Although this Court did not reach the constitutional issue in *Hayburn's Case*, the opinions of five Justices, sitting on Circuit Courts, were reported, and we have since recognized that the case "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Piaui* 514 U.S. at 218; see also *Morrison v. Olson*, 487 U.S. 654, 677, n. 15, 101 L. Ed. 2d 569, 108 S. Ct. 2597 (1988). As we recognized in *Plaut*, such an effort by a coequal branch to "annul a final judgment" is "'an assumption of Judicial power' and therefore forbidden." 514 U.S. at 224 (quoting *Bates v. Kimball*, 2 Chipman 77 (Vt. 1824)).

Unlike the situation in *Hayburn's Case*, § 3626(e)(2) does not involve the direct review of a judicial decision by officials of the Legislative or Executive Branches. Nonetheless, the prisoners suggest that § 3626(e)(2) falls within *Hayburn's* prohibition against an indirect legislative "suspension" or reopening of a final judgment, such as that addressed in *Plaut*. See

Piaui, 514 U.S. at 226 (quoting *Hayburn's Case*, *supra*, at 413 {opinion of Iredell, J., and Sitgreaves, D. J.} ("No decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested")). In *Plaut*, we held that a federal statute that required federal courts to reopen final judgments that had been entered before the statute's enactment was unconstitutional on separation of powers grounds. 514 U.S. at 211. The plaintiffs had brought a civil securities fraud action seeking money damages. 514 U.S. at 213. While that action was pending, we ruled in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991), that such suits must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation. In light of this intervening decision, the *Plaut* plaintiffs' suit was untimely, and the District Court accordingly dismissed the action as time barred. *Piaui*, *supra*, at 214. After the judgment dismissing the case had become final, Congress enacted a statute providing for the reinstatement of those actions, including the *Plaut* plaintiffs', that had been dismissed under *Lampf* but that would have been timely under the previously applicable statute of limitations. 514 U.S. at 215.

We concluded that this retroactive command that federal courts reopen final judgments exceeded Congress' authority. 514 U.S. at 218-219. The decision of an inferior court within the Article III hierarchy is not the final word of the department (unless the time for appeal has expired), and "it is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'" 514 U.S. at 227 (quoting *United States v. Schooner Peggy*, 5 U.S. 103, 1 Cranch 103, 109, 2 L. Ed. 49 (1801)). But once a judicial decision achieves finality, it "becomes the last word of the judicial department." 514 U.S. at 227. And because Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy," 514 U.S. at 218-219, the "judicial Power is one to render dispositive judgments," and Congress cannot retroactively command Article III courts to reopen final judgments, 514 U.S. at 219 (quoting Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990) (internal quotation marks omitted)).

Plaut, however, was careful to distinguish the situation before the Court in that case -- legislation that attempted to reopen the dismissal of a suit seeking money damages -- from legislation that "altered the prospective effect of injunctions entered by Article III courts." 514 U.S. at 232. We emphasized that "nothing in our holding today calls . . . into question" Congress' authority to alter the prospective effect of previously entered injunctions. *Ibid.* Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law. Cf. *Landgraf v. USI Film Products*, 511 U.S. 244, 273, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive"). This conclusion follows from our decisions in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 13 HOW 518, 14 L. Ed. 249 (1852) (*Wheeling Bridge I*) and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 18 HOW 421, 15 L. Ed. 435 (1856) (*Wheeling Bridge II*).

In *Wheeling Bridge I*, we held that a bridge across the Ohio River, because it was too low, unlawfully "obstructed the navigation of the Ohio," and ordered that the bridge be raised or

permanently removed. 13 HOW at 578. Shortly thereafter, Congress enacted legislation declaring the bridge to be "lawful structure," establishing the bridge as a "post-road for the passage of the mails of the United States," and declaring that the Wheeling and Belmont Bridge Company was authorized to maintain the bridge at its then-current site and elevation. *Wheeling Bridge II*, 18 HOW at 429. After the bridge was destroyed in a storm, Pennsylvania sued to enjoin the bridge's reconstruction, arguing that the statute legalizing the bridge was unconstitutional because it effectively annulled the Court's decision in *Wheeling Bridge I*. We rejected that argument, concluding that the decree in *Wheeling Bridge I* provided for ongoing relief by "directing the abatement of the obstruction" which enjoined the defendants' from any continuance or reconstruction of the obstruction. Because the intervening statute altered the underlying law such that the bridge was no longer an unlawful obstruction, we held that it was "quite plain the *decree* of the court cannot be enforced." *Wheeling Bridge II*, 18 HOW at 431-432. The Court explained that had *Wheeling Bridge I* awarded money damages in an action at law, then that judgment would be final, and Congress' later action could not have affected plaintiffs right to those damages. See .18 HOW at 431. But because the decree entered in *Wheeling Bridge I* provided for prospective relief -- a continuing injunction against the continuation or reconstruction of the bridge -- the ongoing validity of the injunctive relief depended on "whether or not [the bridge] interferes with the right of navigation." 18 HOW at 431. When Congress altered the underlying law such that the bridge was no longer an unlawful obstruction, the injunction against the maintenance of the bridge was not enforceable. See *id.* at 432.

Applied here, the principles of *Wheeling Bridge II* demonstrate that the automatic stay of § 3626(e)(2) does not unconstitutionally "suspend" or reopen a judgment of an Article III court. Section § 3626(e)(2) does not by itself "tell judges when, how, or what to do." 178 F.3d at 449 (Easterbrook, J., dissenting from denial of rehearing en banc). Instead, § 3626(e)(2) merely reflects the change implemented by, § 3626(b), which does the "heavy lifting" in the statutory scheme by establishing new standards for prospective relief. See *Berwanger v. Cottey*, 178 F.3d 834, 839 (CA7 1999). Section 3626 prohibits the continuation of prospective relief that was "approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means to correct the violation," § 3626(b)(2), or in the absence of "findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of a Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means necessary to correct the violation," § 3626(b)(3). Accordingly, if prospective relief under an existing decree had been granted or approved absent such findings, then that prospective relief must cease, see § 3626(b)(2), unless and until the court makes findings on the record that such relief remains necessary to correct an ongoing violation and is narrowly tailored, see § 3626(b)(3). The PLRA's automatic stay provision assists in the enforcement of §§ 3626(b)(2) and (3) by requiring the court to stay any prospective relief that, due to the change in the underlying standard, is no longer enforceable, *i.e.*, prospective relief that is not supported by the findings specified in §§ 3626(b)(2) and (3).

By establishing new standards for the enforcement of prospective relief in § 3626(b), Congress has altered the relevant underlying law. The PLRA has restricted courts' authority to

issue and enforce prospective relief concerning prison conditions, requiring that such relief be supported by findings and precisely tailored to what is needed to remedy the violation of a federal right. See *Benjamin v. Jacobson*, 172 F.3d 144, 163 (CA2 1999) (en banc); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 184-185 (CA3 1999); *Tyler v. Murphy*, 135 F.3d 594, 597 (CA8 1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657 (CA1 1997). We note that the constitutionality of § 3626(b) is not challenged here; we assume, without deciding, that the new standards it pronounces are effective. As *Plata* and *Wheeling Bridge II* instruct, when Congress changes the law underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law. Although the remedial injunction here is a "final judgment" for purposes of appeal, it is not the "last word of the judicial department." *Plaut*, 514 U.S. at 227. The provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992). Prospective relief must be "modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Ibid.*; see also *Railway Employees' v. Wright*, 364 U.S. 642, 646-647, 5 L. Ed. 2d 349, 81 S. Ct. 368 (1961) (a court has the authority to alter the prospective effect of an injunction to reflect a change in circumstances, whether of law or fact, that has occurred since the injunction was entered); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329, 82 L. Ed. 872, 58 S. Ct. 578 (1938) (applying the Norris-LaGuardia Act's prohibition on a district court's entry of injunctive relief in the absence of findings).

The entry of the automatic stay under § 3626(e)(2) helps to implement the change in the law caused by §§ 3626(b)(2) and (3). If the prospective relief under the existing decree is not supported by the findings required under § 3626(b)(2), and the court has not made the findings required by § 3626(b)(3), then prospective relief is no longer enforceable and must be stayed. The entry of the stay does not reopen or "suspend" the previous judgment, nor does it divest the court of authority to decide the merits of the termination motion. Rather, the stay merely reflects the changed legal circumstances -- that prospective relief under the existing decree is no longer enforceable, and remains unenforceable unless and until the court makes the findings required by § 3626(b)(3).

For the same reasons, § 3626(e)(2) does not violate the separation of powers principle articulated in *United States v. Klein*, 80 U.S. 128, 13 Wall. 128, 20 L. Ed. 519 (1872). In that case, Klein, the executor of the estate of a Confederate sympathizer, sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if Klein could demonstrate that the decedent had not given aid or comfort to the rebellion. See *id.* at 131. In *United States v. Padelford*, 76 U.S. 531, 9 Wall. 531, 542-543, 19 L. Ed. 788 (1870), we held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. *Klein*, 13 Wall. at 133-134. We concluded that the statute was unconstitutional because it purported to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146.

Here, the prisoners argue that Congress has similarly prescribed a rule of decision because, for the period of time until the district court makes a final decision on the merits of the motion to terminate prospective relief, § 3626(e)(2) mandates a particular outcome: the termination of prospective relief. As we noted in *Plaut*, however, "whatever the precise scope of *Klein*, . . . later decisions have made clear that its prohibition does not take hold when Congress 'amends applicable law.'" 514 U.S. at 218 (quoting *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 118 L. Ed. 2d 73, 112 S. Ct. 1407 {1992}). The prisoners concede this point but contend that, because § 3626(e)(2) does not itself amend the legal standard, *Klein* is still applicable. As we have explained, however, § 3626(e)(2) must be read not in isolation, but in the context of § 3626 as a whole. Section 3626(e)(2) operates in conjunction with the new standards for the continuation of prospective relief; if the new standards of § 3626(b)(2) are not met, then the stay "shall operate" unless and until the court makes the findings required by § 3626(b)(3). Rather than prescribing a rule of decision, § 3626(e)(2) simply imposes the consequences of the court's application of the new legal standard.

Finally, the prisoners assert that, even if § 3626(e)(2) does not fall within the recognized prohibitions of *Hayburn's Case*, *Plaut*, or *Klein*, it still offends the principles of separation of powers because it places a deadline on judicial decisionmaking, thereby interfering with core judicial functions. Congress' imposition of a time limit in § 3626(0)(2), however, does not in itself offend the structural concerns underlying the Constitution's separation of powers. For example, if the PLRA granted courts 10 years to determine whether they could make the required findings, then certainly the PLRA would raise no apprehensions that Congress had encroached on the core function of the Judiciary to decide "cases and controversies properly before them." *United States v. Raines*, 362 U.S. 17, 20, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960). Respondents' concern with the time limit, then, must be its relative brevity. But whether the time is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question, an issue that is not before us. We leave open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns.

In contrast to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design. In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns. The PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly.

Through the PLRA, Congress clearly intended to make operation of the automatic stay mandatory, precluding courts from exercising their equitable powers to enjoin the stay. And we conclude that this provision does not violate separation of powers principles. Accordingly, the judgment of the Court of Appeals for the Seventh Circuit is reversed, and the action is remanded for further proceedings consistent with this opinion.

It is so ordered.

CITY OF BOERNE, Petitioner,
v.
P.F. FLORES, Archbishop of San Antonio, and United States.

No. 95-2074.

Supreme Court of the United States

Argued Feb. 19, 1997.

Decided June 25, 1997.

[KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, THOMAS, and GINSBURG, JJ., joined, and in all but Part III-A-1 of which SCALIA, J., joined. STEVENS, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part, in which STEVENS, J., joined. O'CONNOR, J., filed a dissenting opinion, in which BREYER, J., joined except as to a portion of Part I. SOUTER, J., and BREYER, J., filed dissenting opinions.]

Justice KENNEDY delivered the opinion of the Court.

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

I

Situated on a hill in the city of Boerne, Texas, some 28 miles northwest of San Antonio, is St. Peter Catholic Church. Built in 1923, the church's structure replicates the mission style of the region's earlier history. The church seats about 230 worshippers, a number too small for its growing parish. Some 40 to 60 parishioners cannot be accommodated at some Sunday masses. In order to meet the needs of the congregation the Archbishop of San Antonio gave permission to the parish to plan alterations to enlarge the building.

A few months later, the Boerne City Council passed an ordinance authorizing the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts. Under the ordinance, the Commission must preapprove construction affecting historic landmarks or buildings in a historic district.

Soon afterwards, the Archbishop applied for a building permit so construction to enlarge the church could proceed. City authorities, relying on the ordinance and the designation of a historic district (which, they argued, included the church), denied the application. The

Archbishop brought this suit challenging the permit denial in the United States District Court for the Western District of Texas. 877 F.Supp. 355 (1995).

The complaint contained various claims, but to this point the litigation has centered on RFRA and the question of its constitutionality. The Archbishop relied upon RFRA as one basis for relief from the refusal to issue the permit. The District Court concluded that by enacting RFRA Congress exceeded the scope of its enforcement power under §5 of the Fourteenth Amendment. The court certified its order for interlocutory appeal and the Fifth Circuit reversed, finding RFRA to be constitutional. 73 F.3d 1352 (1996). We granted certiorari, 519 U.S. ----, 117 S.Ct. 293, 136 L.Ed.2d 212 (1996), and now reverse.

II

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

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

The application of the *Sherbert* test, the *Smith* decision explained, would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability. The anomaly would have been accentuated, the Court reasoned, by the difficulty of determining whether a particular practice was central to an individual's religion. We explained, moreover, that it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." 494 U.S., at 887, 110 S.Ct., at 1604 (internal quotation marks and citation omitted).

The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake. *Id.*, at 881-882, 110 S.Ct., at 1601-1602. In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), for example, we invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. That case implicated not only the right to the free exercise of religion but

also the right of parents to control their children's education.

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

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

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

"(1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

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

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

"(4) in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

"(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. §2000bb(a).

The Act's stated purposes are:

"(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

"(2) to provide a claim or defense to persons whose religious exercise is substantially

burdened by government." §2000bb(b).

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

III A

Under our Constitution, the Federal Government is one of enumerated powers. *M'Culloch v. Maryland*, 4 Wheat. 316, 465, 4 L.Ed. 579 (1819); see also *The Federalist* No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison). The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803).

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

"Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

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

In defense of the Act respondent contends, with support from the United States as amicus, that RFRA is permissible enforcement legislation. Congress, it is said, is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process

Clause, the free exercise of religion, beyond what is necessary under Smith. It is said the congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law's effects accords with the settled understanding that §5 includes the power to enact legislation designed to prevent as well as remedy constitutional violations. It is further contended that Congress' §5 power is not limited to remedial or preventive legislation.

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

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

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, see U.S. Const., Art. 1, §2, as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966), despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. *South Carolina v. Katzenbach*, supra (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach v. Morgan*, supra (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome v. United States*, 446 U.S. 156, 161, 100 S.Ct. 1548, 1553, 64 L.Ed.2d 119 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a "standard, practice, or procedure with respect to voting"); see also *James Everard's Breweries v. Day*, 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174 (1924) (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes).

It is also true, however, that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell*, supra, at 128, 91 S.Ct., at 266 (opinion of Black, 1). In assessing the breadth of §5's enforcement power, we begin with its text. Congress has been given the power "to enforce" the "provisions of this article." We agree with respondent, of course, that Congress can enact legislation under §5 enforcing the constitutional right to the free

exercise of religion. The "provisions of this article," to which §5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress' power to enforce the Free Exercise Clause follows from our holding in *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment." See also *United States v. Price*, 383 U.S. 787, 789, 86 S.Ct. 1152, 1154, 16 L.Ed.2d 267 (1966) (there is "no doubt of the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment") (internal quotation marks and citation omitted).

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

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

1

The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. The Joint Committee on Reconstruction of the 39th Congress began drafting what would become the Fourteenth Amendment in January 1866. The objections to the Committee's first draft of the Amendment, and the rejection of the draft, have a direct bearing on the central issue of defining Congress' enforcement power. In February, Republican Representative John Bingham of Ohio reported the following draft amendment to the House of Representatives on behalf of the Joint Committee:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." Cong. Globe, 39th Cong., 1st Sess., 1034 (1866).

The proposal encountered immediate opposition, which continued through three days of debate. Members of Congress from across the political spectrum criticized the Amendment, and

the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. E.g., *id.*, at 1063-1065 (statement of Rep. Hale); *id.*, at 1082 (statement of Sen. Stewart); *id.*, at 1095 (statement of Rep. Hotchkiss); *id.*, at App. 133-135 (statement of Rep. Rogers). Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution. Typifying these views, Republican Representative Robert Hale of New York labeled the Amendment "an utter departure from every principle ever dreamed of by the men who framed our Constitution," *id.*, at 1063, and warned that under it "all State legislation, in its codes of civil and criminal jurisprudence and procedures ... may be overridden, may be repealed or abolished, and the law of Congress established instead." *Ibid.* Senator William Stewart of Nevada likewise stated the Amendment would permit "Congress to legislate fully upon all subjects affecting life, liberty, and property," such that "there would not be much left for the State Legislatures," and would thereby "work an entire change in our form of government." *Id.*, at 1082; accord, *id.*, at 1087 (statement of Rep. Davis); *id.*, at App. 133 (statement of Rep. Rogers). Some radicals, like their brethren "unwilling that Congress shall have any such power .. to establish uniform laws throughout the United States upon ... the protection of life, liberty, and property," *id.*, at 1095 (statement of Rep. Hotchkiss), also objected that giving Congress primary responsibility for enforcing legal equality would place power in the hands of changing congressional majorities. *Ibid.* See generally Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L.Rev.* 1, 57 (1955); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 *Stan. L.Rev.* 3, 21 (1954).

As a result of these objections having been expressed from so many different quarters, the House voted to table the proposal until April. See e.g., B. Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* 215, 217 (1914); *Cong. Globe*, 42d Cong., 1st Sess., App. 115 (1871) (statement of Rep. Farnsworth). The congressional action was seen as marking the defeat of the proposal. See *The Nation*, Mar. 8, 1866, p. 291 ("The postponement of the amendment .. is conclusive against the passage of [it]"); *New York Times*, Mar. 1, 1866, p. 4 ("It is doubtful if this ever comes before the House again ..."); see also *Cong. Globe*, 42d Cong., 1st Sess., App., at 115 (statement of Rep. Farnsworth) (The Amendment was "given its quietus by a postponement for two months, where it slept the sleep that knows no waking"). The measure was defeated "chiefly because many members of the legal profession s[aw] in [it] ... dangerous centralization of power," *The Nation*, *supra*, at 291, and "many leading Republicans of th[e] House [of Representatives] would not consent to so radical a change in the Constitution," *Cong. Globe*, 42d Cong., 1st Sess., App., at 151 (statement of Rep. Garfield). The Amendment in its early form was not again considered. Instead, the Joint Committee began drafting a new article of Amendment, which it reported to Congress on April 30, 1866.

Section 1 of the new draft Amendment imposed self-executing limits on the States. Section 5 prescribed that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." See *Cong. Globe*, 39th Cong., 1st Sess., at 2286. Under the revised Amendment, Congress' power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective. Representative Bingham said the new draft would give Congress "the power ... to protect by national law the privileges and immunities of all the citizens of the Republic ... whenever the

same shall be abridged or denied by the unconstitutional acts of any State." *Id.*, at 2542. Representative Stevens described the new draft Amendment as "allow[ing] Congress to correct the unjust legislation of the States." *Id.*, at 2459. See also *id.*, at 2768 (statement of Sen. Howard) (§5 "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment"). See generally H. Brannon, *The Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States* 387 (1901) (Congress' "powers are only prohibitive, corrective, vetoing, aimed only at undue process of law"); *id.*, at 420, 452-455 (same); T. Cooley, *Constitutional Limitations* 294, n. 1 (2d ed. 1871) ("This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall 'abridge the privileges or immunities of citizens of the United States' "). The revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property. See, e.g., *Cong. Globe*, 42d Cong., 1st Sess., at App. 151 (statement of Rep. Garfield) ("The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State[s]"). After revisions not relevant here, the new measure passed both Houses and was ratified in July 1868 as the Fourteenth Amendment.

The significance of the defeat of the Bingham proposal was apparent even then. During the debates over the Ku Klux Klan Act only a few years after the Amendment's ratification, Representative James Garfield argued there were limits on Congress' enforcement power, saying "unless we ignore both the history and the language of these clauses we cannot, by any reasonable interpretation, give to [§5] ... the force and effect of the rejected [Bingham] clause." *Cong. Globe*, 42d Cong., 1st Sess., at App. 151; see also *id.*, at App. 115-116 (statement of Rep. Farnsworth). Scholars of successive generations have agreed with this assessment. See H. Flack, *The Adoption of the Fourteenth Amendment* 64 (1908); Bickel, *The Voting Rights Cases*, 1966 *Sup.Ct. Rev.* 79, 97.

The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. The Bingham draft, some thought, departed from that tradition by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation. Under it, "Congress, and not the courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States." Flack, *supra*, at 64. While this separation of powers aspect did not occasion the widespread resistance which was caused by the proposal's threat to the federal balance, it nonetheless attracted the attention of various Members. See *Cong. Globe*, 39th Cong., 1st Sess., at 1064 (statement of Rep. Hale) (noting that Bill of Rights, unlike the Bingham proposal, "provide safeguards to be enforced by the courts, and not to be exercised by the Legislature"); *id.*, at App. 133 (statement of Rep. Rogers) (prior to Bingham proposal it "was left entirely for the courts ... to enforce the privileges and immunities of the citizens"). As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. Cf. *South Carolina v. Katzenbach*, 383 U.S., at 325, 86 S.Ct., at 816-817 (discussing Fifteenth Amendment). The power to interpret the Constitution in a case or controversy remains in the Judiciary.

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

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

After *South Carolina v. Katzenbach*, the Court continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination. See *Oregon v. Mitchell*, 400 U.S., at 132, 91 S.Ct., at 268 ("In enacting the literacy test ban ... Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race") (opinion of Black, 1.); *id.*, at 147, 91 S.Ct., at 276 (Literacy

tests "have been used at times as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians") (opinion of Douglas, J.); *id.*, at 216, 91 S.Ct., at 311 ("Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious") (opinion of Harlan, J.); *id.*, at 235, 91 S.Ct., at 320 ("[T]here is no question but that Congress could legitimately have concluded that the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education") (opinion of Brennan, J.); *id.*, at 284, 91 S.Ct., at 344 ("[N]ationwide [suspension of literacy tests] may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country") (opinion of Stewart, J.); *City of Rome*, 446 U.S., at 182, 100 S.Ct., at 1564 ("Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable"); *Morgan*, 384 U.S., at 656, 86 S.Ct., at 1726 (Congress had a factual basis to conclude that New York's literacy requirement "constituted an invidious discrimination in violation of the Equal Protection Clause").

3

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

There is language in our opinion in *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in §1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one. In *Morgan*, the Court considered the constitutionality of §4(e) of the Voting Rights Act of 1965, which provided that no person who had successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English could be denied the right to vote because of an inability to read or write English.

New York's Constitution, on the other hand, required voters to be able to read and write English. The Court provided two related rationales for its conclusion that §4(e) could be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government" *Id.*, at 652, 86 S.Ct., at 1724. Under the first rationale, Congress could prohibit New York from denying the right to vote to large segments of its Puerto Rican community, in order to give Puerto Ricans "enhanced political power" that would be "helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." *Ibid.* Section 4(e) thus could be justified as a remedial measure to deal with "discrimination in governmental services." *Id.*, at 653, 86 S.Ct., at 1725. The second rationale, an alternative holding, did not address discrimination in the provision of public services but "discrimination in establishing voter qualifications." *Id.*, at 654, 86 S.Ct., at 1725. The Court perceived a factual basis on which Congress could have concluded that New York's literacy requirement "constituted an invidious discrimination in violation of the Equal Protection Clause." *Id.*, at 656, 86 S.Ct., at 1726. Both rationales for upholding §4(e) rested on unconstitutional discrimination by New York and Congress' reasonable attempt to combat it. As Justice Stewart explained in *Oregon v. Mitchell*, *supra*, at 296, 91 S.Ct., at 350, interpreting *Morgan* to give Congress the power to interpret the Constitution "would require an enormous extension of that decision's rationale."

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

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

B

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 2227, 124 L.Ed.2d 472 (1993) ("[A] law targeting religious beliefs as such is never permissible"). To avoid the difficulty of proving such violations, it is said, Congress can simply invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest. If Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause, see *Fullilove v. Klutznick*, 448 U.S. 448, 477, 100 S.Ct. 2758, 2774, 65 L.Ed.2d 902 (1980) (plurality opinion); *City of Rome*, 446 U.S., at 177, 100 S.Ct., at 1561-1562, then it can do the same,

respondent argues, to promote religious liberty.

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

A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. See, e.g., Religious Freedom Restoration Act of 1991, Hearings on H.R. 2797 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 2d Sess., 331-334 (1993) (statement of Douglas Laycock) (House Hearings); The Religious Freedom Restoration Act, Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 30-31 (1993) (statement of Dallin H. Oaks) (Senate Hearing); Senate Hearing 68-76 (statement of Douglas Laycock); Religious Freedom Restoration Act of 1990, Hearing on H.R. 5377 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess., 49 (1991) (statement of John H. Buchanan, Jr.) (1990 House Hearing). The absence of more recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country." House Hearings 334 (statement of Douglas Laycock). See also House Report 2 ("[L]aws directly targeting religious practices have become increasingly rare"). Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. Much of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, see, e.g., House Hearings 81 (statement of Nadine Strossen); *id.*, at 107-110 (statement of William. Yang); *id.*, at 118 (statement of Rep. Stephen J. Solarz); *id.*, at 336 (statement of Douglas Laycock); Senate Hearing 5-6, 14-26 (statement of William Yang); *id.*, at 27-28 (statement of Hmong-Lao Unity Assn., Inc.); *id.*, at 50 (statement of Baptist Joint Committee); see also Senate Report 8; House Report 5-6, and n. 14, and on zoning regulations and historic preservation laws (like the one at issue here), which as an incident of their normal operation, have adverse effects on churches and synagogues. See, e.g. House Hearings 17, 57 (statement of Robert P. Dugan, Jr.); *id.*, at 81 (statement of Nadine Strossen); *id.*, at 122-123 (statement of Rep. Stephen J. Solarz); *id.*, at 157 (statement of Edward M. Gaffney, Jr.); *id.*, at 327 (statement of Douglas Laycock); Senate Hearing 143-144 (statement of Forest D. Montgomery); 1990 House Hearing 39 (statement of Robert P. Dugan, Jr.); see also Senate Report 8; House Report 5-6, and n. 14. It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation. See House Report 2; Senate Report 4-5; House Hearings 64 (statement of Nadine Strossen); *id.*, at 117-118 (statement of Rep. Stephen J. Solarz); 1990 House Hearing at 14 (statement of Rep. Stephen J. Solarz). This lack of support in the legislative record, however, is not RFRA's most serious shortcoming. Judicial deference, in most cases, is based not on the state of the

legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." *Oregon v. Mitchell*, 400 U.S., at 207, 91 S.Ct., at 306-308 (opinion of Harlan, J.). As a general matter, it is for Congress to determine the method by which it will reach a decision.

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

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. 42 U.S.C. §2000bb-2(1). RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. §2000bb-3(a). RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power, even in the area of voting rights. In *South Carolina v. Katzenbach*, the challenged provisions were confined to those regions of the country where voting discrimination had been most flagrant, see 383 U.S., at 315, 86 S.Ct., at 811-812, and affected a discrete class of state laws, i.e., state voting laws. Furthermore, to ensure that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth), the coverage under the Act would terminate "at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years." *Id.*, at 331, 86 S.Ct., at 820. The provisions restricting and banning literacy tests, upheld in *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), and *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), attacked a particular type of voting qualification, one with a long history as a "notorious means to deny and abridge voting rights on racial grounds." *South Carolina v. Katzenbach*, 383 U.S., at 355, 86 S.Ct., at 832 (Black, J., concurring and dissenting). In *City of Rome*, 446 U.S. 156, 100 S.Ct. 1548, the Court rejected a challenge to the constitutionality of a Voting Rights Act provision which required certain jurisdictions to submit changes in electoral practices to the Department of Justice for preimplementation review. The requirement was placed only on jurisdictions with a history of intentional racial discrimination in voting. *Id.*, at 177, 100 S.Ct., at 1561-1562. Like the provisions at issue in *South Carolina v. Katzenbach*, this

provision permitted a covered jurisdiction to avoid preclearance requirements under certain conditions and, moreover, lapsed in seven years. This is not to say, of course, that §5 legislation requires termination dates, geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under §5.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. See *Smith*, 494 U.S., at 887, 110 S.Ct., at 1604 ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"); *id.*, at 907, 110 S.Ct., at 1615 ("The distinction between questions of centrality and questions of sincerity and burden is admittedly fine ...") (O'CONNOR, J., concurring in judgment). Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If " 'compelling interest' really means what it says ... many laws will not meet the test.... [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.*, at 888, 110 S.Ct., at 1605. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA. Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive. Cf. *Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). RFRA's substantial burden test, however, is not even a discriminatory effects or disparate impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement--a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to

codify--which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty." 1 Annals of Congress 500 (1789). Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.

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

* * *

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

It is so ordered.

* * *

TENNESSEE, PETITIONER v. GEORGE LANE *et al.*

on writ of certiorari to the United States Court of Appeals for the Sixth Circuit

No. 02-1667. Argued January 13, 2004--Decided May 17, 2004

Justice Stevens delivered the opinion of the Court.

Title II of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 337, 42 U. S. C. §§12131-12165, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." §12132. The question presented in this case is whether Title II exceeds Congress' power under §5 of the Fourteenth Amendment.

I

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

* * *

III

The Eleventh Amendment renders the States immune from "any suit in law or equity, commenced or prosecuted ... by Citizens of another State, or by Citizens or Subjects of any Foreign State." Even though the Amendment "by its terms .. applies only to suits against a State by citizens of another State," our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State's own citizens. *Garrett*, 531 U. S., at 363; *Kimel v. Florida Bd. of Regents*, 528 U. S. 62, 72-73 (2000). Our cases have also held that Congress may abrogate the State's Eleventh Amendment immunity. To determine whether it has done so in any given case, we "must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Id.*, at 73.

The first question is easily answered in this case. The Act specifically provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U. S. C. § 12202. As in *Garrett*, see 531 U. S., at 363-364, no party disputes the adequacy of that expression of Congress' intent to abrogate the States' Eleventh Amendment immunity. The question, then, is whether Congress had the power to give effect to its intent.

In *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976), we held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. *Id.*, at 456. This enforcement power, as we have often acknowledged, is a "broad power indeed." *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718, 732 (1982), citing *Ex parte Virginia*, 100 U. S. 339, 346 (1880). It includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U. S., at 81. We have thus repeatedly affirmed that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721, 727-728 (2003). See also *City of Boerne v. Flores*, 521 U. S. 507, 518 (1997). The most recent affirmation of the breadth of Congress' §5 power came in *Hibbs*, in which we considered whether a male state employee could recover money damages against the State for its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 107 Stat. 6, 29 U. S. C. §2601 et seq. We upheld the FMLA as a valid exercise of Congress' §5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under the rule of *Personnel Administrator of Mass. v. Feeney*, 442 U. S. 256 (1979). When Congress seeks to remedy or prevent unconstitutional discrimination, §5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.

Congress' §5 power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *Boerne*, 521 U. S., at 519. In *Boerne*, we recognized that the line between remedial legislation and substantive redefinition is "not easy to discern," and that "Congress must have wide latitude in determining where it lies." *Id.*, at 519-520. But we also confirmed that "the distinction exists and must be observed," and set forth a test for so observing it: Section 5 legislation is valid if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520.

In *Boerne*, we held that Congress had exceeded its §5 authority when it enacted the Religious Freedom Restoration Act of 1993 (URA). We began by noting that Congress enacted RFRA "in direct response" to our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), for the stated purpose of "restor[ing] a constitutional rule that *Smith* had rejected. 521 U. S., at 512, 515 (internal quotation marks omitted). Though the respondent attempted to defend the statute as a reasonable means of enforcing the Free Exercise

Clause as interpreted in *Smith*, we concluded that RFRA was "so out of proportion" to that objective that it could be understood only as an attempt to work a "substantive change in constitutional protections." *id.*, at 529, 532. Indeed, that was the very purpose of the law.

This Court further defined the contours of *Boerne's* "congruence and proportionality" test in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999). At issue in that case was the validity of the Patent and Plant Variety Protection Remedy Clarification Act (hereinafter Patent Remedy Act), a statutory amendment Congress enacted in the wake of our decision in *Atascadero State Hospital v. Scanlon*, 473 U. S. 234 (1985), to clarify its intent to abrogate state sovereign immunity from patent infringement suits. *Florida Prepaid* 527 U. S., at 631-632. Noting the virtually complete absence of a history of unconstitutional patent infringement on the part of the States, as well as the Act's expansive coverage, the Court concluded that the Patent Remedy Act's apparent aim was to serve the Article I concerns of "provid[ing] a uniform remedy for patent infringement and plac[ing] States on the same footing as private parties under that regime," and not to enforce the guarantees of the Fourteenth Amendment. *Id.*, at 647-648. See also *Kimel*, 528 U. S. 62 (finding that the Age Discrimination in Employment Act exceeded Congress' §5 powers under *Boerne*); *United States v. Morrison*, 529 U. S. 598 (2000) (Violence Against Women Act).

Applying the *Boerne* test in *Garrett*, we concluded that Title I of the ADA was not a valid exercise of Congress' §5 power to enforce the Fourteenth Amendment's prohibition on unconstitutional disability discrimination in public employment. As in *Florida Prepaid*, we concluded Congress' exercise of its prophylactic §5 power was unsupported by a relevant history and pattern of constitutional violations. 531 U. S., at 368, 374. Although the dissent pointed out that Congress had before it a great deal of evidence of discrimination by the States against persons with disabilities, *id.*, at 379 (*Breyer, J.*, dissenting), the Court's opinion noted that the "overwhelming majority" of that evidence related to "the provision of public services and public accommodations, which areas are addressed in Titles II and III, rather than Title I, *id.*, at 371, n. 7. We also noted that neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of unconstitutional employment discrimination. We emphasized that the House and Senate Committee Reports on the ADA focused on "'discrimination [in] ... employment in the private sector,' " and made no mention of discrimination in public employment. *Id.*, at 371-372 (quoting S. Rep. No. 101-116, p. 6 (1989), and H. R. Rep. No. 101-485, pt. 2, p. 28 (1990)) (emphasis in *Garrett*). Finally, we concluded that Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment. Taken together, the historical record and the broad sweep of the statute suggested that Title I's true aim was not so much to enforce the Fourteenth Amendment's prohibitions against disability discrimination in public employment as it was to "rewrite" this Court's Fourteenth Amendment jurisprudence. 531 U. S., at 372-374.

In view of the significant differences between Titles I and H, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' §5 enforcement power. It is to that question that we now turn.

IV

* * *

It is not difficult to perceive the harm that Title H is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "[a]s of 1979, most States ... categorically disqualified 'idiots' from voting, without regard to individual capacity." The majority of these laws remain on the books, and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors. The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, *e.g.*, *Jackson v. Indiana*, 406 U. S. 715 (1972); the abuse and neglect of persons committed to state mental health hospitals, *Youngberg v. Romeo*, 457 U. S. 307 (1982); and irrational discrimination in zoning decisions, *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985). The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting. Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.

This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 101-116, at 18. See also H. R. Rep. No. 101-485, pt. 2, at 47. It also uncovered further evidence of those shortcomings, in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions. See *Garrett*, 531 U. S., at 379 (*Breyer, J.*, dissenting). See also *id.*, at 391 (App. C to opinion of *Breyer, I.*, dissenting). As the Court's opinion in *Garrett* observed, the "overwhelming majority" of these examples concerned discrimination in the administration of public programs and services. *Id.*, at 371, n. 7; Government's Lodging in *Garrett*, O. T. 2000, No. 99-1240 (available in Clerk of Court's case file).

With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings. U. S. Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* 39 (1983). Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. Oversight Hearing on H. R. 4468 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40-41, 48 (1988). And its appointed task force heard numerous examples of the exclusion of persons with

disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. Government's Lodging in *Garrett*, O. T. 2000, No. 99-1240. See also Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment (Oct. 12, 1990).

V

The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. At the outset, we must determine the scope of that inquiry. Title II--unlike RFRA, the Patent Remedy Act, and the other statutes we have reviewed for validity under §5--reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees. Petitioner urges us both to examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity. According to petitioner, the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. But nothing in our case law requires us to consider Title II with its wide variety of applications, as an undifferentiated whole. Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under §5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid §5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further. See *United States v. Raines*, 362 U. S. 17, 26 (1960).

Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable problem]" warranted "added prophylactic measures in response." *Hibbs*, 538 U. S., at 737 (internal quotation marks omitted).

The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. 42 U. S. C. § 12131(2). But Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the

service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. 28 CFR §35.151 (2003). But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. §35.150(b)(1). Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. *Ibid.* And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§35.150(a)(2), (a)(3).

This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. *Boddie*, 401 U. S., at 379 (internal quotation marks and citation omitted). Our cases have recognized a number of affirmative obligations that flow from this principle: the duty to waive filing fees in certain family-law and criminal cases, the duty to provide transcripts to criminal defendants seeking review of their convictions, and the duty to provide counsel to certain criminal defendants. Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U. S., at 532; *Kimel*, 528 U. S., at 86. It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' §5 authority to enforce the guarantees of the Fourteenth Amendment. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

Chief Justice Rehnquist, with whom *Justice Kennedy* and *Justice Thomas* join, dissenting.

In *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356 (2001), we held that Congress did not validly abrogate States' Eleventh Amendment immunity when it enacted Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. §§12111-12117. Today, the Court concludes that Title II of that Act, §§12131-12165, does validly abrogate that immunity, at least insofar "as it applies to the class of cases implicating the fundamental right of access to the courts." *Ante*, at 19. Because today's decision is irreconcilable with *Garrett* and the well-established principles it embodies, I dissent.

The Eleventh Amendment bars private lawsuits in federal court against an unconsenting

State. *E.g.*, *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721, 726 (2003); *Garrett, supra*, at 363; *Kimel v. Florida Bd. of Regents*, 528 U. S. 62, 73 (2000). Congress may overcome States' sovereign immunity and authorize such suits only if it unmistakably expresses its intent to do so, and only if it "acts pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment." *Hibbs, supra*, at 726. While the Court correctly holds that Congress satisfied the first prerequisite, *ante*, at 6, I disagree with its conclusion that Title II is valid §5 enforcement legislation.

Section 5 of the Fourteenth Amendment grants Congress the authority "to enforce, by appropriate legislation," the familiar substantive guarantees contained in §1 of that Amendment. U. S. Const., Art. 14, §1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Congress' power to enact "appropriate" enforcement legislation is not limited to "mere legislative repetition" of this Court's Fourteenth Amendment jurisprudence. *Garrett, supra*, at 365. Congress may "remedy" and "deter" state violations of constitutional rights by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Hibbs*, 538 U. S., at 727 (internal quotation marks omitted). Such "prophylactic" legislation, however, "must be an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.'" *Id.*, at 727-728 (quoting *Kline!*, *supra*, at 88); *City of Boerne v. Flores*, 521 U. S. 507, 525 (1997) (enforcement power is "corrective or preventive, not definitional"). To ensure that Congress does not usurp this Court's responsibility to define the meaning of the Fourteenth Amendment, valid §5 legislation must exhibit "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Hibbs, supra*, at 728 (quoting *City of Boerne, supra*, at 520). While the Court today pays lipservice to the "congruence and proportionality" test, see *ante*, at 8, it applies it in a manner inconsistent with our recent precedents.

In *Garrett*, we conducted the three-step inquiry first enunciated in *City of Boerne* to determine whether Title I of the ADA satisfied the congruence-and-proportionality test. A faithful application of that test to Title 11 reveals that it too "'substantively redefine[s]," rather than permissibly enforces, the rights protected by the Fourteenth Amendment. *Hibbs, supra*, at 728.

The first step is to "identify with some precision the scope of the constitutional right at issue." *Garrett, supra*, at 365. This task was easy in *Garrett, Hibbs, Kimel*, and *City of Boerne* because the statutes in those cases sought to enforce only one constitutional right. In *Garrett*, for example, the statute addressed the equal protection right of disabled persons to be free from unconstitutional employment discrimination. *Garrett, supra*, at 365. See also *Hibbs, supra*, at 728 ("The [Family and Medical Leave Act of 1993 (FMLA)] aims to protect the right to be free from gender-based discrimination in the workplace"); *Kimel, supra*, at 83 (right to be free from unconstitutional age discrimination in employment); *City of Boerne, supra*, at 529 (right of free exercise of religion). The scope of that right, we explained, is quite limited; indeed, the Equal Protection Clause permits a State to classify on the basis of disability so long as it has a rational basis for doing so. *Garrett, supra*, at 366-368 (discussing *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985)); see also *ante*, at 11.

In this case, the task of identifying the scope of the relevant constitutional protection is more difficult because Title II purports to enforce a panoply of constitutional rights of disabled persons: not only the equal protection right against irrational discrimination, but also certain rights protected by the Due Process Clause. *Ante*, at 11-12. However, because the Court ultimately upholds Title H as it applies to the class of cases implicating the fundamental right of access to the courts," *ante*, at 19, the proper inquiry focuses on the scope of those due process ' rights. The Court cites four access-to-the-courts rights that Title II purportedly enforces: (1) the right of the criminal defendant to be present at all critical stages of the trial, *Faretta v.*

California, 422 U. S. 806, 819 (1975); (2) the right of litigants to have a "meaningful opportunity to be heard" in judicial proceedings, *Boddie v. Connecticut*, 401 U. S. 371, 379 (1971); (3) the right of the criminal defendant to trial by a jury composed of a fair cross section of the community, *Taylor v. Louisiana*, 419 U. S. 522, 530 (1975); and (4) the public right of access to criminal proceedings, *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U. S. 1-15 (1986). *Ante*, at 11-12.

Having traced the "metes and bounds" of the constitutional rights at issue, the next step in the congruence-and-proportionality inquiry requires us to examine whether Congress "identified a history and pattern" of violations of these constitutional rights by the States with respect to the disabled. *Garrett*, 531 U. S., at 368. This step is crucial to determining whether Title II is a legitimate attempt to remedy or prevent actual constitutional violations by the States or an illegitimate attempt to rewrite the constitutional provisions it purports to enforce. Indeed, "Congress' §5 power is appropriately exercised *only* in response to state transgressions." *Ibid.* (emphasis added). But the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons.

Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled. *Ante*, at 12-15. This digression recounts historical discrimination against the disabled through institutionalization laws, restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services. Some of this evidence would be relevant if the Court were considering the constitutionality of the statute as a whole; but the Court rejects that approach in favor of a narrower "as-applied" inquiry. We discounted much the same type of outdated, generalized evidence in *Garrett* as unresponsive of Title I's ban on employment discrimination. 531 U. S., at 368-372; see also *City of Boerne*, 521 U. S., at 530 (noting that the "legislative record lacks modern instances of religious bigotry"). The evidence here is likewise irrelevant to Title II's purported enforcement of Due Process access-to-the-courts rights.

Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States*. The bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the States themselves. We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States. *Garrett*, *supra*, at 368-369; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627, 640 (1999); *Kimel*, 528 U. S., at 89. Moreover, the majority today cites the same

congressional task force evidence we rejected in *Garrett. Ante*, at 15 (citing *Garrett, supra*, at 379 (*Breyer, J.*, dissenting), and 531 U. S., at 391-424 (App. C to opinion of *Breyer, J.*, dissenting) (chronicling instances of "unequal treatment" in the "administration of public programs")). As in *Garrett*, this "unexamined, anecdotal" evidence does not suffice. 531 U. S., at 370. Most of the brief anecdotes do not involve States at all, and those that do are not sufficiently detailed to determine whether the instances of "unequal treatment" were irrational, and thus unconstitutional under our decision in *Cleburne. Garrett, supra*, at 370-371. Therefore, even outside the "access to the courts" context, the Court identifies few, if any, constitutional violations perpetrated by the States against disabled persons.

With respect to the due process "access to the courts" rights on which the Court ultimately relies, Congress' failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.

The Court's attempt to disguise the lack of congressional documentation with a few citations to judicial decisions cannot retroactively provide support for Title II, and in any event, fails on its own terms. See, e.g., *Garrett*, 531 U. S., at 368 ("[W]e examine whether *Congress* identified a history and pattern" of constitutional violations); *ibid.* ("*Mhe legislative record* ... fails to show that *Congress* did in fact identify a pattern" of constitutional violations) (emphases added). Indeed, because this type of constitutional violation occurs in connection with litigation, it is particularly telling that the majority is able to identify only *two* reported cases finding that a disabled person's federal constitutional rights were violated. See *ante*, at 14, n. 14 (citing *Ferrell v. Estelle*, 568 F. 2d 1128, 1132-1133 (CA5), opinion withdrawn as moot, 573 F. 2d 867 (1978); *People v. Rivera*, 125 Misc. 2d 516, 528, 480 N. Y. S. 2d 426, 434 (Sup. Ct. 1984)).

Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally "inaccessible" courthouse--i.e., one a disabled person cannot utilize without assistance--does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an "inaccessible" courthouse violate the Equal Protection Clause, unless it is irrational for the State not to alter the courthouse to make it "accessible." But financial considerations almost always furnish a rational basis for a State to decline to make those alterations, See *Garrett*, 531 U. S., at 372 (noting that it would be constitutional for an employer to "conserve scarce financial resources" by hiring employees who can use existing facilities rather than making the facilities accessible to disabled employees). Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States' sovereign immunity.

The near-total lack of actual constitutional violations in the congressional record is reminiscent of *Garrett*, wherein we found that the same type of minimal anecdotal evidence "401 far short of even suggesting the pattern of unconstitutional [state action] on which §5 legislation must be based."*id.*, at 370. See also *Kimel*, 528 U. S., at 91 ("Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary"); *Florida Prepaid, supra*, at 645 ("The legislative record thus suggests that the Patent Remedy Act did not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic §5 legislation" (quoting *City of Boerne*, 521 U. S., at 526)).

The barren record here should likewise be fatal to the majority's holding that Title II is valid legislation enforcing due process rights that involve access to the courts. This conclusion gains even more support when Title II's nonexistent record of constitutional violations is compared with legislation that we have sustained as valid §5 enforcement legislation. See, e.g., *Hibbs*, 538-U. S., at 729-732 (tracing the extensive legislative record documenting States' gender discrimination in employment leave policies); *South Carolina v. Katzenbach*, 383 U. S. 301, 312-313 (1966) (same with respect to racial discrimination in voting rights). Accordingly, Title II can only be understood as a congressional attempt to "rewrite the Fourteenth Amendment law laid down by this Court," rather than a legitimate effort to remedy or prevent state violations of that Amendment. *Garrett, supra*, at 374.

The third step of our congruence-and-proportionality inquiry removes any doubt as to whether Title II is valid §5 legislation. At this stage, we ask whether the rights and remedies created by Title II are congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress. *Hibbs, supra*, at 737-739; *Garrett, supra*, at 372-373.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U. S. C. § 12132. A disabled person is considered "qualified" if he "meets the essential eligibility requirements" for the receipt of the entity's services or participation in the entity's programs, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services." § 12131(2) (emphasis added). The ADA's findings make clear that Congress believed it was attacking "discrimination" in all areas of public services, as well as the "discriminatory effect" of "architectural, transportation, and communication barriers." §§12101(a)(3), (a)(5). In sum, Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.

"Despite subjecting States to this expansive liability," the broad terms of Title II "d[o] nothing to limit the coverage of the Act to cases involving arguable constitutional violations." *Florida Prepaid*, 527 U. S., at 646. By requiring special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination. We invalidated Title I's similar

requirements in *Garrett*, observing that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." 531 U. S., at 368; *id.*, at 372-373 (contrasting Title I's reasonable accommodation and disparate impact provisions with the Fourteenth Amendment's requirements). Title II fails for the same reason. Like Title I, Title II may be laudable public policy, but it cannot be seriously disputed that it is also an attempt to legislatively "redefine the States' legal obligations" under the Fourteenth Amendment. *Kimel*, 528 U. S., at 88.

The majority, however, claims that Title II also vindicates fundamental rights protected by the Due Process Clause--in addition to access to the courts--that are subject to heightened Fourteenth Amendment scrutiny. *Ante*, at 11 (citing *Dunn v. Blumstein*, 405 U. S. 330, 336-337 (1972) (voting); *Shapiro v. Thompson*, 394 U. S. 618, 634 (1969) (right to move to a new jurisdiction); *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942) (marriage and procreation)). But Title II is not tailored to provide prophylactic protection of these rights; instead, it applies to any service, program, or activity provided by any entity. Its provisions affect transportation, health, education, and recreation programs, among many others, all of which are accorded only rational-basis scrutiny under the Equal Protection Clause. A requirement of accommodation for the disabled at a state-owned amusement park or sports stadium, for example, bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights. Thus, as with Title I in *Garrett*, the Patent Remedy Act in *Florida Prepaid*, the Age Discrimination in Employment Act of 1967 in *Kimel*, and the RFRA in *City of Boerne*, all of which we invalidated as attempts to substantively redefine the Fourteenth Amendment, it is unlikely that many of the [state actions] affected by [Title II] ha[ve] any likelihood of being unconstitutional." *City of Boerne, supra*, at 532. Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity."

The majority concludes that Title II's massive overbreadth can be cured by considering the statute only "as it applies to the class of cases implicating the accessibility of judicial services." *Ante*, at 20 (citing *United States v. Raines*, 362 U. S. 17, 26 (1960)). I have grave doubts about importing an "as applied" approach into the §5 context. While the majority is of course correct that this Court normally only considers the application of a statute to a particular case, the proper inquiry under *City of Boerne* and its progeny is somewhat different. In applying the congruence-and-proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment. This question can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.

In conducting its as-applied analysis, however, the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right. But Title II is not susceptible of being carved up in this manner; it applies indiscriminately to all "services," "programs," or "activities" of any "public entity." Thus, the majority's approach is not really an assessment of whether Title II is "appropriate legislation" at all, U. S. Const., Arndt. 14, §5 (emphasis added), but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.

Our §5 precedents do not support this as-applied approach. In each case, we measured the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce. If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, those cases might have come out differently. In *Garrett*, for example, Title I might have been upheld "as applied" to irrational employment discrimination; or in *Florida Prepaid*, the Patent Remedy Act might have been upheld "as applied" to intentional, uncompensated patent infringements. It is thus not surprising that the only authority cited by the majority is *Raines, supra*, a case decided long before we enunciated the congruence-and-proportionality test.

I fear that the Court's adoption of an as-applied approach eliminates any incentive for Congress to craft §5 legislation for the purpose of remedying or deterring actual constitutional violations. Congress can now simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States. All the while, States will be subjected to substantial litigation in a piecemeal attempt to vindicate their Eleventh Amendment rights. The majority's as-applied approach simply cannot be squared with either our recent precedent or the proper role of the Judiciary.

Even in the limited courthouse-access context, Title II does not properly abrogate state sovereign immunity. As demonstrated in depth above, Congress utterly failed to identify any evidence that disabled persons were denied constitutionally protected access to judicial proceedings. Without this predicate showing, Title II, even if we were to hypothesize that it applies only to courthouses, cannot be viewed as a congruent and proportional response to state constitutional violations. *Garrett*, 531 U. S., at 368 ("Congress' §5 authority is appropriately exercised only in response to state transgressions").

Moreover, even in the courthouse-access context, Title II requires substantially more than the Due Process Clause. Title II subjects States to private lawsuits if, *inter alia*, they fail to make "reasonable modifications" to facilities, such as removing "architectural ... barriers." 42 U. S., C. §§12131(2), 12132. Yet the statute is not limited to occasions when the failure to modify results, or will likely result, in an actual due process violation--i.e., the inability of a disabled person to participate in a judicial proceeding. Indeed, liability is triggered if an inaccessible building results in a disabled person being "subjected to discrimination"--a term that presumably encompasses any sort of inconvenience in accessing the facility, for whatever purpose. § 12132.

* * *

For the foregoing reasons, I respectfully dissent.

Justice Scalia, dissenting.

Section 5 of the Fourteenth Amendment provides that Congress "shall have power to enforce, by appropriate legislation, the provisions" of that Amendment--including, of course, the Amendment's Equal Protection and Due Process Clauses. In *Katzenbach v. Morgan*, 384 U. S. 641 (1966), we decided that Congress could, under this provision, forbid English literacy tests for Puerto Rican voters in New York State who met certain educational criteria. Though those

tests were not themselves in violation of the Fourteenth Amendment, we held that §5 authorizes prophylactic legislation--that is, "legislation that proscribes facially constitutional conduct," *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721, 728 (2003), when Congress determines such proscription is desirable "to make the amendments fully effective," *Morgan, supra*, at 648 (quoting *Ex parte Virginia*, 100 U. S. 339, 345 (1880)). We said that "the measure of what constitutes 'appropriate legislation' under §5 of the Fourteenth Amendment" is the flexible "necessary and proper" standard of *McCulloch v. Maryland*, 4 Wheat. 316, 342, 421 (1819). *Morgan*, 384 U. S., at 651. We described §5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Ibid.*

The *Morgan* opinion followed close upon our decision in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), which had upheld prophylactic application of the similarly worded "enforce" provision of the Fifteenth Amendment (§2) to challenged provisions of the Voting Rights Act of 1965. But the Fourteenth Amendment, unlike the Fifteenth, is not limited to denial of the franchise and not limited to the denial of other rights on the basis of race. In *City of Boerne v. Flores*, 521 U. S. 507 (1997), we confronted Congress's inevitable expansion of the Fourteenth Amendment, as interpreted in *Morgan*, beyond the field of racial discrimination.' There Congress had sought, in the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*, to impose upon the States an interpretation of the First Amendment's Free Exercise Clause that this Court had explicitly rejected. To avoid placing in congressional hands effective power to rewrite the Bill of Rights through the medium of §5, we formulated the "congruence and proportionality" test for determining what legislation is "appropriate." When Congress enacts prophylactic legislation, we said, there must be "proportionality or congruence between the means adopted and the legitimate end to be achieved." 521 U. S., at 533.

I joined the Court's opinion in *Boerne* with some misgiving. I have generally rejected tests based on such malleable standards as "proportionality," because they have a way of turning into vehicles for the implementation of individual judges' policy preferences. See, *e.g.*, *Ewing v. California*, 538 U. S. 11, 31-32 (2003) (*Scalia, J.*, concurring in judgment) (declining to apply a "proportionality" test to the Eighth Amendment's ban on cruel and unusual punishment); *Stenberg v. Carhart*, 530 U. S. 914, 954-956 (2000) (*Scalia, J.*, dissenting) (declining to apply the "undue burden" standard of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992)); *BMW of North America, Inc. v. Gore*, 517 U. S. 559, 599 (1996) (*Scalia, J.*, dissenting) (declining to apply a "reasonableness" test to punitive damages under the Due Process Clause). Even so, I signed on to the "congruence and proportionality" test in *Boerne*, and adhered to it in later cases: *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999), where we held that the provisions of the Patent and Plant Variety Protection Remedy Clarification Act, 35 U. S. C. §§271(h), 296(a), were "'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,'" 527 U. S., at 646 (quoting *Boerne, supra*, at 532); *Kimel v. Florida Bd. of Regents*, 528 U. S. 62 (2000), where we held that the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.* (1994 ed. and Supp. III), imposed on state and local governments requirements "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act," 528 U. S., at 83; *United*

States v. Morrison, 529 U. S. 598 (2000), where we held that a provision of the Violence Against Women Act, 42 U. S. C. §13981, lacked congruence and proportionality because it was "not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe," 529 U. S., at 626; and *Board of Trustees of Univ. of Ala. v. Garrett*; 531 U. S. 356 (2001), where we said that Title I of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 330, 42 U. S. C. §§12111-12117, raised "the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*," 531 U. S., at 372.

But these cases were soon followed by *Nevada Dept. of Human Resources v. Hibbs*, in which the Court held that the Family and Medical Leave Act of 1993, 107 Stat. 9, 29 U. S. C. §2612 *et seq.*, which required States to provide their employees up to 12 work weeks of unpaid leave (for various purposes) annually, was "congruent and proportional to its remedial object [of preventing sex discrimination], and can be understood as responsive to, or designed to prevent, unconstitutional behavior." 538 U. S., at 740 (internal quotation marks omitted). I joined *Justice Kennedy's* dissent, which established (conclusively, I thought) that Congress had identified no unconstitutional state action to which the statute could conceivably be a proportional response. And now we have today's decision, holding that Title II of the ADA is congruent and proportional to the remediation of constitutional violations, in the face of what seems to me a compelling demonstration of the opposite by *The Chief Justice's* dissent.

I yield to the lessons of experience. The "congruence and proportionality" standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed. As I wrote for the Court in an earlier case, "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U. S. 211, 239 (1995).

I would replace "congruence and proportionality" with another test--one that provides a clear, enforceable limitation supported by the text of §5. Section 5 grants Congress the power "to enforce, by appropriate legislation," the other provisions of the Fourteenth Amendment. U. S. Const., Arndt. 14 (emphasis added). *Morgan* notwithstanding, one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit--even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not "enforce" the right of access to the courts at issue in this case, see *ante*, at 19, by requiring that disabled persons be provided access to *all* of the "services, programs, or activities" furnished or conducted by the State, 42 U. S. C. § 12132. That is simply not what the power to enforce means--or ever meant. The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined "enforce" as:

"To put in execution; to cause to take effect; as, to *enforce* the laws." *Id.*, at 396. See also J. Worcester, Dictionary of the English Language 484 (1860) ("To put in force; to cause to be applied or executed; as, 'To *enforce* a law' "). Nothing in §5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or "remedy" conduct that does not *itself violate* any provision of the Fourteenth Amendment. So-called "prophylactic legislation" is reinforcement rather than enforcement.

Morgan asserted that this commonsense interpretation "would confine the legislative power ... to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of §1 of the Amendment." 384 U. S., at 648-649. That is not so. One must remember "that in 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution." R. Berger, *Government By Judiciary* 147 (2d ed. 1997). If, just after the Fourteenth Amendment was ratified, a State had enacted a law imposing racially discriminatory literacy tests (different questions for different races) a citizen prejudiced by such a test would have had no means of asserting his constitutional right to be free of it. Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights. One of the first pieces of legislation passed under Congress's §5 power was the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, entitled "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*" Section 1 of that Act, later codified as Rev. Stat. §1979, 42 U. S. C. §1983, authorized a cause of action against "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." 17 Stat. 13. Section 5 would also authorize measures that do not restrict the States' substantive scope of action but impose requirements directly related to the *facilitation* of "enforcement"--for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified. But what §5 does *not* authorize is so-called "prophylactic" measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.

The major impediment to the approach I have suggested is *stare decisis*. A lot of water has gone under the bridge since *Morgan*, and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of *Morgan* and *South Carolina*. As Prof. Archibald Cox put it in his Supreme Court Foreword: "The etymological meaning of section 5 may favor the narrower reading. Literally, 'to enforce' means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state's constitutional duty." Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 110-111 (1966).

However, *South Carolina* and *Morgan*, all of our later cases except *Hibbs* that give an expansive meaning to "enforce" in §5 of the Fourteenth Amendment, and all of our earlier cases that even suggest such an expansive meaning in dicta, involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, *racial discrimination*. See *Oregon v. Mitchell*, 400 U. S. 112 (1970) (see discussion *infra*); *Ex parte Virginia*, 100 U. S.

339 (1880) (dictum in a case involving a statute that imposed criminal penalties for officials' racial discrimination in jury selection); *Strauder v. West Virginia*, 100 U. S. 303, 311-312 (1880) (dictum in a case involving a statute that permitted removal to federal court of a black man's claim that his jury had been selected in a racially discriminatory manner); *Virginia v. Rives*, 100 U. S. 313, 318 (1880) (dictum in a racial discrimination case involving the same statute). See also *City of Rome v. United States*, 446 U. S. 156, 173-178 (1980) (upholding as valid legislation under §2 of the Fifteenth Amendment the most sweeping provisions of the Voting Rights Act Of 1965); *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 439-441 (1968) (upholding a law, 42 U. S. C. §1982, banning public or private racial discrimination in the sale and rental of property as appropriate legislation under §2 of the Thirteenth Amendment).

Giving §5 more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions. In the *Slaughter-House Cases*, 16 Wall. 36, 81 (1873), the Court's first confrontation with the Fourteenth Amendment, we said the following with respect to the Equal Protection Clause:

"We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

Racial discrimination was the practice at issue in the early cases (cited in *Morgan*) that gave such an expansive description of the effects of §5. See 384 U. S., at 648 (citing *Ex parte Virginia*); 384 U. S., at 651 (citing *Strauder v. West Virginia*, and *Virginia v. Rives*). In those early days, bear in mind, the guarantee of equal protection had not been extended beyond race to sex, age, and the many other categories it now covers. Also still to be developed were the incorporation doctrine (which holds that the Fourteenth Amendment incorporates and applies against the States the Bill of Rights, see *Duncan v. Louisiana*, 391 U. S. 145, 147-148 (1968)) and the doctrine of so-called "substantive due process" (which holds that the Fourteenth Amendment's Due Process Clause protects unenumerated liberties, see generally *Lawrence v. Texas*, 539 U. S. 558 (2003); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992)). Thus, the Fourteenth Amendment did not include the many guarantees that it now provides. In such a seemingly limited context, it did not appear to be a massive expansion of congressional power to interpret §5 broadly. Broad interpretation was particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored. The former is still true, and the latter remained true at least as late as *Morgan*.

When congressional regulation has not been targeted at racial discrimination, we have given narrower scope to §5. In *Oregon v. Mitchell*, 400 U. S. 112 (1970), the Court upheld, under §2 of the Fifteenth Amendment, that provision of the Voting Rights Act Amendments of 1970, 84 Stat. 314, which barred literacy tests and similar voter-eligibility requirements--classic

tools of the racial discrimination in voting that the Fifteenth Amendment forbids; but found to be *beyond* the §5 power of the Fourteenth Amendment the provision that lowered the voting age from 21 to 18 in state elections. See 400 U. S., at 124-130 (opinion of Black, J.); *id.*, at 153-154 (Harlan, J., concurring in part and dissenting in part); *id.*, at 293-296 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in part and dissenting in part). A third provision, which forbade States from disqualifying voters by reason of residency requirements, was also upheld--but only a minority of the Justices believed that §5 was adequate authority. Justice Black's opinion in that case described exactly the line I am drawing here, suggesting that Congress's enforcement power is broadest when directed "to the goal of eliminating discrimination on account of race." *Id.*, at 130. And of course the *results* reached in *Boerne*, *Florida Prepaid*, *Kimel*, *Morrison*, and *Garrett* are consistent with the narrower compass afforded congressional regulation that does not protect against or prevent racial discrimination.

Thus, principally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic §5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. See *Hibbs*, 538 U. S., at 741-743 (*Scalia*, *J.*, dissenting); *Morrison*, 529 U. S., at 626-627; *Morgan*, 384 U. S., at 666-667, 669, 670-671 (Harlan, J., dissenting). I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. See *Morrison*, *supra*, at 625-626. And I would not, of course, permit any congressional measures that violate other provisions of the Constitution. When those requirements have been met, however, I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under §5 to prevent or remedy racial discrimination by the States.

I shall also not subject to "congruence and proportionality" analysis congressional action under §5 that is *not* directed to racial discrimination. Rather, I shall give full effect to that action when it consists of "enforcement" of the provisions of the Fourteenth Amendment, within the broad but not unlimited meaning of that term I have described above. When it goes beyond enforcement to prophylaxis, however, I shall consider it *ultra vires*. The present legislation is plainly of the latter sort.

* * *

Requiring access for disabled persons to all public buildings cannot remotely be considered a means of "enforcing" the Fourteenth Amendment. The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the principal object of the Civil War Amendments. "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'" *United*

States v. 12 200-Ii. Reels of Super 811/1M. Film, 413 U. S. 123, 127 (1973) (Burger, C. J., for the Court) {footnote omitted}. It is past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion. For these reasons, I respectfully dissent from the judgment of the Court.

IV. UNCONSTITUTIONAL **DELEGATION**

A.L.A. SCHECHTER POULTRY CORPORATION et al.

v.

UNITED STATES.

Nos. 854, 864.

Supreme Court of the United States

Argued May 2, 3, 1935.

Decided May 27, 1935.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Petitioners in No. 854 were convicted in the District Court of the United States for the Eastern District of New York on eighteen counts of an indictment charging violations of what is known as the 'Live Poultry Code,' and on an additional count for conspiracy to commit such violations. By demurrer to the indictment and appropriate motions on the trial, the defendants contended (1) that the code had been adopted pursuant to an unconstitutional delegation by Congress of legislative power; (2) that it attempted to regulate intrastate transactions which lay outside the authority of Congress; and (3) that in certain provisions it was repugnant to the due process clause of the Fifth Amendment.

'The Circuit Court of Appeals sustained the conviction on the conspiracy count and on sixteen counts for violation of the code, but reversed the conviction on two counts which charged violation of requirements as to minimum wages and maximum hours of labor, as these were not deemed to be within the congressional power of regulation. 76 F.(2d) 617. On the respective applications of the defendants (No. 854) and of the government (No. 864), this Court granted writs of certiorari April 15, 1935. 295 U.S. 723, 55 S.Ct. 651, 79 L.Ed.

New York City is the largest live poultry market in the United States. Ninety- six per cent of the live poultry there marketed comes from other states. Three-fourths of this amount arrives by rail and is consigned to commission men or receivers. Most of these freight shipments (about 75 per cent.) come in at the Manhattan Terminal of the New York Central Railroad, and the remainder at one of the four terminals in New Jersey serving New York City. The commission men transact by far the greater part of the business on a commission basis, representing the shippers as agents, and remitting to them the proceeds of sale, less commissions, freight, and handling charges. Otherwise, they buy for their own account. They sell to slaughterhouse operators who are also called marketmen.

The defendants are slaughterhouse operators of the latter class. A.L.A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the latter corporation and also guaranteed the credits of the former corporation, which was operated by Martin, Alex, and Aaron Schechter. Defendants ordinarily purchase their live poultry from

commission men at the West Washington Market in New York City or at the railroad terminals serving the city, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is there sold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery, by shochtim in defendants' employ. Defendants do not sell poultry in interstate commerce.

The 'Live Poultry Code' was promulgated under section 3 of the National Industrial Recovery Act. That section, the pertinent provisions of which are set forth in the margin, authorizes the President to approve 'codes of fair competition.' SUCH A CODE may be approved for a trade or industry, upon application by one or more trade or industrial associations or groups, if the President finds (1) that such associations or groups 'impose no inequitable restrictions on admission to membership therein and are truly representative,' and (2) that such codes are not designed 'to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy' of title 1 of the act (15 USCA s 701 et seq.). Such codes 'shall not permit monopolies or monopolistic practices.' As a condition of his approval, the President may 'impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared.' Where such a code has not been approved, the President may prescribe one, either on his own motion or on complaint. Violation of any provision of a code (so approved or prescribed) 'in any transaction in or affecting interstate or foreign commerce' is made a misdemeanor punishable by a fine of not more than \$500 for each offense, and each day the violation continues is to be deemed a separate offense.

The 'Live Poultry Code' was approved by the President on April 13, 1934. Its divisions indicate its nature and scope. The code has eight articles entitled (1) 'purposes,' (2) 'definitions,' (3) 'hours,' (4) 'wages,' (5) 'general labor provisions,' (6) 'administration,' (7) 'trade practice provisions,' and (8) 'general.'

The declared purpose is 'To effect the policies of title 1 of the National Industrial Recovery Act.' The code is established as 'a code for fair competition for the live poultry industry of the metropolitan area in and about the City of New York.' That area is described as embracing the five boroughs of New York. City, the counties of Rockland, Westchester, Nassau, and Suffolk in the state of New York, the counties of Hudson and Bergen in the state of New Jersey, and the county of Fairfield in the state of Connecticut.

The 'industry' is defined as including 'every person engaged in the business of selling, purchasing of resale, transporting, or handling and/or slaughtering live poultry, from the time such poultry comes into the New York metropolitan area to the time it is first sold in slaughtered form,' and such 'related branches' as may from time to time be included by amendment. Employers are styled 'members of the industry,' and the term 'employee' is defined to embrace 'any and all persons engaged in the industry, however compensated,' except 'members.'

The code fixes the number of hours for workdays. It provides that no employee, with certain exceptions, shall be permitted to work in excess of forty hours in any one week, and that no employees, save as stated, 'shall be paid in any pay period less than at the rate of fifty (50) cents per hour.' The article containing 'general labor provisions' prohibits the employment of any person under 16 years of age, and declares that employees shall have the right of 'collective bargaining' and freedom of choice with respect to labor organizations, in the terms of section 7(a) of the act (15 USCA s 707(a)). The minimum number of employees, who shall be employed by slaughterhouse operators, is fixed; the number being graduated according to the average volume of weekly sales.

Provision is made for administration through an 'industry advisory committee,' to be selected by trade associations and members of the industry, and a 'code supervisor,' to be appointed, with the approval of the committee, by agreement between the Secretary of Agriculture and the Administrator for Industrial Recovery. The expenses of administration are to be borne by the members of the industry proportionately upon the basis of volume of business, or such other factors as the advisory committee may deem equitable, 'subject to the disapproval of the Secretary and/or Administrator.'

The seventh article, containing 'trade practice provisions,' prohibits various practices which are said to constitute 'unfair methods of competition.' The final article provides for verified reports, such as the Secretary or Administrator may require, '(1) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and (2) for the determination by the Secretary or Administrator of the extent to which the declared policy of the act is being effectuated by this code.' The members of the industry are also required to keep books and records which 'will clearly reflect all financial transactions of their respective businesses and the financial condition thereof,' and to submit weekly reports showing the range of daily prices and volume of sales' for each kind of produce.

The President approved the code by an executive order (No. 6675--A) in which he found that the application for his approval had been duly made in accordance with the provisions of title 1 of the National Industrial Recover Act; that there had been due notice and hearings; that the code constituted 'a code of fair competition' as contemplated by the act and complied with its pertinent provisions, including clauses (1) and (2) of subsection (a) of section 3 of title 1 (15 USCA s 703(a)(1, 2)); and that the code would tend 'to effectuate the policy of Congress as declared in section 1 of Title I.' The executive order also recited that the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act had rendered separate reports as to the provisions within their respective jurisdictions. The Secretary of Agriculture reported that the provisions of the code 'establishing standards of fair competition {a) are regulations of transactions in or affecting the current of interstate and/or foreign commerce and (b) are reasonable,' and also that the code would tend to effectuate the policy declared in title 1 of the act, as set forth in section 1 (15 USCA s 701). The report of the Administrator for Industrial Recovery dealt with wages, hours of labor, and other labor provisions.

Of the eighteen counts of the indictment upon which the defendants were convicted, aside from the count for conspiracy, two counts charged violation of the minimum wage and maximum hour provisions of the code, and ten counts were for violation of the requirement

(found in the 'trade practice provisions') of 'straight killing.' This requirement was really one of 'straight' selling. The term 'straight killing' was defined in the code as 'the practice of requiring persons purchasing poultry for resale to accept the run of any half coop, coop, or coops, as purchased by slaughterhouse operators, except for culls: The charges in the ten counts, respectively, were that the defendants in selling to retail dealers and butchers had permitted 'selections of individual chickens taken from particular coops and half coops.'

Of the other six counts, one charged the sale to a butcher of an unfit chicken; two counts charged the making of sales without having the poultry inspected or approved in accordance with regulations or ordinances of the city of New York; two counts charged the making of false reports or the failure to make reports relating to the range of daily prices and volume of sales for certain periods; and the remaining count was for sales to slaughterers or dealers who were without licenses required by the ordinances and regulations of the city of New York.

Second. The Question of the Delegation of Legislative Power.--We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Company v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446. The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Article 1, s 1. And the Congress is authorized 'To make all Laws which shall be necessary and proper for carrying into Execution' its general powers. Article 1, s 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the *Panama Refining Company Case* that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. *Id.*, 293 U.S. 388, page 421, 55 S.Ct. 241, 79 L.Ed. 446.

Accordingly, we look to the statute to see whether Congress has overstepped these limitations--whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

The aspect in which the question is now presented is distinct from that which was before us in the case of the *Panama Refining Company*. There the subject of the statutory prohibition was defined. National Industrial Recovery Act, s 9(c), 15 USCA s 709(c). That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The

question was with respect to the range of discretion given to the President in prohibiting that transportation. *Id.*, 293 U.S. 388, pages 414, 415, 430, 55 S.Ct. 241, 79 L.Ed. 446. As to the 'codes of fair competition,' under section 3 of the act, the question is more fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed.

What is meant by 'fair competition' as the term is used in the act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction, and expansion which are stated in the first section of title 1?

The act does not define 'fair competition.' 'Unfair competition,' as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. *Good-year's Rubber Manufacturing Co. v. Good-year Rubber Co.*, 128 U.S. 598, 604, 9 S.Ct. 166, 32 L.Ed. 535; *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 140, 25 S.Ct. 609, 49 L.Ed. 972; *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413, 36 S.Ct. 357, 60 L.Ed. 713. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own--to misappropriation of what equitably belongs to a competitor. *International News Service v. Associated Press*, 248 U.S. 215, 241, 242, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud or coercion or conduct otherwise prohibited by law. *Id.*, 248 U.S. 315, page 258, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. But it is evident that in its widest range, 'unfair competition,' as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The government does not contend that the act contemplates such a limitation. It would be opposed both to the declared purposes of the act and to its administrative construction.

The Federal Trade Commission Act [section 5] (15 USCA s 45) introduced the expression 'unfair methods of competition,' which were declared to be unlawful. That was an expression new in the law. Debate apparently convinced the sponsors of the legislation that the words 'unfair competition,' in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition; its scope being left to judicial determination as controversies arise. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 648, 649, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191; *Federal Trade Commission v. R. F. Keppel*, 291 U.S. 304, 310--312, 54 S.Ct. 423, 78 L.Ed. 814. What are 'UNFAIR METHODS OF COMPETITION' ARE THUS to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 453, 42 S.Ct. 150, 66 L.Ed. 307, 19 A.L.R. 882; *Federal Trade Commission v. Klesner*, 280 U.S. 19, 27, 28, 50 S.Ct. 1, 74 L.Ed. 138, 68 A.L.R. 838; *Federal Trade Commission v. Raladam Co.*, *supra*; *Federal Trade Commission v. R. F. Keppel*, *supra*; *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 73, 54 S.Ct. 315, 78

L.Ed. 655. To make this possible, Congress set up a special procedure. A commission, a quasi judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority. Federal Trade Commission v. Raladam Co., supra; Federal Trade Commission v. Klesner, supra.

In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. But the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in procedure but in subject-matter. We cannot regard the 'fair competition' of the codes as antithetical to the 'unfair methods of competition' of the Federal Trade Commission Act. The 'fair competition' of the codes has a much broader range and a new significance. The Recovery Act provides that it shall not be construed to impair the powers of the Federal Trade Commission, but, when a code is approved, its provisions are to be the 'standards of fair competition' for the trade or industry concerned, and any violation of such standards in any transaction in or affecting interstate or foreign commerce is to be deemed 'an unfair method of competition' within the meaning of the Federal Trade Commission Act. Section 3(b) of the act, 15 USCA s 703(b).

For a statement of the authorized objectives and content of the 'codes of fair competition,' we are referred repeatedly to the 'Declaration of Policy' in section 1 of title 1 of the Recovery Act (15 USCA s 701). Thus the approval of a code by the President is conditioned on his finding that it 'will tend to effectuate the policy of this title.' Section 3(a) of the act, 15 USCA s 703(a). The President is authorized to impose such conditions 'for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.' Id. The 'policy herein declared' is manifestly that set forth in section 1. That declaration embraces a broad range of objectives. Among them we find the elimination of 'unfair competitive practices.' But, even if this clause were to be taken to relate to practices which fall under the ban of existing law, either common law or statute, it is still only one of the authorized aims described in section 1. It is there declared to be 'the policy of Congress'-- 'to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.'

Under section 3, whatever 'may tend to effectuate' these general purposes may be included in the 'codes of fair competition.' We think the conclusion is inescapable that the authority sought to be conferred by section 3 was not merely to deal with 'unfair competitive practices' which offend against existing law, and could be the subject of judicial condemnation

without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly • disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1. Codes of laws of this sort are styled 'codes of fair competition.'

The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. See *Panama Refining Company v. Ryan*, *supra*, and cases there reviewed.

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion: First, the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code 'impose no inequitable restrictions on admission to membership' and are 'truly representative.' That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. Second, the President is required to find that the code is not 'designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them.' And to this is added a proviso that the code 'shall not permit monopolies or monopolistic practices.' But these restrictions leave virtually untouched the field of policy envisaged by section 1, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will, and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make--that the code 'will tend to effectuate the policy of this title.' While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the 'Declaration of Policy.'

Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The act provides for the creation by the President of administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants--their recommendations and findings in relation to the making of codes--have no sanction beyond the will of the President, who may accept, modify, or reject them as he pleases. Such recommendations or findings in no way limit the authority which section 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a

host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies. By the Interstate Commerce Act (49 USCA s 1 et seq.), Congress has itself provided a code of laws regulating the activities of the common carriers subject to the act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. *Interstate Commerce Commission v. Louisville & Nashville Railroad. Company*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431; *State of Florida v. United States*, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291; *United States v. Baltimore & Ohio Railroad Company*, 293 U.S. 454, 55 S.Ct. 268, 79 L.Ed. 587. When the Commission is authorized to issue, for the construction, extension, or abandonment of lines, a certificate of 'public convenience and necessity,' or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest,' we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers, and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. *New York Central Securities Corporation v. United States*, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 77 L.Ed. 138; *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U.S. 266, 273, 46 S.Ct. 263, 70 L.Ed. 578; *Chesapeake & Ohio Railway Co. v. United States*, 283 U.S. 35, 42, 51 S.Ct. 337, 75 L.Ed. 824.

Similarly, we have held that the Radio Act of 1927 established standards to govern radio communications, and, in view of the limited number of available broadcasting frequencies, Congress authorized allocation and licenses. The Federal Radio Commission was created as the licensing authority, in order to secure a reasonable equality of opportunity in radio transmission and reception. The authority of the Commission to grant licenses 'as public convenience, interest or necessity requires' was limited by the nature of radio communications, and by the scope, character, and quality of the services to be rendered and the relative advantages to be derived through distribution of facilities. These standards established by Congress were to be enforced upon hearing and evidence by an administrative body acting under statutory restrictions adapted to the particular activity. *Federal Radio Commission v. Nelson Brothers Bond & Mtg. Co.*, 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166.

In *Hampton, Jr. & Company v. United States*, 276 U.S. 394, 48 S.Ct. 348, 350, 72 L.Ed. 624 the question related to the 'flexible tariff provision' of the Tariff Act of 1922. We held that Congress had described its plan 'to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States.' As the differences in cost might vary from time to time, provision was made for the investigation and determination

of these differences by the executive branch so as to make 'the adjustments necessary to conform the duties to the standard underlying that policy and plan.' Id. 276 U.S. 394, pages 404, 405, 48 S.Ct. 348, 350, 72 L.Ed. 624. The Court found the same principle to be applicable in fixing customs duties as that which permitted Congress to exercise its rate-making power in interstate commerce, 'by declaring the rule which shall prevail in the legislative fixing of rates,' and then remitting 'the fixing of such rates' in accordance with its provisions 'to a rate-making body.' Id. 276 U.S. 394, page 409, 48 S.Ct. 348, 352, 72 L.Ed. 624. The Court fully recognized the limitations upon the delegation of legislative power. Id. 276 U.S. 394, pages 408-411, 48 S.Ct. 348, 72 L.Ed. 624.

To summarize and conclude upon this point: Section 3 of the Recovery Act (15 USCA s 703 is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. Vol" that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

The other violations for which defendants were convicted related to the making of local sales. Ten counts, for violation of the provision as to 'straight killing,' were for permitting customers to make 'selections of individual chickens taken from particular coops and half coops.' Whether or not this practice is good or bad for the local trade, its effect, if any, upon interstate commerce was only indirect. The same may be said of violations of the code by intrastate transactions consisting of the sale 'of an unfit chicken' and of sales which were not in accord with the ordinances of the city of New York. The requirement of reports as to prices and volumes of defendants' sales was incident to the effort to control their intrastate business.

In view of these conclusions, we find it unnecessary to discuss other questions which have been raised as to the validity of certain provisions of the code under the due process clause of the Fifth Amendment.

On both the grounds we have discussed, the attempted delegation of legislative power and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, we hold the code provisions here in question to be invalid and that the judgment of conviction must be reversed.

No. 854--reversed.

No. 864--affirmed.

Mr. Justice CARDOZO (concurring).

The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440, 55 S.Ct. 241, 79 L.Ed. 446.

This court has held that delegation may be unlawful, though the act to be performed is definite and single, if the necessity, time, and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co. v. Ryan*, *supra*. I thought that ruling went too far. I pointed out in an opinion that there had been 'no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases.' 293 U.S. 388, at page 435, 55 S.Ct. 241, 254, 79 L.Ed. 446. Choice, though within limits, had been given him 'as to the occasion, but none whatever as to the means.' *Id.* Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.

I have said that there is no standard, definite or even approximate, to which legislation must conform. Let me make my meaning more precise. If codes of fair competition are codes eliminating 'unfair' methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. For many years a like power has been committed to the Federal Trade Commission with the approval of this court in a long series of decisions. Cf. *Federal Trade Commission v. R.F. Keppel & Bro.*, 291 U.S. 304, 312, 54 S.Ct. 423, 78 L.Ed. 814; *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 648, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191; *Federal Trade Commission v. Gratz*, 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993. Delegation in such circumstances is born of the necessities of the occasion. The industries of the country are too many and diverse to make it possible for Congress, in respect of matters such as these, to legislate directly with adequate appreciation of varying conditions. Nor is the substance of the power changed because the President may act at the instance of trade or industrial associations having special knowledge of the facts. Their function is strictly advisory; it is the imprimatur of the President that begets the quality of law. *Doty v. Love*, 295 U.S. 64, 55 S.Ct. 558, 79 L.Ed. ---. When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers.

But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences, though it is one that is struggling now for recognition and acceptance. By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptance as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce

clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it. Nothing less is aimed at by the code now submitted to our scrutiny.

The code does not confine itself to the suppression of methods of competition that would be classified as unfair according to accepted business standards or accepted norms of ethics. It sets up a comprehensive body of rules to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption. One of the new rules, the source of ten counts in the indictment, is aimed at an established practice, not unethical or oppressive, the practice of selective buying. Many others could be instanced as open to the same objection if the sections of the code were to be examined one by one. The process of dissection will not be traced in all its details. Enough at this time to state what it reveals. Even if the statute itself had fixed the meaning of fair competition by way of contrast with practices that are oppressive or unfair, the code outruns the bounds of the authority conferred. What is excessive is not sporadic or superficial. It is deep-seated and pervasive. The licit and illicit sections are so combined and welded as to be incapable of severance without destructive mutilation.

But there is another objection, far-reaching and incurable, aside from any defect of unlawful delegation.

If this code had been adopted by Congress itself, and not by the President on the advice of an industrial association, it would even then be void, unless authority to adopt it is included in the grant of power 'to regulate commerce with foreign nations, and among the several States.' United States Constitution, art. 1, s 8, cl. 3.

I find no authority in that grant for the regulation of wages and hours of labor in the intrastate transactions that make up the defendants' business. As to this feature of the case, little can be added to the opinion of the court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.' Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. Cf. *Board of Trade of City of Chicago v. Olsen*, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system.

To take from this code the provisions as to wages and the hours of labor is to destroy it altogether. If a trade or an industry is so predominantly local as to be exempt from regulation by the Congress in respect of matters such as these, there can be no 'code' for it at all. This is clear

from the provisions of section 7(a) of the act (15 USCA s 707(a), with its explicit disclosure of the statutory scheme. Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder. A code collapses utterly with bone and sinew gone.

I am authorized to state that Mr. Justice STONE joins in this opinion.

YAKUS
v.
UNITED STATES.
ROTTENBERG et al.
v.
SAME.

Nos. 374, 375.

Argued Jan. 7, 1944.

Decided March 27, 1944.

[Mr. Justice RUTLEDGE, Mr. Justice ROBERTS, and Mr. Justice MURPHY, dissenting.]

Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for our decision are: (1) Whether the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U.S.C.App.Supp. II, s 901 et seq., 50 U.S.C.A. Appendix, s 901 et seq., as amended by the Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U.S.C.App.Supp. II, s 961 et seq., 50 U.S.C.A. Appendix, s 961 et seq., involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to - control prices; (2) whether s 204(d) of the Act was intended to preclude consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation; (3) whether the exclusive statutory procedure set up by ss 203 and 204 of the Act for administrative and judicial review of regulations, with the accompanying stay provisions, provide a sufficiently adequate means of determining the validity of a price regulation to meet the demands of due process; and (4) whether, in view of this available method of review, s 204(d) of the Act, if construed to preclude consideration of the validity of the regulation as a defense to a prosecution for violating it, contravenes the Sixth Amendment, or works an unconstitutional legislative interference with the judicial power.

Petitioners in both of these cases were tried and convicted by the District Court for Massachusetts upon several counts of indictments charging violation of ss 4(a) and 205(b) of the Act by the willful sale of wholesale cuts of best at prices above the maximum prices prescribed by ss 1364.451--1364.455 of Revised Maximum Price Regulation No. 169, 7 Fed.Reg. 10381 et seq. Petitioners have not availed themselves of the procedure set up by ss 203 and 204 by which any person subject to a maximum price regulation may test its validity by protest to and hearing before the Administrator, whose determination may be reviewed on complaint to the Emergency Court of Appeals and by this Court on certiorari, see *Lockerty v. Phillips*, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339. When the indictments were found the 60 days period allowed by the statute for filing protests had expired.

In the course of the trial the District Court overruled or denied offers of proof, motions and requests for rulings, raising various questions as to the validity of the Act and Regulation, including those presented by the petitions for certiorari. In particular petitioners offered evidence, which the District Court excluded as irrelevant, for the purpose of showing that the Regulation did not conform to the standards prescribed by the Act and that it deprived petitioners of property without the due process of law guaranteed by the Fifth Amendment. They specifically raised the question reserved in *Lockerty v. Phillips*, supra, whether the validity of a regulation may be challenged in defense of a prosecution for its violation although it had not been tested by the prescribed administrative procedure and complaint to the Emergency Court of Appeals. The District Court convicted petitioners upon verdicts of guilty. The Circuit Court of Appeals for the First Circuit affirmed, 137 F.2d 850, and we granted certiorari, 320 U.S. 730, 64 S.Ct. 190.

I

The Emergency Price Control Act provides for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary wartime measure, and provides in s 1(b) for its termination on June 30, 1943, unless sooner terminated by Presidential proclamation or concurrent resolution of Congress. By the amendatory act of October 2, 1942, it was extended to June 30, 1944.

Section 1(a) declares that the Act is in the interest of the national defense and security and necessary to the effective prosecution of the present war', and that its purposes are:

to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, * * * and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; * * *.'

The standards which are to guide the Administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by s 2(a) and by s 1 of the amendatory Act of October 2, 1942, and Executive Order 9250, 50 U.S.C.A.Appendix, s 901 note, promulgated under it. 7 Fed.Reg. 7871. By s 2(a) the Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' when, in his judgment, their prices 'have risen or threaten to

rise to an extent or in a manner inconsistent with the purposes of this Act'

The section also directs that

'So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative) * * * and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including * * *. Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941.¹

By the Act of October 2, 1942, the President is directed to stabilize prices, wages and salaries 'so far as practicable' on the basis of the levels which existed on September 15, 1942, except as otherwise provided in the Act. By Title L s 4 of Executive Order No. 9250, he has directed 'all departments and agencies of the Government' 'to stabilize the cost of living in accordance with the Act of October 2, 1942.'

Revised Maximum Price Regulation No. 169 was issued December 10, 1942, under authority of the Emergency Price Control Act as amended and Executive Order No. 9250. The Regulation established specific maximum prices for the sale at wholesale of specified cuts of beef and veal. As is required by s 2(a) of the Act, it was accompanied by a 'statement of the considerations involved' in prescribing it. From the preamble to the Regulation and from the Statement of Considerations accompanying it, it appears that the prices fixed for sales at wholesale were slightly in excess of those prevailing between March 16 and March 28, 1942, and approximated those prevailing on September 15, 1942. Findings that the Regulation was necessary, that the prices which it fixed were fair and equitable, and that it otherwise conformed to the standards prescribed by the Act, appear in the Statement of Considerations.

That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural features of the Act later to be considered which are challenged on constitutional grounds.

Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent war-time inflation and its

enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in s 1 denote the objective to be sought by the Administrator in fixing prices--the prevention of inflation and its enumerated consequences. The standards set out in s 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective--maximum price fixing--and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. Compare *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; *Hampton Jr. & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624; *Currin v. Wallace*, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441; *Mulford v. Smith*, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092; *United States v. Rock Royal Co-op.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 657, 61 S.Ct. 524, 85 L.Ed. 624; *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344; *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774.

The Act is unlike the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, considered in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, which proclaimed in the broadest terms its purpose 'to rehabilitate industry and to conserve natural resources.' It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated. Compare *Sunshine Anthracite Coal Co. v. Adkins*, supra, 310 U.S. at page 309, 60 S.Ct. at page 915, 84 L.Ed. 1263.

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct--here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that

its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. See *Opp Cotton Mills v. Administrator*, supra, 312 U.S. at pages 145, 146, 61 S.Ct. at pages 532, 533, 85 L.Ed. 624, and cases cited.

Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

As we have said: 'The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality * * * to perform its function.' *Currin v. Wallace*, supra, 306 U.S. at page 15, 59 S.Ct. at page 387, 83 L.Ed. 441. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. See *Union Bridge Co. v. United States*, 204 U.S. 364, 386, 27 S.Ct. 367, 374, 51 L.Ed. 523. Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 413 et seq., 4 L.Ed. 579. It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. *Hampton v. United States*, supra, 276 U.S. pages 408, 409, 48 S.Ct. at pages 351, 352, 72 L.Ed. 624. Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

The standards prescribed by the present Act, with the aid of the 'statement of the considerations' required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Compare *Kiyoshi Hirabayashi v. United States*, supra, 320 U.S. at page 104, 63 S.Ct. at page 1387, 87 L.Ed. 1774. Hence we are unable to find in them an unauthorized delegation of legislative power. The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained in *Sunshine Anthracite Coal Co. v. Adkins*, supra, or the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in *Dakota Cent. Tel. Co. v. State of South Dakota*, 250 U.S. 163, 39 S.Ct. 507, 63 L.Ed. 910, 4

A.L.R. 1623; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are 'reciprocally unequal and unreasonable', held valid in *Field v. Clark*, supra (143 U.S. 649, 12 S.Ct. 504, 36 L.Ed., 294).

The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination than the power to fix just and reasonable rates, see *Sunshine Anthracite Coal Co. v. Adkins*, supra, and cases cited; or the power to approve consolidations in the 'public interest', sustained in *New York Cent. Securities Corp. v. United States*, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 48, 77 L.Ed. 138 (Compare *United States v. Lowden*, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208); or the power to regulate radio stations engaged in chain broadcasting 'as public interest, convenience or necessity requires', upheld in *National Broadcasting Co. v. United States*, supra, 319 U.S. at page 225, 63 S.Ct. at pages 1013, 1014, 87 L.Ed. 1344; or the power to prohibit 'unfair methods of competition' not defined or forbidden by the common law, *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304, 54 S.Ct. 423, 426, 78 L.Ed. 814; or the direction that in allotting marketing quotas among states and producers due consideration be given to a variety of economic factors, sustained in *Mulford v. Smith*, supra, 307 U.S. at pages 48, 49, 59 S.Ct. at page 652, 653, 83 L.Ed. 1092; or the similar direction that in adjusting tariffs to meet differences in costs of production the President 'take into consideration' 'in so far as he finds it practicable' a variety of economic matters, sustained in *Hampton Jr. & Co. v. United States*, supra (276 U.S. 394, 48 S.Ct. 349, 72 L.Ed. 624); or the similar authority, in making classifications within an industry, to consider various named and unnamed 'relevant factors' and determine the respective weights attributable to each, held valid in *Opp Cotton Mills v. Administrator*, supra.

Mr. Justice ROBERTS.

I dissent. I find it unnecessary to discuss certain of the questions treated in the opinion of the court. I am of opinion that the Act unconstitutionally delegates legislative power to the Administrator. As I read the opinion of the court it holds the Act valid on the ground that sufficiently precise standards are prescribed to confine the Administrator's regulations and orders within fixed limits, and that judicial review is provided effectively to prohibit his transgression of those limits. I believe that analysis demonstrates the contrary. I proceed, therefore, to examine the statute.

The Powers Conferred

When, in his judgment, commodity prices have risen, or threaten to rise, 'to an extent or in a manner inconsistent with the purposes' of the Act the Administrator may establish 'such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes' of the Act.

'So far as practicable' in establishing any maximum price he is to ascertain the prices

prevailing in a specified period in 1941 but may use another period nearest to that specified because necessary data for the period specified is not available; and may make adjustments 'for such relevant factors as he may determine and deem to be of general applicability,' including several factors mentioned. Before issuing any regulation he shall 'so far as practicable' advise with representative members of the industry affected.

Any regulation may provide for adjustments and reasonable exceptions which, in the Administrator's judgment, are necessary and proper to effectuate the purposes of the Act. If, in his judgment, such action is necessary or proper to effectuate the purposes of the Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or hoarding in connection with any commodity (50 U.S.C.A. Appendix s 902, 50 U.S.C.A. Appendix s 902).

It will be seen that whether, and, if so, when, the price of any commodity shall be regulated depends on the judgment of the Administrator as to the necessity or propriety of such price regulation in effectuating the purposes of the Act.

The Supposed Standards for the Administrator's Guidance

The Act provides that any regulation or order must be 'generally fair and equitable' in the Administrator's judgment; but coupled with this injunction is another that the order and regulation must be such as, in the judgment of the Administrator, is necessary or proper to effectuate the purposes of the Act.

I turn, therefore, to the stated purposes to ascertain what, if any, limits the statute places upon the Administrator's exercise of his powers.

Section 1(a), 50 U.S.C. Appendix, s 901(a), 50 U.S.C.A. Appendix, s 901(a), states seven purposes, which should be set forth separately as follows:

'to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;'

In order to exercise his power anent this purpose the Administrator will have to form a judgment as to what stabilization means, and what are speculative, unwarranted and abnormal increases in price. It hardly need be said that men may differ radically as to the connotation of these terms and that it would be very difficult to convict anyone of error of judgment in so classifying a given economic phenomenon.

to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;'

To accomplish this purpose the Administrator must form a judgment as to what constitutes profiteering, hoarding, manipulation or speculation. As if the administrative discretion were not sufficiently broad there is added the phrase 'other disruptive practices', which seems to leave the Administrator at large in the formation of opinion as to whether any practice

is disruptive.

'to assure that defense appropriations are not dissipated by excessive prices;'

It is not clear--to me at least--what is the limit of this purpose. I can conceive that an honest Administrator might, without laying himself open to the charge of exceeding his powers, make any kind of order or regulation based upon the view that otherwise defense appropriations by Congress might be dissipated by what he considers excessive prices. How his exercise of judgment in connection with this purpose could be thought excessive it is impossible for me to say.

'to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living;'

The Administrator's judgment that any price policy will tend to affect the classes mentioned in this purpose from what he may decide to be 'undue impairment of their standard of living' would seem to be so sweeping that it would be impossible to convict him of an error of judgment in any conclusion he might reach.

'to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices;'

Of course Congress might have included in the catalogue of beneficiaries churches, hospitals, labor unions, banks and trust companies and other praiseworthy organizations, without rendering the 'standard' any more vague.

'to assist in securing adequate production of commodities and facilities;'

Here is a purpose which seems, to some extent at least, to permit the easing of price restrictions; for it would appear that diminishment of price would hardly assist in promoting production. Thus the Administrator, and he alone, is to balance two competing policies and strike the happy mean between them. Who shall say his conclusion is so indubitably wrong as to be properly characterized as 'arbitrary or capricious'.

'to prevent a post emergency collapse of values;'

This purpose, or 'standard', seems to permit adoption by the Administrator of any conceivable policy. I have difficulty in envisaging any price policy in support of which some economic data or opinion could not be cited to show that it would tend to prevent post emergency collapse of values.

These seven purposes must, I submit, be considered as separate and independent. Any action taken by the Administrator which, in his judgment, promotes any one or more of them is within the granted power. If in his judgment, any action by him is necessary or appropriate to

the accomplishment of one or more of them, the Act gives sanction to his order or regulation.

Reflection will demonstrate that in fact the Act sets no limits upon the discretion or judgment of the Administrator. His commission is to take any action with respect to prices which he believes will preserve what he deems a sound economy during the emergency and prevent what he considers to be a disruption of such a sound economy in the post war period. His judgment, founded as it may be, on his studies and investigations, as well as other economic data, even though contrary to the great weight of current opinion or authority, is the final touchstone of the validity of his action.

I shall not repeat what I have said in *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641. I have there quoted the so-called standards prescribed in the National Industrial Recovery Act. Comparison of them with those of the present Act, and perusal of what was said concerning them in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, leaves no doubt that the decision is now overruled. There, as here, the 'code' or regulation, to become effective, had to be found by the Executive to 'tend to effectuate the policy' of the Act. (See footnote 3, p. 521.)

Christine Todd WHITMAN, Administrator of Environmental Protection
Agency, et al., Petitioners,
v.
AMERICAN TRUCKING ASSOCIATIONS, INC., et al.
American Trucking Associations, Inc., et al., Petitioners,
v.
Christine Todd Whitman, Administrator of Environmental Protection Agency, et al.

Nos. 99-1257 and 99-1426

Argued Nov. 7, 2000.
Decided Feb. 27, 2001.

Justice SCALIA delivered the opinion of the Court.

These cases present the following questions: (1) Whether §109(b)(1) of the Clean Air Act (CAA) delegates legislative power to the Administrator of the Environmental Protection Agency (EPA). (2) Whether the Administrator may consider the costs of implementation in setting national ambient air quality standards (NAAQS) under §109(b)(1). (3) Whether the Court of Appeals had jurisdiction to review the EPA's interpretation of Part D of Title I of the CAA, 42 U.S.C. §§7501-7515, with respect to implementing the revised ozone NAAQS. (4) If so, whether the EPA's interpretation of that part was permissible.

I

Section 109(a) of the CAA, as added, 84 Stat. 1679, and amended, 42 U.S.C. §7409(a), requires the Administrator of the EPA to promulgate NAAQS for each air pollutant for which "air quality criteria" have been issued under § 108, 42 U.S.C. §7408. Once a NAAQS has been promulgated, the Administrator must review the standard (and the criteria on which it is based) "at five-year intervals" and make "such revisions ... as may be appropriate." CAA §109(d)(1), 42 U.S.C. §7409(d)(1). These cases arose when, on July 18, 1997, the Administrator revised the NAAQS for particulate matter (PM) and ozone. See NAAQS for Particulate Matter, 62 Fed.Reg. 38652 (codified in 40 CFR §50.7 (1999)); NAAQS for Ozone, *id.*, at 38856 (codified in 40 CFR §§50.9, 50.10 (1999)). American Trucking Associations, Inc., and its co-respondents in No. 99-1257--which include, in addition to other private companies, the States of Michigan, Ohio, and West Virginia--challenged the new standards in the Court of Appeals for the District of Columbia Circuit, pursuant to 42 U.S.C. §7607(b)(1).

The District of Columbia Circuit accepted some of the challenges and rejected others. It agreed with the No. 99-1257 respondents (hereinafter respondents) that §109(b)(1) delegated legislative power to the Administrator in contravention of the United States Constitution, Art. 1, § 1, because it found that the EPA had interpreted the statute to provide no "intelligible principle" to guide the agency's exercise of authority. *American Trucking Assns., Inc. v. EPA*, 175 F.3d 1027, 1034 (C.A.D.C.1999). The court thought, however, that the EPA could perhaps avoid the

unconstitutional delegation by adopting a restrictive construction of §109(b)(1), so instead of declaring the section unconstitutional the court remanded the NAAQS to the agency. *Id.*, at 1038. (On this delegation point, Judge Tatel dissented, finding the statute constitutional as written. *Id.*, at 1057.) On the second issue that the Court of Appeals addressed, it unanimously rejected respondents' argument that the court should depart from the rule of *Lead Industries Assn., Inc. v. EPA*, 647 F.2d 1130, 1148 (C.A.D.C.1980), that the EPA may not consider the cost of implementing a NAAQS in setting the initial standard. It also rejected respondents' argument that the implementation provisions for ozone found in Part D, Subpart 2, of Title I of the CAA, 42 U.S.C. §§7511-7511f, were so tied to the existing ozone standard that the EPA lacked the power to revise the standard. The court held that although Subpart 2 constrained the agency's method of implementing the new standard, 175 F.3d, at 1050, it did not prevent the EPA from revising the standard and designating areas of the country as "nonattainment areas," see 42 U.S.C. §7407(d)(1), by reference to it, 175 F.3d, at 1047-1048. On the EPA's petition for rehearing, the panel adhered to its position on these points, and unanimously rejected the EPA's new argument that the court lacked jurisdiction to reach the implementation question because there had been no "final" implementation action. *American Trucking Assns., Inc. v. EPA*, 195 F.3d 4 (C.A.D.C.1999). The Court of Appeals denied the EPA's suggestion for rehearing en bane, with five judges dissenting. *Id.*, at 13.

The Administrator and the EPA petitioned this Court for review of the first, third, and fourth questions described in the first paragraph of this opinion. Respondents conditionally cross-petitioned for review of the second question. We granted certiorari on both petitions, 529 U.S. 1129, 120 S.Ct. 2003, 146 L.Ed.2d 954 (2000); 530 U.S. 1202, 120 S.Ct. 2193, 147 L.Ed.2d 231 (2000), and scheduled the cases for argument in tandem. We have now consolidated the cases for purposes of decision.

II

In *Lead Industries Assn., Inc. v. EPA*, *supra*, at 1148, the District of Columbia Circuit held that "economic considerations [may] play no part in the promulgation of ambient air quality standards under Section 109" of the CAA. In the present cases, the court adhered to that holding, 175 F.3d, at 1040-1041, as it had done on many other occasions. See, *e.g.*, *American Lung Assn. v. EPA*, 134 F.3d 388, 389 (C.A.D.C.1998); *NRDC v. Administrator, EPA*, 902 F.2d 9.62, 973 (C.A.D.C.1990), vacated in part on other grounds, *NRDC v. EPA*, 921 F.2d 326 (C.A.D.C.1991); *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1185 (C.A.D.C.1981). Respondents argue that these decisions are incorrect. We disagree; and since the first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers, we address that issue of interpretation first and reach respondents' constitutional arguments in Part III, *infra*.

Section 109(b)(1) instructs the EPA to set primary ambient air quality standards "the attainment and maintenance of which ... are requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. §7409(b)(1). Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards. The language, as one scholar has noted, "is absolute." D. Currie, *Air Pollution: Federal Law and Analysis* 4-15

(1981). The EPA, "based on" the information about health effects contained in the technical "criteria" documents compiled under §108(a)(2), 42 U.S.C. §7408(a)(2), is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an "adequate" margin of safety, and set the standard at that level. Nowhere are the costs of achieving such a standard made part of that initial calculation.

Against this most natural of readings, respondents make a lengthy, spirited, but ultimately unsuccessful attack. They begin with the object of §109(b)(1)'s focus, the "public health." When the term first appeared in federal clean air legislation--in the Act of July 14, 1955 (1955 Act), 69 Stat. 322, which expressed "recognition of the dangers to the public health" from air pollution--its ordinary meaning was "[O]le health of the community." Webster's New International Dictionary 2005 (2d ed.1950). Respondents argue, however, that §109(b)(1), as added by the Clean Air Amendments of 1970 (1970 Act), 84 Stat. 1676, meant to use the term's secondary meaning: "[t]he ways and means of conserving the health of the members of a community, as by preventive medicine, organized care of the sick, etc." Ibid. Words that can have more than one meaning are given content, however, by their surroundings, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000); *Jones v. United States*, 527 U.S. 373, 389, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), and in the context of §109(b)(1) this second definition makes no sense. Congress could not have meant to instruct the Administrator to set NAAQS at a level "requisite to protect" "the art and science dealing with the protection and improvement of community health." Webster's Third New International Dictionary 1836 (1981). We therefore revert to the primary definition of the term: the health of the public.

Even so, respondents argue, many more factors than air pollution affect public health. In particular, the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air--for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent upon those industries. That is unquestionably true, and Congress was unquestionably aware of it. Thus, Congress had commissioned in the Air Quality Act of 1967 (1967 Act) "a detailed estimate of the cost of carrying out the provisions of this Act; a comprehensive study of the cost of program implementation by affected units of government; and a comprehensive study of the economic impact of air quality standards on the Nation's industries, communities, and other contributing sources of pollution." §2, 81 Stat. 505. The 1970 Congress, armed with the results of this study, see *The Cost of Clean Air*, S. Doc. No. 91-40 (1969) (publishing the results of the study), not only anticipated that compliance costs could injure the public health, but provided for that precise exigency. Section 110(f)(1) of the CAA permitted the Administrator to waive the compliance deadline for stationary sources *if, inter cilia*, sufficient control measures were simply unavailable and "the continued operation of such sources is *essential ... to the public health or welfare.*" 84 Stat. 1683 (emphasis added). Other provisions explicitly permitted or required economic costs to be taken into account in implementing the air quality standards. Section 111(b)(1)(3), for example, commanded the Administrator to set "standards of performance" for certain new sources of emissions that as specified in §111(a)(1) were to "reflec[t] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." Section 202(a)(2) prescribed that emissions standards for

automobiles could take effect only "after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 84 Stat. 1690. See also §202(b)(5)(C) (similar limitation for interim standards); §211(c)(2) (similar limitation for fuel additives); §231(b) (similar limitation for implementation of aircraft emission standards). Subsequent amendments to the CAA have added many more provisions directing, in explicit language, that the Administrator consider costs in performing various duties. See, *e.g.*, 42 U.S.C. §7545(k)(1) (reformulate gasoline to "require the greatest reduction in emissions taking into consideration the cost of achieving such emissions reductions"); §7547(a)(3) (emission reduction for nonroad vehicles to be set "giving appropriate consideration to the cost" of the standards). We have therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted. See *Union Elec. Co. v. EPA*, 427 U.S. 246, 257, and n. 5, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). Cf. *General Motors Corp. v. United States*, 496 U.S. 530, 538, 541, 110 S.Ct. 2528, 110 L.Ed.2d 480 (1990) (refusing to infer in certain provisions of the CAA deadlines and enforcement limitations that had been expressly imposed elsewhere).

Accordingly, to prevail in their present challenge, respondents must show a textual commitment of authority to the EPA to consider costs in setting NAAQS under §109(b)(1). And because §109(b)(1) and the NAAQS for which it provides are the engine that drives nearly all of Title I of the CAA, 42 U.S.C. §§7401-7515, that textual commitment must be a clear one. Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes. See *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, *supra*, at 159- 160. Respondents' textual arguments ultimately founder upon this principle.

Their first claim is that §109(b)(1)'s terms "adequate margin" and "requisite" leave room to pad health effects with cost concerns. Just as we found it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion--and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements," *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, *supra*, at 231, 114 S.Ct. 2223, so also we find it implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards. Accord *Christensen v. Harris County*, 529 U.S. 576, 590, 120 S.Ct. 1655, 146 L.Ed.2d 621, n. * (2000) (SCALIA, J., concurring in part and concurring in judgment) ("The implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity" (emphasis deleted)).

The same defect inheres in respondents' next two arguments: that while the Administrator's judgment about what is requisite to protect the public health must be "based on [the] criteria" documents developed under §108(a)(2), see §109(b)(1), it need not be based *solely* on those criteria; and that those criteria themselves, while they must include "effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air,"

are not necessarily *limited* to those effects. Even if we were to concede those premises, we still would not conclude that one of the unenumerated factors that the agency can consider in developing and applying the criteria is cost of implementation. That factor is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in §§ 108 and 109 had Congress meant it to be considered. Yet while those provisions describe in detail how the health effects of pollutants in the ambient air are to be calculated and given effect, see §108(a)(2), they say not a word about costs.

Respondents point, finally, to a number of provisions in the CAA that *do* require attainment cost data to be generated. Section 108(b)(1), for example, instructs the Administrator to "issue to the States," simultaneously with the criteria documents, "information on air pollution control techniques, which information shall include data relating to the cost of installation and operation." 42 U.S.C. §7408(b)(1). And §109(d)(2)(C)(iv) requires the Clean Air Scientific Advisory Committee to "advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of NAAQS. 42 U.S.C. §7409(d)(2)(C)(iv). Respondents argue that these provisions make no sense unless costs are to be considered in setting the NAAQS. That is not so. These provisions enable the Administrator to assist the States in carrying out their statutory role as primary *implementers* of the NAAQS. It is to the States that the Act assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources. See 42 U.S.C. §§7407(a), 7410 (giving States the duty of developing implementation plans). It would be impossible to perform that task intelligently without considering which abatement technologies are most efficient, and most economically feasible—which is why we have said that "the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan," *Union Elec. Co. v. EPA*, 427 U.S., at 266, 96 S.Ct. 2518. Thus, federal clean air legislation has, from the very beginning, directed federal agencies to develop and transmit implementation data, including cost data, to the States. See 1955 Act, §2(b), 69 Stat. 322; Clean Air Act of 1963, amending §§3(a), (b) of the CAA, 77 Stat. 394; 1967 Act, §§103(a)-(d), 104, 107(c), 81 Stat. 486-488. That Congress chose to carry forward this research program to assist States in choosing the means through which they would implement the standards is perfectly sensible, and has no bearing upon whether cost considerations are to be taken into account in formulating the standards.

It should be clear from what we have said that the canon requiring texts to be so construed as to avoid serious constitutional problems has no application here. No matter how severe the constitutional doubt, courts may choose only between reasonably available interpretations of a text. See, *e.g.*, *Miller v. French*, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998). The text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA. We therefore affirm the judgment of the Court of Appeals on this point.

III

Section 109(b)(1) of the CAA instructs the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. §7409(b)(1). The Court of Appeals held that this section as interpreted by the Administrator did not provide an "intelligible principle" to guide the EPA's exercise of authority in setting NAAQS. "[The] EPA," it said, lack[ed] any determinate criteria for drawing lines. It has failed to state intelligibly how much is too much." 175 F.3d, at 1034. The court hence found that the EPA's interpretation (but not the statute itself) violated the nondelegation doctrine. *Id.*, at 1038. We disagree.

In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, §1, of the Constitution vests "[a]ll legislative Powers herein granted ... in a Congress of the United States." This text permits no delegation of those powers, *Loving v. United States*, 517 U.S. 748, 771, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996); see *id.*, at 776-777 (SCALIA, *J.*, concurring in part and concurring in judgment), and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928). We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. Both *Fahey v. Mallonee*, 332 U.S. 245, 252-253, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), and *Lichter v. United States*, 334 U.S. 742, 783, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948), mention agency regulations in the course of their nondelegation discussions, but *Lichter* did so because a subsequent Congress had incorporated the regulations into a revised version of the statute, *ibid.*, and *Fahey* because the customary practices in the area, implicitly incorporated into the statute, were reflected in the regulations. 332 U.S., at 250. 67 S.Ct. 1552. The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise--that is to say, the prescription of the standard that Congress had omitted--would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.

We agree with the Solicitor General that the text of §109(b)(1) of the CAA at a minimum requires that "[for a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." Tr. of Oral Arg. in No. 99-1257, p. 5. Requisite, in turn, "mean[s] sufficient, but not more than necessary." *Id.*, at 7. These limits on the EPA's discretion are strikingly similar to the ones we approved in *Touby v. United States*, 500 U.S. 160, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991), which permitted the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was " 'necessary to avoid an imminent hazard to the public safety.' " *Id.*, at 163, 111 S.Ct. 1752. They also resemble the Occupational Safety and Health Act provision requiring the agency to " 'set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will

suffer any impairment of health' "--which the Court upheld in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980), and which even then-Justice REHNQUIST, who alone in that case thought the statute violated the nondelegation doctrine, see *id.*, at 671, 100 S.Ct. 2844 (opinion concurring in judgment), would have upheld if, like the statute here, it did not permit economic costs to be considered. See *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 545, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (REHNQUIST, J., dissenting).

The scope of discretion §109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). We have, on the other hand, upheld the validity of §11(b)(2) of the Public Utility Holding Company Act of 1935, 49 Stat. 821, which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104, 67 S.Ct. 133, 91 L.Ed. 103 (1946). We have approved the wartime conferral of agency power to fix the prices of commodities at a level that "will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act." *Yakus v. United States*, 321 U.S. 414, 420, 423-426, 64 S.Ct. 660, 88 L.Ed. 834 (1944). And we have found an "intelligible principle" in various statutes authorizing regulation in the "public interest." See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) (FCC's power to regulate airwaves); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25, 53 S.Ct. 45, 77 L.Ed. 138 (1932) (ICC's power to approve railroad consolidations). In short, we have "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Mistretta v. United States*, 488 U.S. 361, 416, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (SCALIA, J., dissenting); see *id.*, at 373, 109 S.Ct. 647 (majority opinion).

It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. See *Loving v. United States*, *supra*, at 772-773, 116 S.Ct. 1737; *United States v. Mazurie*, 419 U.S. 544, 556-557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). While Congress need not provide any direction to the EPA regarding the manner in which it is to define "country elevators," which are to be exempt from new-stationary-source regulations governing grain elevators, see §7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy. But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." 175 F.3d, at 1034. In *Touby*, for example, we did not require the statute to decree how "imminent" was too imminent, or how "necessary" was necessary enough, or even--most relevant here--how "hazardous" was too hazardous. 500 U.S., at 165-167, 111 S.Ct. 1752. Similarly, the statute at issue in *Lichter* authorized agencies to recoup "excess profits" paid under wartime Government

contracts, yet we did not insist that Congress specify how much profit was too much. 334 U.S., at 783-786, 68 S.Ct. 1294. It is therefore not conclusive for delegation purposes that, as respondents argue, ozone and particulate matter are "nonthreshold" pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero, and hence require the EPA to make judgments of degree. IA] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." *Mistretta v. United States*, supra, at 417, 109 S.Ct. 647 (SCALIA, J., dissenting) (emphasis deleted); see 488 U.S., at 378-379, 109 S.Ct. 647 (majority opinion). Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is "requisite"--that is, not lower or higher than is necessary--to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.

We therefore reverse the judgment of the Court of Appeals remanding for reinterpretation that would avoid a supposed delegation of legislative power. It will remain for the Court of Appeals--on the remand that we direct for other reasons--to dispose of any other preserved challenge to the NAAQS under the judicial-review provisions contained in 42 U.S.C. §7607(d)(9).

IV

The final two issues on which we granted certiorari concern the EPA's authority to implement the revised ozone NAAQS in areas whose ozone levels currently exceed the maximum level permitted by that standard. The CAA designates such areas "nonattainment," §107(d)(1), 42 U.S.C. §7407(d)(1); see also Pub.L. 105-178, §6103, 112 Stat. 465 (setting timeline for new ozone designations), and it exposes them to additional restrictions over and above the implementation requirements imposed generally by §110 of the CAA. These additional restrictions are found in the five substantive subparts of Part D of Title I, 42 U.S.C. §§7501-7515. Subpart 1, §§7501-7509a, contains general nonattainment regulations that pertain to every pollutant for which a NAAQS exists. Subparts 2 through 5, §§7511-7514a, contain rules tailored to specific individual pollutants. Subpart 2, added by the Clean Air Act Amendments of 1990, § 103, 104 Stat. 2423, addresses ozone. 42 U.S.C. §§7511-7511f. The dispute before us here, in a nutshell, is whether Subpart I alone (as the agency determined), or rather Subpart 2 or some combination of Subparts 1 and 2, controls the implementation of the revised ozone NAAQS in nonattainment areas.

A

The Administrator first urges, however, that we vacate the judgment of the Court of Appeals on this issue because it lacked jurisdiction to review the EPA's implementation policy. Section 307(b)(1) of the CAA, 42 U.S.C. §7607(b)(1), gives the court jurisdiction over "any ... nationally applicable regulations promulgated, or final action taken, by the Administrator," but the EPA argues that its implementation policy was not agency "action," was not "final" action, and is not ripe for review. We reject each of these three contentions.

At the same time the EPA proposed the revised ozone NAAQS in 1996, it also proposed an "interim implementation policy" for the NAAQS, see 61 Fed.Reg. 65752 (1996), that was to

govern until the details of implementation could be put in final form through specific "rulemaking actions." The preamble to this proposed policy declared that "the interim implementation policy ... represent [s] EPA's preliminary views on these issues and, while it may include various statements that States must take certain actions, these statements are made pursuant to EPA's preliminary interpretations, and thus do not bind the States and public as a matter of law." *Ibid.* If the EPA had done no more, we perhaps could accept its current claim that its action was not final. However, after the agency had accepted comments on its proposed policy, and on the same day that the final ozone NAAQS was promulgated, the White House published in the Federal Register what it titled a "Memorandum for the Administrator of the Environmental Protection Agency" that prescribed implementation procedures for the EPA to follow. 62 Fed.Reg. 38421 (1997). (For purposes of our analysis we shall assume that this memorandum was not itself action by the EPA.) The EPA supplemented this memorandum with an explanation of the implementation procedures, which it published in the explanatory preamble to its final ozone NAAQS under the heading, "Final decision on the primary standard." *Id.*, at 38873. "In light of comments received regarding the interpretation proposed in the Interim Implementation Policy," the EPA announced, it had "reconsidered that interpretation" and settled on a new one. *Ibid.* The provisions of "subpart 1 of part D of Title I of the Act" will immediately "apply to the implementation of the new 8-hour [ozone] standards." *Ibid.*; see also *id.*, at 38885 (new standard to be implemented "simultaneously [with the old standard] ... under the provisions of ... subpart 1"). Moreover, the provisions of subpart 2 "will [also] continue to apply as a matter of law for so long as an area is not attaining the [old] 1-hour standard." *Id.*, at 38873. Once the area reaches attainment for the old standard, however, "the provisions of subpart 2 will have been achieved and those provisions will no longer apply." *Ibid.*; see also *id.*, at 38884-38885.

We have little trouble concluding that this constitutes final agency action subject to review under §307. The bite in the phrase "final action" (which bears the same meaning in §307(b)(1) that it does under the Administrative Procedure Act (APA) 5 U.S.C. §704, see *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980)) is not in the word "action," which is meant to cover comprehensively every manner in which an agency may exercise its power. See *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238, n. 7, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980). It is rather in the word "final," which requires that the action under review "mark the consummation of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Only if the "EPA has rendered its last word on the matter" in question, *Harrison v. PPG Industries, Inc.*, *supra*, at 586, 100 S.Ct. 1889, is its action "final" and thus reviewable. That standard is satisfied here. The EPA's "decisionmaking process," which began with the 1996 proposal and continued with the reception of public comments, concluded when the agency, "in light of [these comments]," and in conjunction with a corresponding directive from the White House, adopted the interpretation of Part D at issue here. Since that interpretation issued, the EPA has refused in subsequent rulemakings to reconsider it, explaining to disappointed commenters that its earlier decision was conclusive. See 63 Fed.Reg. 31014, 31018-31019 (1998). Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final.

The decision is also ripe for our review. "Ripeness `requir[es] us to evaluate both the

fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' " *Texas v. United States*, 523 U.S. 296, 300-301, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). The question before us here is purely one of statutory interpretation that would not "benefit from further factual development of the issues presented." *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998). Nor will our review "inappropriately interfere with further administrative action," *ibid.*, since the EPA has concluded its consideration of the implementation issue. Finally, as for hardship to the parties: The respondent States must--on pain of forfeiting to the EPA control over implementation of the NAAQS--promptly undertake the lengthy and expensive task of developing state implementation plans (SIP' s) that will attain the new, more stringent standard within five years. See 42 U.S.C. §§7410, 7502. Whether or not this would suffice in an ordinary case brought under the review provisions of the APA, see 5 U.S.C. §704, we have characterized the special judicial-review provision of the CAA, 42 U.S.C. §7607(b), as one of those statutes that specifically provides for "preenforcement" review, see *Ohio Forestry Assn., Inc. v. Sierra Club*, *supra*, at 737, 118 S.Ct. 1665. Such statutes, we have said, permit "judicial review directly, even before the concrete effects normally required for APA review are felt." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). The effects at issue here surely meet that lower standard.

Beyond all this, the implementation issue was fairly included within the challenges to the final ozone rule that were properly before the Court of Appeals. Respondents argued below that the EPA could not revise the ozone standard, because to do so would trigger the use of Subpart 1, which had been supplanted (for ozone) by the specific rules of Subpart 2. Brief for Industry Petitioners and Intervenors in No. 97-1441 (and consolidated cases) (CADC), pp. 32-34. The EPA responded that Subpart 2 did not supplant but simply supplemented Subpart 1, so that the latter section still "applies to all nonattainment areas for all NAAQS, ... including nonattainment areas for any revised ozone standard." Final Brief for EPA in No. 97-1441 (and consolidated cases) (CADC), pp. 67-68. The agency later reiterated that Subpart 2 "does not supplant implementation provisions for revised ozone standards. This interpretation fully harmonizes Subpart 2 with EPA's clear authority to revise any NAAQS." *id.*, at 71. In other words, the EPA was arguing that the revised standard could be issued, despite its apparent incompatibility with portions of Subpart 2, *because it would be implemented under Subpart 1 rather than Subpart 2*. The District of Columbia Circuit ultimately agreed that Subpart 2 could be harmonized with the EPA's authority to promulgate revised NAAQS, but *not* because Subpart 2 is entirely inapplicable--which is one of EPA's assignments of error. It is unreasonable to contend, as the EPA now does, that the Court of Appeals was obligated to reach the agency's preferred result, but forbidden to assess the reasons the EPA had given for reaching that result. The implementation issue was fairly included within respondents' challenge to the ozone rule, which all parties agree is final agency action ripe for review.

B

Our approach to the merits of the parties' dispute is the familiar one of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If the statute resolves the question whether Subpart 1 or Subpart 2 (or some

combination of the two) shall apply to revised ozone NAAQS, then "that is the end of the matter." *Id.*, at 842-843, 104 S.Ct. 2778. But if the statute is "silent or ambiguous" with respect to the issue, then we must defer to a "reasonable interpretation made by the administrator of an agency." *Id.*, at 844, 104 S.Ct. 2778. We cannot agree with the Court of Appeals that Subpart 2 clearly controls the implementation of revised ozone NAAQS, see 175 F.3d, at 1048-1050, because we find the statute to some extent ambiguous. We conclude, however, that the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear. We therefore hold the implementation policy unlawful. See *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 392, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

The text of Subpart 1 at first seems to point the way to a clear answer to the question, which Subpart controls? Two sections of Subpart 1, 7502(a)(1)(C) and 7502(a)(2)(D), contain switching provisions stating that if the classification of ozone nonattainment areas is "specifically provided [for] under other provisions of [Part D]," then those provisions will control instead of Subpart 's. Thus it is true but incomplete to note, as the Administrator does, that the substantive language of Subpart 1 is broad enough to apply to revised ozone standards. See, e.g., §7502(a)(1)(A) {instructing the Administrator to classify nonattainment areas according to "any revised standard, including a revision of any standard in effect on November 15, 1990"}; §7502(a)(2)(A) (setting attainment deadlines). To determine whether that language *does* apply one must resolve the further textual issue whether some *other* provision, namely Subpart 2, provides for the classification of ozone nonattainment areas. If it does, then according to the switching provisions of Subpart 1 it will control.

So, does Subpart 2 provide for classifying nonattainment ozone areas under the revised standard? It unquestionably does. The backbone of the subpart is Table 1, printed in §7511(a)(1) and reproduced in the margin here,' which defines five categories of ozone nonattainment areas and prescribes attainment deadlines for each. Section 7511(a)(I) funnels all nonattainment areas into the table for classification, declaring that leiach area designated nonattainment for ozone shall be classified at the time of such designation, under table 1, by

TABLE

Area class	Design value*	Primary standard attainment date* *
Marginal November 15, 1990	0.121 up to 0.130	3 years after
Moderate November 15, 1990	0.138 up to 0.160	6 years after
Serious November 15, 1990	0.160 up to 0.180	9 years after
Severe November 15, 1990	0.180 up to 0.280	15 years after
Extreme November 15, 1990	0.280 and above	<u>20</u> years after

*The design. value is measured in parts per million

(Prm).

**The primary standard attainment date is measured from November 15, 1990.

operation of law." And once an area has been classified, "the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1." The EPA argues that this text is not as clear or comprehensive as it seems, because the title of §7511(a) reads "Classification and attainment dates for 1989 nonattainment areas," which suggests that Subpart 2 applies only to areas that were in nonattainment in 1989, and not to areas later designated nonattainment under a revised ozone standard. The suggestion must be rejected, however, because §7511(b)(1) specifically provides for the classification of areas that *were* in attainment in 1989 but have subsequently slipped into nonattainment. It thus makes clear that Subpart 2 is *not* limited solely to 1989 nonattainment areas. This eliminates the interpretive role of the title, which may only "she[d] light on some ambiguous word or phrase in the statute itself," *Carter v. United States*, 530 U.S. 255, 267, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) {internal quotation marks omitted} (quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S., at 212, 118 S.Ct. 1952, in turn quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947)).

It may well be, as the EPA argues--and as the concurring opinion below on denial of rehearing pointed out, see 195 F.3d, at 11-12--that some provisions of Subpart 2 are ill fitted to implementation of the revised standard. Using the old 1-hour averages of ozone levels, for example, as Subpart 2 requires, see §7511(a)(1); 44 Fed.Reg. 8202 (1979), would produce at best an inexact estimate of the new 8-hour averages, see 40 CFR §50.10, and App. 1 (1999). Also, to the extent that the new ozone standard is stricter than the old one, see Reply Brief for Petitioners in No. 99-1257, p. 17 ("the stricter 8-hour NAAQS"); 62 Fed.Reg. 38856, 38858 (1997) (8-hour standard of 0.09 ppm rather than 0.08 ppm would have "generally represented] the continuation of the [old] level of protection"), the classification system of Subpart 2 contains a gap, because it fails to classify areas whose ozone levels are greater than the new standard (and thus nonattaining) but less than the approximation of the old standard codified by Table 1. And finally, Subpart 2's method for calculating attainment dates--which is simply to count forward a certain number of years from November 15, 1990 (the date the 1990 CAA Amendments took force), depending on how far out of attainment the area started--seems to make no sense for areas that are first classified under a new standard after November 15, 1990. If, for example, areas were classified in the year 2000, many of the deadlines would already have expired at the time of classification.

These gaps in Subpart 2's scheme prevent us from concluding that Congress clearly intended Subpart 2 to be the exclusive, permanent means of enforcing a revised ozone standard in nonattainment areas. The statute is in our view ambiguous concerning the manner in which Subpart 1 and Subpart 2 interact with regard to revised ozone standards, and we would defer to the EPA's reasonable resolution of that ambiguity. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S., at 132, 120 S.Ct. 1291; *INS v. Aguirre- Aguirre*, 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). We cannot defer, however, to the interpretation the EPA has given.

Whatever effect may be accorded the gaps in Subpart 2 as implying some limited applicability of Subpart 1, they cannot be thought to render Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory once a new standard has been promulgated, as the EPA has concluded. The principal distinction between Subpart 1 and Subpart 2 is that the latter

eliminates regulatory discretion that the former allowed. While Subpart 1 permits the EPA to establish classifications for nonattainment areas, Subpart 2 classifies areas as a matter of law based on a table. Compare §7502(a)(1) with §7511(a)(1) (Table 1). Whereas the EPA has discretion under Subpart I to extend attainment dates for as long as 12 years, under Subpart 2 it may grant no more than 2 years' extension. Compare §§7502(a)(2)(A) and (C) with §7511(a)(5). Whereas Subpart 1 gives the EPA considerable discretion to shape nonattainment programs, Subpart 2 prescribes large parts of them by law. Compare §7502(c) and (d) with §7511a. Yet according to the EPA, Subpart 2 was simply Congress's "approach to the implementation of the [old] 1-hour" standard, and so there was no reason that "the new standard could not simultaneously be implemented under ... subpart 1." 62 Fed.Reg. 38856, 38885 (1997); see also *id.*, at 38873 ("the provisions of subpart 1 ... would apply to the implementation of the new 8-hour ozone standards"). To use a few apparent gaps in Subpart 2 to render its textually explicit applicability to nonattainment areas under the new standard utterly inoperative is to go over the edge of reasonable interpretation. The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.

The EPA's interpretation making Subpart 2 abruptly obsolete is all the more astonishing because Subpart 2 was obviously written to govern implementation for some time. Some of the elements required to be included in SIP's under Subpart 2 were not to take effect until many years after the passage of the Act. See §7511a(e)(3) (restrictions on "electric utility and industrial and commercial boiler[s]" to be "effective 8 years after November 15, 1990"); §7511 a(c)(5)(A) (vehicle monitoring program to [b]egi[n] 6 years after November 15, 1990"); §7511a(g)(1) (emissions milestone requirements to be applied "6 years after November 15, 1990, and at intervals of every 3 years thereafter"). A plan reaching so far into the future was not enacted to be abandoned the next time the EPA reviewed the ozone standard--which Congress knew could happen at any time, since the technical staff papers had already been completed in late 1989. See 58 Fed.Reg. 13008, 13010 (1993); see also 42 U.S.C. §7409(d)(1) (NAAQS must be reviewed and, if appropriate, revised at least once every five years). Yet nothing in the EPA's interpretation would have prevented the agency from aborting Subpart 2 the day after it was enacted. Even now, if the EPA's interpretation were correct, some areas of the country could be required to meet the new, more stringent ozone standard in *at most* the same time that Subpart 2 had allowed them to meet the old standard. Compare §7502(a)(2) (Subpart I attainment dates) with §7511(a) (Subpart 2 attainment dates). Los Angeles, for instance, "would be required to attain the revised NAAQS under Subpart 1 no later than the same year that marks the outer time limit for attaining Subpart 2's one-hour ozone standard." Brief for Petitioners in No. 99-1257, p. 49. An interpretation of Subpart 2 so at odds with its structure and manifest purpose cannot be sustained.

We therefore find the EPA's implementation policy to be unlawful, though not in the precise respect determined by the Court of Appeals. After our remand, and the Court of Appeals' final disposition of this case, it is left to the EPA to develop a reasonable interpretation of the nonattainment implementation provisions insofar as they apply to revised ozone NAAQS.

To summarize our holdings in these unusually complex cases: (1) The EPA may not

consider implementation costs in setting primary and secondary NAAQS under § 109(b) of the CAA. (2) Section 109(b)(1) does not delegate legislative power to the EPA in contravention of Art. I, §1, of the Constitution. (3) The Court of Appeals had jurisdiction to review the EPA's interpretation of Part D of Title 1 of the CAA, relating to the implementation of the revised ozone NAAQS. (4) The EPA's interpretation of that Part is unreasonable.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS₂ concurring.

I agree with the majority that §109's directive to the agency is no less an "intelligible principle" than a host of other directives that we have approved. *Ante*, at 912-914. I also agree that the Court of Appeals' remand to the agency to make its own corrective interpretation does not accord with our understanding of the delegation issue. *Ante*, at 912. I write separately, however, to express my concern that there may nevertheless be a genuine constitutional problem with §109, a problem which the parties did not address.

The parties to this case who briefed the constitutional issue wrangled over constitutional doctrine with barely a nod to the text of the Constitution. Although this Court since 1928 has treated the "intelligible principle" requirement as the only constitutional limit on congressional grants of power to administrative agencies, see *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928), the Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress." U.S. Const., Art. 1, §1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."

As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.

Justice STEVENS₂ with whom Justice SOUTER joins, concurring in part and concurring in the judgment.

Section 109(b)(1) delegates to the Administrator of the Environmental Protection Agency (EPA) the authority to promulgate national ambient air quality standards (NAAQS). In Part III of its opinion, *ante*, at 911-914, the Court convincingly explains why the Court of Appeals erred when it concluded that § 109 effected "an unconstitutional delegation of legislative power." *American Trucking Assns., Inc. v. EPA*, 175 F.3d 1027, 1033 (C.A.D.C.1999) (per curiam). I wholeheartedly endorse the Court's result and endorse its explanation of its reasons, albeit with the following caveat.

The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is "legislative" but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not "legislative power." Despite the fact that there is language in our opinions that supports the Court's articulation of our holding, I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is "legislative power."

The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it. See Black's Law Dictionary 899 (6th ed.1990) (defining "legislation" as, *inter alia*, "[f]ormulation of rule[s] for the future"); 1 K. Davis & R. Pierce, Administrative Law Treatise §2.3, P. 37 (3d ed. 1994) ("If legislative power means the power to make rules of conduct that bind everyone based on resolution of major policy issues, scores of agencies exercise legislative power routinely by promulgating what are candidly called 'legislative rules' "). If the NAAQS that the EPA promulgated had been prescribed by Congress, everyone would agree that those rules would be the product of an exercise of "legislative power." The same characterization is appropriate when an agency exercises rulemaking authority pursuant to a permissible delegation from Congress.

My view is not only more faithful to normal English usage, but is also fully consistent with the text of the Constitution. In Article I, the Framers vested "All legislative Powers" in the Congress, Art. I., §1, just as in Article II they vested the "executive Power" in the President, Art. II § 1. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others. See *Bowsher v. Synar*, 478 U.S. 714, 752, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (STEVENS, J., concurring in judgment) ("Despite the statement in Article I of the Constitution that 'All legislative powers herein granted shall be vested in a Congress of the United States,' it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers"); *INS v. Chadha*, 462 U.S. 919, 985-986, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (White, J., dissenting) ("[L]egislative power can be exercised by independent agencies and Executive departments ..."); 1 Davis §2.6, p. 66 ("The Court was probably mistaken from the outset in interpreting Article I's grant of power to Congress as an implicit limit on Congress' authority to delegate legislative power"). Surely the authority granted to members of the Cabinet and federal law enforcement agents is properly characterized as "Executive" even though not exercised by the President. Cf. *Morrison v. Olson*, 487 U.S. 654, 705-706, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (SCALIA, J., dissenting) (arguing that the independent counsel exercised "executive power" unconstrained by the President).

It seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is "legislative." As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it. Accordingly, while I join Parts 1, II and IV of the Court's opinion, and agree with almost everything said in Part III, I would hold that when Congress enacted § 109, it effected a constitutional delegation of legislative power to the EPA.

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

I join Parts I, III, and IV of the Court's opinion. I also agree with the Court's determination in Part II that the Clean Air Act does not permit the Environmental Protection Agency to consider the economic costs of implementation when setting national ambient air quality standards under §109(b)(1) of the Act. But I would not rest this conclusion solely upon §109's language or upon a presumption, such as the Court's presumption that any authority the Act grants the EPA to consider costs must flow from a "textual commitment" that is "clear." *Ante*, at 909-910. In order better to achieve regulatory goals--for example, to allocate resources so that they save more lives or produce a cleaner environment--regulators must often take account of all of a proposed regulation's adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public harm. Hence, I believe that, other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation.

In this case, however, other things are not equal. Here, legislative history, along with the statute's structure, indicates that §109's language reflects a congressional decision not to delegate to the agency the legal authority to consider economic costs of compliance.

For one thing, the legislative history shows that Congress intended the statute to be "technology forcing." Senator Edmund Muskie, the primary sponsor of the 1970 amendments to the Act, introduced them by saying that Congress' primary responsibility in drafting the Act was not "to be limited by what is or appears to be technologically or economically feasible," but "to establish what the public interest requires to protect the health of persons," even if that means that "*industries will be asked to do what seems to be impossible at the present time.*" 116 Cong. Rec. 32901-32902 (1970), 1 Legislative History of the Clean Air Amendments of 1970 (Committee Report compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-18, p. 227 (1974) (hereinafter Leg. Hist.) (emphasis added).

The Senate directly focused upon the technical feasibility and cost of implementing the Act's mandates. And it made clear that it intended the Administrator to develop air quality standards set independently of either. The Senate Report for the 1970 amendments explains:

"In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) *the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible*; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health....

"Therefore, the Committee determined that *existing sources of pollutants either should meet the standard of the law or be closed down. ...*" S.Rep. No. 91-1196, pp. 2-3 (1970), 1 Leg. Hist. 402-403 (emphasis added).

Indeed, this Court, after reviewing the entire legislative history, concluded that the 1970 amendments were "expressly designed to force regulated sources to develop pollution control

devices that *might at the time appear to be economically or technologically infeasible.*" Union Elec. Co. v. EPA, 427 U.S. 246, 257, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976) (emphasis added). And the Court added that the 1970 amendments were intended to be a "drastic remedy to ... a serious and otherwise uncheckable problem." *Id.*, at 256, 96 S.Ct. 2518. Subsequent legislative history confirms that the technology-forcing goals of the 1970 amendments are still paramount in today's Act. See Clean Air Conference Report (1977): Statement of Intent; Clarification of Select Provisions, 123 Cong. Rec. 27070 (1977) (stating, regarding the 1977 amendments to the . Act, that "this year's legislation retains and even strengthens the technology forcing ... goals of the 1970 Act"); S.Rep. No. 101-228, p. 5 (1989) (stating that the 1990 amendments to the Act require ambient air quality standards to be set at "the level that 'protects the public health' with an 'adequate margin of safety,' *without regard to the economic or technical feasibility of attainment*" (emphasis added)).

To read this legislative history as meaning what it says does not impute to Congress an irrational intent. Technology-forcing hopes can prove realistic. Those persons, for example, who opposed the 1970 Act's insistence on a 90% reduction in auto emission pollutants, on the ground of excessive cost, saw the development of catalytic converter technology that helped achieve substantial reductions without the economic catastrophe that some had feared. See §6(a) of the Clean Air Act Amendments of 1970, amending §§202(b)(1)(A), (B), 84 Stat. 1690 (codified at 42 U.S.C. §§7521(b)(1)(A), (B)) (requiring a 90% reduction in emissions); 1 Leg. Hist. 238, 240 (statement of Sen. Griffin) (arguing that the emissions standards could "force [the automobile] industry out of existence" because costs "would not be taken into account"); see generally Reitze, Mobile Source Air Pollution Control, 6 *Env'tl. Law.* 309, 326-327 (2000) (discussing the development of the catalytic converter).

At the same time, the statute's technology-forcing objective makes regulatory efforts to determine the costs of implementation both less important and more difficult. It means that the relevant economic costs are speculative, for they include the cost of unknown future technologies. It also means that efforts to take costs into account can breed time-consuming and potentially unresolvable arguments about the accuracy and significance of cost estimates. Congress could have thought such efforts not worth the delays and uncertainties that would accompany them. In any event, that is what the statute's history seems to say. See Union Elec., *supra*, at 256-259, 96 S.Ct. 2518. And the matter is one for Congress to decide.

Moreover, the Act does not, on this reading, wholly ignore cost and feasibility. As the majority points out, *ante*, at 909-910, the Act allows regulators to take those concerns into account when they determine how to implement ambient air quality standards. Thus, States may consider economic costs when they select the particular control devices used to meet the standards, and industries experiencing difficulty in reducing their emissions can seek an exemption or variance from the state implementation plan. See Union Elec., *supra*, at 266, 96 S.Ct. 2518 ("[T]he most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan").

The Act also permits the EPA, within certain limits, to consider costs when it sets deadlines by which areas must attain the ambient air quality standards. 42 U.S.C. §7502(a)(2)(A) (providing that "the Administrator may extend the attainment date ... for a period

no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures"); §7502(a)(2)(C) (permitting the Administrator to grant up to two additional 1- year extensions); cf. §§7511(a)(1), (5) (setting more rigid attainment deadlines for areas in nonattainment of the ozone standard, but permitting the Administrator to grant up to two 1-year extensions). And Congress can change those statutory limits if necessary. Given the ambient air quality standards' substantial effects on States, cities, industries, and their suppliers and customers, Congress will hear from those whom compliance deadlines affect adversely, and Congress can consider whether legislative change is warranted. See, e.g., Steel Industry Compliance Extension Act of 1981, 95 Stat. 139 (codified at 42 U.S.C. §7413(e) (1988 ed.)) (repealed 1990) (granting the Administrator discretion to extend the ambient air quality standard attainment date set in the 1977 Act by up to three years for steelmaking facilities).

Finally, contrary to the suggestion of the Court of Appeals and of some parties, this interpretation of § 109 does not require the EPA to eliminate every health risk, however slight, at any economic cost, however great, to the point of "hurtling" industry over "the brink of ruin," or even forcing "deindustrialization." *American Trucking Assns., Inc. v. EPA*, 175 F.3d 1027, 1037, 1038, n. 4 (C.A.D.C.1999); see also Brief for Cross-Petitioners in No. 99-1426, p. 25. The statute, by its express terms, does not compel the elimination of *all* risk; and it grants the Administrator sufficient flexibility to avoid setting ambient air quality standards ruinous' to industry.

Section 109(b)(1) directs the Administrator to set standards that are "requisite to protect the public health" with "an adequate margin of safety." But these words do not describe a world that is free of all risk--an impossible and undesirable objective. See *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 642, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) (plurality opinion) (the word "safe" does not mean "risk-free"). Nor are the words "requisite" and "public health" to be understood independent of context. We consider football equipment "safe" even if its use entails a level of risk that would make drinking water "unsafe" for consumption. And what counts as "requisite" to protecting the public health will similarly vary with background circumstances, such as the public's ordinary tolerance of the particular health risk in the particular context at issue. The Administrator can consider such background circumstances when "decid[ing] what risks are acceptable in the world in which we live." *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146, 1165 (C.A.D.C.1987).

The statute also permits the Administrator to take account of comparative health risks. That is to say, she may consider whether a proposed rule promotes safety overall. A rule likely to cause more harm to health than it prevents is not a rule that is "requisite to protect the public health." For example, as the Court of Appeals held and the parties do not contest, the Administrator has the authority to determine to what extent possible health risks stemming from reductions in tropospheric ozone (which, it is claimed, helps prevent cataracts and skin cancer) should be taken into account in setting the ambient air quality standard for ozone. See 175 F.3d, at 1050- 1053 (remanding for the Administrator to make that determination).

The statute ultimately specifies that the standard set must be "requisite to protect the public health" "*in the judgment of the Administrator*," §109(b)(1), 84 Stat. 1680 (emphasis

added), a phrase that grants the Administrator considerable discretionary standard-setting authority.

The statute's words, then, authorize the Administrator to consider the severity of a pollutant's potential adverse health effects, the number of those likely to be affected, the distribution of the adverse effects, and the uncertainties surrounding each estimate. Cf. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L.Rev. 303, 364 (1999). They permit the Administrator to take account of comparative health consequences. They allow her to take account of context when determining the acceptability of small risks to health. And they give her considerable discretion when she does so.

This discretion would seem sufficient to avoid the extreme results that some of the industry parties fear. After all, the EPA, in setting standards that "protect the public health" with "an adequate margin of safety," retains discretionary authority to avoid regulating risks that it reasonably concludes are trivial in context. Nor need regulation lead to deindustrialization. Preindustrial society was not a very healthy society; hence a standard demanding the return of the Stone Age would not prove "requisite to protect the public health."

Although I rely more heavily than does the Court upon legislative history and alternative sources of statutory flexibility, I reach the same ultimate conclusion. Section 109 does not delegate to the EPA authority to base the national ambient air quality standards, in whole or in part, upon the economic costs of compliance.