## Oregon

Updated: 03-01-2006

**Registration Deadline** — 21 days before the election.

6. **ID Number.** Federal law requires that you provide your driver’s license number to register to vote. If you do not have a driver’s license then you will have to provide at least the last four digits of your social security number. If you have neither, you will need to write “NONE” on the form. A unique identifying number will instead be assigned to you by your State.

7. **Choice of Party.** You must register with a party if you want to take part in that party’s primary election.

8. **Race or Ethnic Group.** Leave blank.

9. **Signature.** To register in Oregon you must:
   - be a citizen of the United States
   - be a resident of Oregon
   - be at least 18 years old by election day

**Mailing address:**
Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310-0722

## Pennsylvania

Updated: 03-01-2006

**Registration Deadline** — 30 days before an election or primary.

6. **ID Number.** You must supply a Driver’s License Number, if you have one. If you do not have a Driver’s License Number, you must supply the last four digits of your social security number. If you do not have a Social Security Number, please write “NONE” in the box.

7. **Choice of Party.** You must register with a party if you want to take part in that party’s primary election.

8. **Race or Ethnic Group.** You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. **Signature.** To register in Pennsylvania you must:
   - be a citizen of the United States at least one month before the next election
   - be a resident of Pennsylvania and your election district at least 30 days before the election
   - be at least 18 years of age on the day of the next election

**Mailing address:**
Office of the Secretary of the Commonwealth
210 North Office Bldg.
Harrisburg, PA 17120-0029

## Rhode Island

Updated: 03-28-2008

**Registration Deadline** — 30 days before the election.

6. **ID Number.** The applicant shall be required to provide his/her Rhode Island driver’s license number if the applicant has been issued a current and valid Rhode Island driver’s license. In the case of an applicant who has not been issued a current and valid driver’s license he/she must provide the last four (4) digits of his/her social security number. An applicant, who has neither, will be assigned a unique identifying number by the State of Rhode Island.

7. **Choice of Party.** In Rhode Island, a person must register with a party if he/she wishes to take part in that party’s primary election. A person who fails to register with a party at the time of registration may, if he/she chooses, register with a party on the day of that party’s primary and take part in that party’s primary election. If a person does not register with a party, he/she can still vote in general elections and non-partisan primary elections.

8. **Race or Ethnic Group.** Leave blank.

9. **Signature.** To register in Rhode Island you must:
   - be a citizen of the United States
   - be a resident of Rhode Island for 30 days preceding the next election
   - be 18 years old by election day
   - not be currently incarcerated in a correctional facility due to a felony conviction
   - not have been lawfully judged to be mentally incompetent

**Mailing address:**
Rhode Island State Board of Elections
50 Branch Ave.
Providence, RI 02904-2790

## South Carolina

Updated: 03-01-2006

**Registration Deadline** — 30 days before the election.

6. **ID Number.** Your full Social Security number is required. It is required by the South Carolina Code of Laws and is used for internal purposes only. Social security number does not appear on any report produced by the State Election Commission nor is it released to any unauthorized
State Instructions

7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. You are required to fill in this box. Your application may be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. Signature. To register in South Carolina you must:
   • be a citizen of the United States
   • be at least 18 years old on or before the next election
   • be a resident of South Carolina, your county and precinct
   • not be confined in any public prison resulting from a conviction of a crime
   • never have been convicted of a felony or offense against the election laws, or if previously convicted, have served your entire sentence, including probation or parole, or have received a pardon for the conviction
   • not be under a court order declaring you mentally incompetent
   • claim the address on the application as your only legal place of residence and claim no other place as your legal residence

Mailing address:
State Election Commission
P.O. Box 5987
Columbia, SC 29250-5987

South Dakota

Updated: 03-01-2006

Registration Deadline — Received 15 days before the election.

6. ID Number. Your driver's license number is requested. If you do not have a valid driver's license, you must provide the last four digits of your social security number.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.


9. Signature. To register in South Dakota you must:
   • be a citizen of the United States
   • be at least 18 years old on or before the next election
   • not have been convicted of a felony, or if convicted, have had your full rights of citizenship restored (or have received a pardon)

Mailing address:
Elections, Secretary of State
500 E. Capitol
Pierre, SD 57501-5070

Tennessee

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. Social security number, if any, is required for purposes of identification and to avoid duplicate registration (TCA 2.2.16)

7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.


9. Signature. To register in Tennessee you must:
   • be a citizen of the United States
   • be of the United States
   • be at least 18 years old on or before the next election
   • not have been convicted of a felony, or if convicted, have had your full rights of citizenship restored (or have received a pardon)
   • not be adjudicated incompetent by a court of competent jurisdiction (or have been restored to legal capacity)

Mailing address:
Coordinator of Elections
Tennessee Tower, Ninth Floor
312 Eighth Avenue, North
Nashville, TN 37243

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, please write "NONE" on the form. A unique identifying number will instead be assigned to you by your State.

7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.


9. Signature. To register in Texas you must:
   • be a citizen of the United States

State Instructions

- be a resident of the county in which the application for registration is made
- be at least 17 years and 10 months old (you must be 18 to vote)
- not be finally convicted of a felony, or if a convicted felon, you must have fully discharged your punishment, including any incarceration, parole, supervision, period of probation or be pardoned.
- have not been declared mentally incompetent by final judgment of a court of law

Mailing address:
Office of the Secretary of State
Elections Division
P.O. Box 12060
Austin, TX 78711-2060

Utah

Updated: 03-28-2008

Registration Deadline — 30 days before the election for mail-in applications; 15 days before the election for walk-in registrations at the county clerk's office.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver’s license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver’s license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.

7. Choice of Party. Declaring a party is not required in order to register to vote. However, Utah’s election law allows each political party to choose whom it will allow to vote in its primary election. If you do not affiliate with a party, you may be restricted from voting in the primary.


9. Signature. To register in Utah you must:
   - be a citizen of the United States
   - have resided in Utah for 30 days immediately before the next election
   - be at least 18 years old on or before the next election
   - not be a convicted felon currently incarcerated for commission of a felony
   - not be convicted of treason or crime against the electorate franchise, unless restored to civil rights
   - not be found to be mentally incompetent by a court of law

Mailing address:
Office of the Lieutenant Governor
P.O. Box 142325
Salt Lake City, UT 84114

Vermont

Updated: 07-29-2008

Registration Deadline — Delivered to the town clerk before 5:00 PM on the Wednesday before the election.

6. ID Number. You must provide your Vermont Driver’s license number, or if none, the last 4 digits of your Social Security number. If you do not have a Vermont Driver’s license or a Social Security number, please write “NONE” on the form. The Secretary of State’s office will assign you a unique identifying number.

7. Choice of Party. Vermont does not require party registration to participate in any election.


9. Signature. To register in Vermont you must:
   - be a citizen of the United States
   - be a resident of Vermont
   - be 18 years of age on or before election day
   - have taken the following Oath: You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the state of Vermont, you will do it as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person [Voter’s Oath, Vermont Constitution, Chapter II, Section 42]

By signing in Box 9, you are attesting that you have sworn or affirmed the Vermont voter’s oath as printed above.

Mailing address:
Office of the Secretary of State
Director of Elections
26 Terrace Street
Montpelier, VT 05609-1101

Virginia

Updated: 11-10-2010

Registration Deadline — Delivered 29 days before the election.

6. ID Number. Your full social security number is required. Your social security number will appear on reports produced only for official use by voter registration and election officials and, for jury selection purposes, by courts.
State Instructions

7. **Choice of Party.** You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.

8. **Race or Ethnic Group.** Leave blank.

9. **Signature.** To register in Virginia you must:
   - be a citizen of the United States
   - be a resident of Virginia and of the precinct in which you want to vote
   - be 18 years old by the next May or November general election
   - not have been convicted of a felony, or have had your civil rights restored
   - not currently be declared mentally incompetent by a court of law

Mailing address:
State Board of Elections
1100 Bank Street, 1st Floor
Richmond, VA 23219

6. **ID Number.** You must provide your driver’s license number. If you do not have a Washington driver’s license, you must provide the last four digits of your Social Security Number. Failure to provide this information may prevent your registration from being processed.

7. **Choice of Party.** You are not required to designate your party affiliation to register in Washington.

8. **Race or Ethnic Group.** Leave blank.

9. **Signature.** To register in Wisconsin you must:
   - be a citizen of the United States
   - live in West Virginia at the above address
   - be 18 years old, or to vote in the primary be 17 years old and turning 18 before the general election
   - not be under conviction, probation, or parole for a felony, treason or election bribery
   - not have been judged "mentally incompetent" in a court of competent jurisdiction

**Mailing address:**
Secretary of State
Voter Registration by Mail
P.O. Box 40230
Olympia, WA 98504-0230

6. **ID Number.** Enter your driver's license number. If you do not have a driver's license number, enter the last four numbers of your social security number. If you do not have a driver's license number or a social security number, an identification number will be assigned to you.

7. **Choice of Party.** You must register with a party if you want to take part in that party's primary election, caucus, or convention (unless you request the ballot of a party which allows independents to vote).

8. **Race or Ethnic Group.** Leave blank.

9. **Signature.** To register in West Virginia you must:
   - be a citizen of the United States
   - be 18 years old
   - not have been convicted of treason, felony or bribery, or if you have, your civil rights have been restored

**Wisconsin**

Updated: 09-12-2006

**Registration Deadline** — Twenty (20) days before the election (or completed in the local voter registration office up to 5:00 pm. 1 day before the election, or completed at the polling place on election day).

6. **ID Number.** Provide your driver’s license number, if you have no current and valid driver’s license, the last 4 digits of your social security number or DOT-issued ID card number.

7. **Choice of Party.** Not required.

8. **Race or Ethnic Group.** Not required.

9. **Signature.** To register in Wisconsin you must:
   - be a citizen of the United States
   - be a resident of Wisconsin for at least 10 days
   - be 18 years old
   - not have been convicted of treason, felony or bribery, or if you have, your civil rights have been restored
State Instructions

- not have been found by a court to be incapable of understanding the objective of the electoral process
- not make or benefit from a bet or wage depending on the result of an election
- not have voted at any other location, if registering on election day

Mailing address:
State Elections Board
17 West Main Street, Suite 310
P.O. Box 2973
Madison, WI 53701-2973

Wyoming

Updated: 03-01-2006

Wyoming by law, cannot accept this form unless State law is changed.
ARIZONA VOTER REGISTRATION FORM (Translation)
FORMULARIO DE INSCRIPCION DE VOTANTE EN ARIZONA

¿Preguntas? Para preguntas con respecto a la inscripción de votante, llame a su Registrador del Condado indicado al reverso del formulario.

Usted puede usar este formulario para:
- Inscribirse para votar en Arizona
- Informarles que su nombre, dirección o afiliación de partido ha cambiado

Para inscribirse para votar en Arizona, usted tiene que (Requisitos):
- Ser ciudadano de los Estados Unidos (vea los requisitos de la prueba de ciudadanía al reverso)
- Ser residente de Arizona y del condado indicado en su inscripción
- Tener 18 años o más en el día de la próxima Elección General normal

ADVERTENCIA: El incumplimiento de una inscripción falsa es un delito grave de clase 6

Usted no puede inscribirse para votar en Arizona si:
- Usted ha sido condenado de un delito grave y todavía no se le han restaurado sus derechos civiles
- Usted ha sido juzgado incompetente

Cómo inscribirse para votar:
- Usted puede enviar por correo su formulario llenado a la oficina de su Registrador del Condado o entregarlo personalmente
- La oficina de su Registrador del Condado le enviará por correo una prueba de inscripción dentro de 4 a 8 semanas
- Su decisión de inscribirse para votar o no inscribirse, y donde usted presentó su inscripción, se quedará confidencial

Inscripciones recibidas por correo:
- En caso de inscripción por correo, una inscripción de votante es válida si cumple con cualquiera de los siguientes:
  1. El formulario de registro está fechado 26 o más días antes de una elección, y es recibido por el Registrador del Condado por correo de primera clase dentro de cinco días después del último día para registrarse para votar en esa elección.
  2. El formulario tiene la fecha de matasellos de 26 días o más antes de una elección y es recibido por el Registrador del Condado para las 7 p.m. del día de esa elección.

Los ciudadanos con discapacidades pueden:
- Consultarse con el Registrador del Condado/Departamento Electoral para información sobre la votación temprana o cualquier adaptación para votar.

Si usted no es ciudadano de los Estados Unidos o no tendrá 18 años para la próxima Elección General, no llene este formulario.

NUEVOS REQUISITOS DE INSCRIPCION
1. Su formulario lleno de registro electoral debe contar con su número de licencia de manejo o de identificación (no de manejo) de Arizona.
   Si no tiene ninguna de estas licencias, tiene que incluir las últimas cuatro cifras de su número de seguro social.
   Si no tiene una licencia de manejar ni una licencia de identificación no de manejar ni un número de seguro social, se le asignará un número único de identificación por la Secretaría de Estado.
2. Un formulario llenado de inscripción de votante también tiene que contener prueba de ciudadanía o se rechazará el formulario.
   Si usted tiene una licencia de manejar o una licencia de identificación no de manejar expirada después del 1 de octubre de 1996, esta servirá como prueba de ciudadanía. Si no, tiene que adjuntar prueba de ciudadanía con el formulario.
   El reverso del formulario contiene una lista de documentos aceptables para establecer su ciudadanía e instrucciones sobre cómo incluir copias de los documentos con el formulario de registro electoral.
Chief Judge KOZINSKI, concurring: *439 I find this a difficult and perplexing case. The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to “accept and use” the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase “accept and use” narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could “accept and use” the federal form while also requiring registrants to provide documentation confirming what’s in the form. This wouldn’t render the federal form superfluous, just as redundant braking systems on cars and secondary power supplies on computers aren’t superfluous. This is known colloquially as wearing a belt and suspenders,*440 and is widely used to safeguard against failure of critical systems (i.e., getting caught with your pants down). See Redundancy (engineering), Wikipedia, http://goo.gl/ce8il (last visited Jan. 9, 2012).

The two constructions embody different, and somewhat antithetical, policies. The narrow construction maximizes federal control and national uniformity at the expense of state autonomy and local control. The broad construction defers to state and local interests while sacrificing national uniformity. As a linguistic matter, neither construction of “accept and use” strikes me as superior.

If Congress had made it clear that states must accept the federal form as a complete application, or that they need not, I would cheerfully enforce either command. But Congress used tantalizingly vague language, which would make it very useful to fall back on a rule of construction, such as the Clear Statement Rule or the Presumption Against Preemption. Judge Ikuta is right, however, that the Supreme Court has so far adopted such rules only for Supremacy Clause cases, not for those arising under the Elections Clause. See maj. op. at 391–93.

There would, I believe, be ample justification for adopting such rules for Elections Clause preemption. While the federal government has an interest in how elections for federal office are conducted, the states are not disinterested bystanders. Federal elections determine who will represent the state and its citizens in Congress, the White House and, indirectly, the federal courts. Making sure that those representatives are chosen by the state’s qualified electors is of vital significance to the state and its people. Moreover, the federal government is commandeering the state’s resources, giving states a significant stake in ensuring that the process is conducted efficiently and fairly. Rightly or wrongly, many still blame (or credit) voting irregularities in Illinois for John F. Kennedy’s election as President in 1960, and in Texas for Lyndon Johnson’s election to the Senate in 1948. States have an interest in ensuring that their reputations aren’t soiled in this fashion for decades, maybe longer. The risk of fraud and other malfeasance may depend on local conditions and thus differ from state to state. States with a tradition of electoral chicanery, or with large transient populations, may need to impose stricter controls to ensure the integrity of their voting processes.

The fact remains that the Supreme Court has never articulated any doctrine giving deference to the states under the Elections Clause. This may be because it hasn’t had occasion to do so in modern times. Foster v. Love, 522 U.S. 67, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997), was an easy case where the state’s election scheme directly contradicted the constitutional text, while the state’s interest in avoiding a general election on the same day as the rest of the country was slight. A case such as ours, where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors, presents a far more suitable case for deciding whether we should defer to state interests. But only the Supreme Court can adopt such a doctrine.

In the absence of something better, I must re-
sort to secondary aids to construction. In this case, we have legislative history that supports reading “accept and use” in the exclusive sense, which would preclude states from seeking additional documentation. Senator Simpson proposed amending the bill that eventually became the NVRA to provide that “[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration.” 139 Cong. Rec. 5098 (Mar. 16, 1993). He explained his purpose: “It allows States to check documents to verify citizenship.... [I]t simply makes clear that this bill must not be interpreted to stop any particular State from requiring documents. This includes States which currently by State law check documents, as well as those who may wish to check documents in the future.... I offer my amendment to try to ensure that States will continue to have the right, if they wish, to require documents verifying citizenship....” *441 Id. at 5098–99. Senator Simpson understood that “accept and use” could be read narrowly to preclude states from seeking documentation beyond the federal form, and offered his amendment to ensure that the phrase would be construed in the broad, inclusive sense.

Senator Ford, the NVRA’s sponsor, responded: “[T]here is nothing in the bill now that would preclude the State’s requiring presentation of documentary evidence of citizenship. I think basically this is redundant, even though you probably put it in a section. But there is nothing in there now that would preclude it.” *441 Id. at 5099. Senator Ford seemed to believe that “accept and use” was already being used in the inclusive sense, and was amenable to adding language that would confirm this.

The Senate adopted the Simpson amendment, but the House bill lacked a similar provision. The Conference Committee adopted the House version, explaining that “[t]he conferees agree with the House bill and do not include this provision from the Senate amendment. It is not necessary or consistent with the purposes of this Act. Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act. It could also adversely affect the administration of the other registration programs as well.... These concerns lead the conferees to conclude that this section should be deleted.” H.R.Rep. No. 103–66, at 23–24 (1993), reprinted in 1993 U.S.C.C.A.N. 140, 148–49 (Conf.Rep.). The conferees thus rejected the Simpson amendment, not because they thought it superfluous (as did Senator Ford) but because the inclusive meaning of “accept and use” was inconsistent with their vision of how the Act should operate.

After the conference, the Senate re-passed the NVRA without the Simpson amendment. S.Rep. No. 103–6, at 12–13 (1993). A minority of senators opposed the bill in part because they thought “requiring proof of citizenship” would be helpful in combating fraud and worried that the bill “would preclude such corrective action.” *441 Id. at 50.

In the House, some members sought to recommit the bill in order to tack on a Simpson-like amendment. They argued that failure to do so would encourage voter fraud. See 139 Cong. Rec. at 9228 (May 5, 1993) (Rep. Livingson: “Without this provision, this bill is an auto-fraudo bill.”); *441 id. at 9229 (Rep. Cox: “Despite its benign name, this pernicious bill would make it nearly impossible to prevent ineligible people—including illegal aliens—from voting.”). Their arguments fell on deaf ears. *441 Id. at 9231.

The Supreme Court has warned us time and again not to rely on legislative history in interpreting statutes, largely because of the ease with which floor statements and committee reports can be manipulated to create a false impression as to what the body as a whole meant. But the history here consists of actions taken by legislative bodies, not just words penned by staffers or lobbyists. The Court has recognized that such drafting history can offer
interpretive insight: “Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation.” Hamdan v. Rumsfeld, 548 U.S. 557, 579–80, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006). While the dissenting Justices in Hamdan objected to the use of *442 legislative history, their objection rested in large part on the fact that it was being used to defeat clear statutory language. See id. at 665–68, 126 S.Ct. 2749 (Scalia, J., dissenting, joined by Thomas and Alito, JJ.). I'm not convinced they would object with equal vigor where, as here, the statutory language is in equipoise and both chambers affirmatively rejected efforts to authorize precisely what Arizona is seeking to do.

The dissent mistakenly sees some inconsistency between my conclusion today and that in my “well-drafted dissent to the original panel opinion.” Dissent at 450 n.1. But, as a member of a three-judge panel, I had no occasion to construe the statute de novo because we were bound by the law of the circuit and the law of the case. Gonzalez v. Arizona, 624 F.3d 1162, 1198–99 (9th Cir.2010) (Kozinski, C.J., dissenting in large part). To the extent I could reach the issue at all, it was only to determine whether “ Gonzalez I is clearly wrong.” Id. at 1208. Because I concluded then, as I do now, that “both preemptive and non-preemptive constructions of ‘accept’ and ‘use’ are plausible,” I deferred to the earlier panel’s construction. Id. at 1206. As an en banc court, we cannot defer to Gonzalez I. Rather, we must come up with what we think is the best construction of the statute. For the reasons outlined above, and those in Judge Ikuta’s very fine and thorough opinion, I believe the preemptive reading of the statute is somewhat better than the alternative.

BERZON, Circuit Judge, concurring, with whom MURGUIA, Circuit Judge, joins:

I fully concur in the majority opinion but note the following: With respect to whether Proposition 200's polling place provision “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color” in violation of § 2(a) of the VRA, 42 U.S.C. § 1973(a) , the court holds only that the current record is insufficient to show a “causal connection between the challenged voting practice and [a] prohibited discriminatory result,” Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir.1997) (alteration in original) (internal quotation marks omitted). I concur in Section III.A of the majority opinion with that understanding of its limited reach. A different record in a future case could produce a different outcome with regard to the § 2 causation question.

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that Proposition 200's registration provision violates the National Voter Registration Act (“NVRA”). See Maj. Op. at 403. I part ways with the majority, however, when it comes to Proposition 200's requirement that voters provide identification at the polls (“the polling place provision”). The majority concludes that Gonzalez's challenge to the polling place provision under Section 2 of the Voting Rights Act fails because Gonzalez has not established that the polling place provision “results in discrimination on account of race.” Maj. Op. at 405. I respectfully disagree with the majority, for two reasons.

First, in concluding that Proposition 200's polling place provision does not disparately impact Latino voters, the majority conflates statistics on Proposition 200's registration provision with Proposition 200's polling place provision. See Maj. Op. at 405–06. A thorough review of the record reveals that Proposition 200's polling place provision has a significant disproportionate impact on Latino voters. In the 2006 general election, Latino voters *443 comprised between 2.6% and 4.2% of the voters who turned out to vote, but Latino voters cast 10.3% of the ballots that went uncounted because of insufficient identification. Latino voters were overrepresented by 200% to 500% in ballots that were uncounted because of insufficient identi-
Second, the majority mistakenly gives short shrift to the “Senate Factors” from *Thornburg v. Gingles*, 478 U.S. 30, 44, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). FN1 In discussing these factors, the majority acknowledges that Latino voters have “suffered a history of discrimination in Arizona that hindered their ability to participate in the political process fully, that there were socioeconomic disparities between Latinos and whites in Arizona, and that Arizona continues to have some degree of racially polarized voting.” Maj. Op. at 406. Despite acknowledging these facts, the majority concludes that Proposition 200’s polling place provision does not result “in discrimination on account of race.” Maj. Op. at 405. But a proper Section 2 analysis requires that we “consider how the challenged practice ‘interacts with social and historical conditions’ ” to cause an inequality in the opportunities of Latino voters to cast their ballots. *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir.2003) (quoting *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752).

FN1. In *Gingles* the Supreme Court held that a court should consider the following factors, commonly referred to as the “Senate Factors,” in determining whether a plaintiff has established a violation of Section 2 of the Voting Rights Act:

> [T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.


Indeed, as the district court recounted in much detail, *de jure* discrimination against Latinos in Arizona existed during most of the twentieth century. Just prior to 1910, Arizona voters passed a literacy law that explicitly targeted Mexicans and disqualified non-English speakers from voting in state elections. As late as the 1960s, these literacy requirements were a precondition for voting in Arizona.

After Arizona attained statehood in 1912, the new state government engaged in an anti-immigrant campaign characterized by a series of proposals aimed at restricting the political rights of Mexican immigrants’ and limiting their right to work. The new Arizona constitution restricted non-citizens from working on public projects. In 1914, the Arizona legislature enacted the “eighty percent law,” which stated that eighty percent of the employees in businesses that had five or more employees had to be “native-born citizens of the United States.”

Segregation of Latinos in housing and public accommodations was also common in Arizona during most of the twentieth century. In the years immediately following World War II, the city of Phoenix segregated Latino veterans in separate housing units. Movie theaters, restaurants, and stores frequently excluded Latinos or required Latinos to sit in segregated areas. Public parks and swimming pools were also segregated. A particularly notorious example of this segregation occurred in Tempe, where Latinos were only permitted to use the public swimming pool the day before
In my view, statistics showing that Proposition 200’s polling place provision disparately impact Latino voters, when coupled with Arizona’s long history of discrimination against Latinos, current socioeconomic disparities between Latinos and whites in Arizona, and racially polarized voting in Arizona, establish that Proposition 200’s polling place provision results in discrimination on account of race.

History has also shown that when a Latino voter approaches the polling place but is stopped by a person perceived to be an authority figure checking for identification, there’s something intimidating about that experience that evokes fear of discrimination. This intimidation has the effect of keeping Latino voters away from the polls.

In sum, I would hold that Proposition 200’s polling place provision results in discrimination on account of race, in violation of Section 2 of the Voting Rights Act.

RAWLINSON, Circuit Judge, joined by Judge N.R. SMITH, concurring in part and dissenting in part:

I concur in the majority’s conclusion that Arizona’s Proposition 200, which amended Ariz.Rev.Stat. § 16–579 to require proof of identification prior to receiving a ballot, does not violate the Voting Rights Act or the Equal Protection Clause of the Fourteenth Amendment. I also agree that the statutory amendment did not constitute a poll tax as proscribed in the Twenty-fourth Amendment to the United States Constitution. As a result, I join Part III of the majority opinion.

I respectfully dissent from the balance of the majority opinion, because I am not persuaded that application of Proposition 200’s proof-of-citizenship provision to prospective voters using the National Mail Voter Registration Form (the Federal Form) is precluded by the National Voting Rights Act (NVRA). In my view, there is no conflict between the NVRA and Arizona’s proof-of-citizenship requirement. In fact, the plain text of the NVRA validates Arizona’s proof-of-citizenship requirement, even while recognizing that Arizona must “accept and use” the Federal Form.

The text of the NVRA allows for Arizona’s proof-of-citizenship requirement, notwithstanding whether a presumption against preemption generally exists under the Election Clause, as it does under the Supremacy Clause. The NVRA states the following:

In addition to accepting and using the [Federal Form], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg–7(b) of this title for the registration of voters in elections for Federal office.

42 U.S.C. § 1973gg–4(a)(2). Therefore, the plain text of the NVRA authorizes a state to “develop and use a mail voter registration form ... for the registration of voters in elections for Federal office,” in addition to the Federal Form if it “meets all of the criteria stated in section 1973gg–7(b).” As part of such criteria, the NVRA provides that a mail voter registration form “may require only such identifying information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant ....” 42 U.S.C. § 1973gg–7(b)(1) (emphasis added). Section 1973gg–7(b)(2) then specifies that citizenship is a necessary eligibility requirement. Thus, the NVRA expressly allows Arizona to require proof of eligibility, such as proof of citizenship, because it is identifying information necessary to enable the... State election official to assess eligibility, and Arizona accepts and uses the Federal Form. See 42 U.S.C. § 1973gg–7(b)(1).

I emphasize the point that the NVRA itself expressly, not merely implicitly, authorizes a state to “develop and use” its own form “for the registration of voters in elections for Federal office,” in addition to accepting and using the [Federal Form].” 42 U.S.C. § 1973gg–4(a)(2). Because a state must accept and use the Federal Form but is also ex-
pressly authorized to develop and use its own form that meets the criteria in § 1973gg–7(b), the plain text creates a minimum standard through the Federal Form and allows a state to require more as long as it is within the bounds of § 1973gg–7(b). See Hui v. Castaneda, — U.S. ———, 130 S.Ct. 1845, 1855, 176 L.Ed.2d 703 (2010) (“We are required, however, to read the statute according to its text....”); Arkansas v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 827, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997) (noting that it is a “basic principle that statutory language is to be enforced according to its terms”). While state forms must comply with the same general standards as the Federal Form, there is no mandate that states must use only the information included in the Federal Form or that the Federal Form is a complete application. See 42 U.S.C. § 1973gg–4(a)(2). States have the same discretion to decide the contents of the form they develop and use, when drafted in accordance with § 1973gg–7(b), as the Election Assistance Commission (EAC) had for the Federal Form’s requirements. See 42 U.S.C. §§ 1973gg–4(a)(2), 1973gg–7(b). Thus, the statute expressly authorizes a state, as long as it complies with the standards set forth in § 1973gg–7(b), to require additional information outside of the Federal Form for voter registration. I do not know how to more clearly and emphatically stress the point that the plain text of the statute allows Arizona to require proof-of-citizenship in elections for federal office.

The majority argues that the NVRA preempts the proof-of-citizenship requirement, because the NVRA’s requirement that “accept and use” the Federal Form and Proposition 200’s requirement to “reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship’ ... do not operate harmoniously....” Majority Opinion, p. 398 (citing Ariz.Rev.Stat. § 16–166(F)). The majority rejects Arizona’s argument that the statutes are harmonious, because Arizona is accepting and using the Federal Form for voter registration as long as evidence of citizenship is provided pursuant to the state form requirement. See id. at 398–99. The majority reasons that rejecting voter registration based on anything outside the Federal Form is inappropriate because it “is contrary to the form’s intended use and purpose.” Id. at 399. Further, the majority opines that its reading is consistent with the “natural reading of the NVRA.” Id. at 398. I disagree.

The terms of the statute trump the intended use and purpose of the Federal Form. See Lockhart v. United States, 546 U.S. 142, 146, 126 S.Ct. 699, 163 L.Ed.2d 557 (2005) (“The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.”) (citation omitted); see also Siripongs v. Davis, 282 F.3d 755, 758 (9th Cir.2002) (“In interpreting the statute we look to general principles of statutory construction and begin with the language of the statute itself.”) If the “language is *446 clear on its face, the sole function of the court is to enforce it according to its terms....”) (citation, alteration and internal quotation marks omitted). Further, the “accept and use” provisions of the NVRA do not establish a conflict between Proposition 200 and the NVRA where one is not otherwise present in the text of the statutes. Reading the requirement to “accept and use” the Federal Form in § 1973gg–4(a)(1) along with § 1973gg–4(a)(2) does not naturally lead to the conclusion that no requirement outside the Federal Form may disallow a voter’s registration. The relevance and importance of § 1973gg–4(a)(2) is paramount. Invalidating the registration provision ignores § 1973gg–4(a)(2), which qualifies the extent to which a state must depend on the Federal Form for federal voter registration—i.e., the Federal Form is not the exclusive form.

The majority seems to read § 1973gg–4(a)(2) in such a way as to acknowledge a state’s right to develop and use its own form (if compliant with § 1973gg–7(b)), but at the same time opining that a state form cannot require anything more than the Federal Form does, or cause a voter to be ineligible to register to vote in federal elections. However, a
more logical and appropriate reading is that the Federal Form acts as the default—setting minimum requirements—and a state may require additional requirements for federal elections through its own form if the requirements comply with the criteria of the statute (essentially setting the maximum available requirements that may be used in the state form). See *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 370, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) ("[W]here possible, provisions of a statute should be read so as not to create a conflict...”). Therefore, there is flexibility coupled with control through the standards in §1973gg–7(b). The Federal Form acts as a baseline while the criteria in §1973gg–7(b) act as outer limits.

The requirement to "accept and use" the Federal Form does not preclude states from imposing additional requirements. Accepting and using something does not mean that it is necessarily sufficient. For example, merchants may accept and use credit cards, but a customer's production of a credit card in and of itself may not be sufficient. The customer must sign and may have to provide photo identification to verify that the customer is eligible to use the credit card. Second, the ordinary and natural meaning of the word “use” is “to employ” or “derive service from ...”. *Smith v. United States*, 508 U.S. 223, 228–29, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) (citation omitted). The word “accepts” means “to adopt, to agree to carry out provisions, to keep and retain.” *Worden v. SunTrust Banks, Inc.*, 549 F.3d 334, 344 (4th Cir.2008) (citing Black’s Law Dictionary 12 (5th ed.1979)). It is undisputed that Arizona has employed and derived service from the Federal Form and adopted its use for the registration of voters in federal elections. The only real issue is whether Proposition 200's requirement of proof of citizenship so conflicts with the use of the Federal Form that the requirement of proof of citizenship should be voided.

I realize that the majority's argument that “rejecting” necessarily counters “accepting” has some superficial appeal. *See Majority Opinion*, p. 398. However, what is being decided is whether states must accept and use the Federal Form in their federal election procedures as a whole, or whether they must accept the Federal Form as completely sufficient and the sole requirement for voter registration. Thus, the point of contention is whether Arizona defies the demand to accept and use the Federal Form by not finding voter registration*447 wholly sufficient based solely on the Federal Form. The answer cannot be that the Federal Form is the end-all-be-all. Section 1973gg–4(a)(2) clarifies that “accept and use” cannot mean that a state must allow a voter to register solely on the basis of the Federal Form, because it specifically allows a state to develop and use a state form, in addition to the Federal Form, for federal elections. It is beyond my understanding how the Federal Form can be considered “the end” when the NVRA explicitly allows states to develop and use a form “[i]n addition to accepting and using the [Federal Form].” 42 U.S.C. § 1973gg–4(a)(2) (emphasis added).

No provision of the NVRA expressly forbids states from requiring additional identifying documents to verify a voter's eligibility. The NVRA only expressly prohibits states from requiring “notarization or other formal authentication.” 42 U.S.C. § 1973gg–7(b)(3). “We ... read the enumeration of one case to exclude another [if] it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it....” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) (citation omitted). Here, Congress prohibited requiring notarization or other formal authentication but failed to prohibit proof-of-citizenship, while expressly recognizing its importance in voter registration. See 42 U.S.C. § 1973gg–7(b); *see also Kucana v. Holder*, — U.S. ——, 130 S.Ct. 827, 838, 175 L.Ed.2d 694 (2010) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (alteration and citation omitted)). Nor does the NVRA state that it
is the exclusive authority on eligibility verification or that “Arizona's only role was to make [the Federal] [F]orm available to applicants and to ‘accept and use’ it for the registration of voters.” Majority Opinion, p. 400 (emphasis added). The language of the statute not only does not prohibit additional documentation requirements, it expressly permits states to “require … such identifying information … as is necessary to enable the appropriate State election official to assess the eligibility of the applicant …” 42 U.S.C. § 1973gg–7(b)(1).

If, as the majority believes, the requirement to accept and use the Federal Form and the express allowance for a state to develop and use a form that complies with the set criteria of the statute are contradictory, see Majority Opinion, pp. 398–401, then the court “must interpret the statute to give effect to both provisions where possible.” See Ricci v. DeStefano, 557 U.S. 557, 129 S.Ct. 2658, 2674, 174 L.Ed.2d 490 (2009) (citation omitted). Here, it is possible and necessary to interpret the statute as requiring states to accept and use the Federal Form, while allowing states to demand adherence to their form and specific requirements for federal voter registration if in compliance with § 1973gg–7(b).

Reading the statute as a whole solidifies my conclusion that Arizona's registration provision is valid. See Samantar v. Yousuf, —— U.S. ———, 130 S.Ct. 2278, 2289, 176 L.Ed.2d 1047 (2010) (“We do not ... construe statutory phrases in isolation; we read statutes as a whole.” (citation and alteration omitted)); see also, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole....”) (citation omitted). Besides the express authorization for a state to “develop and use” a form compliant with *448 the statute's criteria, 42 U.S.C. § 1973gg–4(a)(2), the NVRA also provides that “each State shall establish procedures to register to vote in elections for Federal office ... (2) by mail application pursuant to section 1973gg–4 of this title, ... in addition to any other method of voter registration provided for under State law,” id. § 1973gg–2(a) (emphasis added). Although the NVRA requires that states “accept and use” the Federal Form, id. § 1973gg–4(a)(2), the NVRA does not foreclose states from using other methods for registering voters, id. § 1973gg–2(a), and allows states to develop and use state specific forms, if those forms fit within set criteria, id. § 1973gg–4(a)(2). Therefore, Congress did not “assume exclusive control of the whole subject....” Ex Parte Siebold, 100 U.S. 371, 383, 25 L.Ed. 717 (1879) (emphasis in the original). Arizona is allowed to require proof of citizenship for federal voter registration because of its expressly granted authority to develop and use a form complying with § 1973gg–7(b), and Arizona may deny voter registration for federal office for lack of such proof. See id. at 392 (“[W]e think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such cooperation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State....”).

The majority notes that, if Arizona is correct that §§ 1973gg–4(a)(2) and 1973gg–7(b) allow the registration provision, “this would mean only that the NVRA allows Arizona to include a proof of citizenship requirement on its State Form.” Majority Opinion, p. 400 (citation omitted). “It would not mean that Arizona has authority to add this requirement to the Federal Form ...” Id. However, this conclusion ignores the specific language of § 1973gg–4(a)(2). That language allows states to develop and use a state form complying with the statute's criteria for federal elections.

The majority also asserts that, even if the NVRA allows a state form to include additional conditions within the parameters of § 1973gg–7(b) (like proof-of-citizenship), a state may not decline an applicant's voter registration for federal elections because of the applicant's failure to satisfy the additional conditions. See Majority Opinion, pp.
the NVRA’s State Form provision, §1973gg–4(a)(2), merely gives a state more options [and] Congress could have required all states to use only the Federal Form ... Instead, Congress allowed States to use their state registration forms to register applicants for both state and federal elections (provided the state form complies with §1973gg–7(b)). But states cannot reject applicants who register for federal elections who use the Federal Form.... Majority Opinion, pp. 398–400 (emphasis by the majority)(footnote reference omitted).

Again, the majority’s attempt to rebut Arizona’s arguments and this dissent contradicts the language of the NVRA and leads to an absurd result. Under the majority’s argument, the state form (and the additional conditions allowed in the state form) have no real effect, because the applicant must only meet the Federal Form requirements in order to register for federal elections. Thus, Arizona must allow an applicant, satisfying all but the proof-of-citizenship requirement, to be registered to vote in federal elections, while not allowing the applicant to be registered for state elections. This faulty interpretation contradicts the NVRA’s plain language that “a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg–7(b) of *449 this title for the registration of voters in elections for Federal office.” 42 U.S.C. §1973gg–4(a)(2) (emphasis added). Put differently, under the majority’s view, a state “registration form that meets all the criteria stated in section 1973gg–7(b)” but that includes an additional condition beyond the Federal Form requirements may not be used to register “voters in elections for Federal office,” although the state form is specifically allowed by the language in §1973gg–4(a)(2).

In addition, the majority believes that my interpretation of §1973gg–4(a)(2) substitutes “instead of” for “[i]n addition to.” Majority Opinion, p. 399. However, my interpretation is loyal to the wording “[i]n addition to,” because the Federal Form requirements must be met. State form requirements, constrained by §1973gg–7(b), are added to the Federal Form requirements. In contrast, the majority’s view of §1973gg–4(a)(2) basically strikes the statute’s text allowing state forms to be used “[i]n addition to” the Federal Form “for the registration of voters in elections for Federal office.”

The majority’s view makes voter registration burdensome for states. For example, an Arizona applicant meeting the Federal Form requirements, but lacking proof-of-citizenship, would have to be allowed to vote for federal officials but could not vote for state officials. States that desire a proof-of-citizenship requirement in their state forms (as the majority suggests is allowed by the NVRA), would be forced to track whether their residents are registered to vote for federal elections, state elections, or both. In essence, the majority’s alteration of the statute imposes an unnecessary burden on the states. Although “it is not our task to assess the consequences of each approach and adopt one that produces the least mischief[,]” Lewis v. City of Chi., Ill., —— U.S. ———, 130 S.Ct. 2191, 2200, 176 L.Ed.2d 967 (2010), the majority’s view, ignoring the plain meaning of the NVRA, cannot be what Congress intended. This is especially true when one considers that the statutory allowance for a state form does not displace the importance of the Federal Form or the delegated authority to the EAC to determine the contents of the Federal Form. The Federal Form maintains its importance, because its use is required in all states. The Federal Form, therefore, establishes a minimum set of requirements. The EAC’s rejection of Arizona’s request to include a proof-of-citizenship requirement demonstrates that the EAC served its purpose of establishing a minimum (not a maximum) set of requirements for all states. Then, states individually are allowed to impose additional requirements within the strict bounds of §1973gg–7(b).

The majority believes that the proof-of-citizenship requirement disrupts the goal of the NVRA—to streamline the registration process. See
Majority Opinion, pp. 400–01. Although the NVRA seeks to simplify and harmonize registration procedures, the statute also identifies “protect[ing] the integrity of the electoral process” and “enhanc[ing] the participation of eligible citizens as voters in elections for Federal office” as guiding purposes of the statute. 42 U.S.C. § 1973gg(b) (emphasis added). Even under the majority's complementary analysis conducted pursuant to Siebold and Foster v. Love, 522 U.S. 67, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997), see Majority Opinion, p. 394, Arizona's proof-of-citizenship procedure complements—rather than conflicts with—these important purposes. See Siebold, 100 U.S. at 384; Foster, 522 U.S. at 74, 118 S.Ct. 464 (holding that a state election law is preempted only “to [the] extent[that] it conflicts with federal law”). The stated harmonious purposes are not served if ineligible voters are allowed to register.

Finally, even though allowing states to “develop and use” their own forms (if compliant with § 1973gg–7(b)) may decrease the efficiency of a Federal Form, this policy consideration cannot overrule the express terms of the statute. DePierre v. United States, —— U.S. ———, 131 S.Ct. 2225, 180 L.Ed.2d 114 (2011) (“That we may rue inartful legislative drafting, however, does not excuse us from the responsibility of construing a statute as faithfully as possible to its actual text....”) (footnote reference omitted); Lewis, 130 S.Ct. at 2200 (“Truth to tell, however, both readings of the statute produce puzzling results.... In all events, it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted....”); cf. United States v. Kennedy, 643 F.3d 1251, 1266 (9th Cir.2011) (Ikuta, J.) (determining that a statute compensating victims of child pornography was “a poor fit for these types of offenses[,]” but acknowledging that “the responsibility lies with Congress, not the courts, to develop a scheme to ensure that defendants ... are held liable ...”).

In sum, the majority's holding hinges on § 1973gg–4(a)(1)’s requirement that states “accept and use” the Federal Form. However, § 1973gg–4(a)(2) also allows a state to “develop and use” its own form if it complies with the standards delineated in § 1973gg–7(b). Therefore, it is difficult to maintain that Arizona's registration provision squarely conflicts with the NVRA or that the NVRA “assume[s] exclusive control of the whole subject....” Siebold, 100 U.S. at 383 (emphasis in the original).

FN1. Chief Judge Kozinski describes the NVRA as “readily susceptible to the interpretation of the majority, but also that of the dissent....” Concurring Opinion, p. 439. His well-drafted dissent to the original panel opinion said it better. See Gonzalez v. Arizona (Gonzalez II), 624 F.3d 1162, 1206 (9th Cir.2010) (Kozinski, J., dissenting) (“The NVRA doesn't say that states must treat the federal form as a complete application.... There's no question that Arizona accepts and uses the federal form for the information contained in it. Arizona only asks for proof of citizenship in addition to the form in order to complete the registration process....”), reh’g en banc granted & opinion withdrawn, 649 F.3d 953 (9th Cir.2011). This en banc concurrence discusses the statutory language “accept and use” in isolation, with no reference to the “[i]n addition” language in 42 U.S.C. § 1973gg–4(a)(2), see Concurring Opinion, pp. 439–42 again diverging from his prior dissent, where he noted: “[S]ection 1973gg–4(a)(2) ... allows states to 'develop and use' their own form if it ‘meets all of the criteria stated in section 1973gg–7(b).’ [ Gonzalez v. Arizona (Gonzalez I), 485 F.3d 1041 (9th Cir.2007) .] reads the statute correctly; it is the majority here that is mistaken.” Gonzalez II, 624 F.3d at 1205. In fact, Chief Judge Kozinski previously identified a basic
problem with the majority’s view via a single question: “[I]f the statute permits zero deviation from the federal form, why permit states to develop their forms at all? The only development needed would be photocopying the federal form.” Id. at 1209.

To determine its meaning, all of the NVRA’s language must be read together and not in isolation. See Samantar, 130 S.Ct. at 2289 (“We do not ... construe statutory phrases in isolation; we read statutes as a whole....”) (citation and alteration omitted). When read together, the meaning is clear. States must accept and use the Federal Form for registering voters for federal elections, but may also develop and use a state form with additional conditions if they comply with § 1973gg–7(b). When the meaning of the statute is clear, reverting to legislative history is inappropriate. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005); see also Hamdan v. Rumsfeld, 548 U.S. 557, 665–68, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006) (Scalia, J., dissenting) (“We have repeatedly held that ... reliance [on legislative history] is impermissible where, as here, the statutory language is unambiguous....”).

The legislative history is also unhelpful here because it is unreliable. “[L]egislative history is itself often murky, ambiguous, and contradictory.” Exxon Mobil, 545 U.S. at 568, 125 S.Ct. 2611; see also Conroy v. Aniskoff, 507 U.S. 511, 113 S.Ct. 1562, 123 L.Ed.2d 229 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: ‘The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself....’ ”) (quoting Aldridge v. Williams, 44 U.S. 9, 24, 3 How. 9, 11 L.Ed. 469 (1845) (emphasis in the original)). In fact, this case is a glaring example of the flaws of using legislative history. Although the legislative history cited by Chief Judge Kozinski supports his reasonable argument, the original view of the NVRA’s sponsor casts doubt on the clarity of that legislative history. Senator Ford, the sponsor of the bill, thought that “there is nothing in the bill now that would preclude the State’s requiring presentation of documentary evidence of citizenship.” 139 Cong. Rec. S2897–4, at S2902 (Mar. 16, 1993). He thought that an amendment specifying that a state could require proof-of-citizenship was redundant. See id. Therefore, even though the Conference Committee opined that the unamended NVRA disallowed proof-of-citizenship, H.R.Rep. No. 103–66, at 20 (1993), reprinted in 1993 U.S.C.C.A.N. 140, 148–49 (Conf.Rep.), it is unclear how many of the members of Congress who voted for the NVRA agreed with Senator Ford. See Exxon Mobil, 545 U.S. at 570, 125 S.Ct. 2611 (“The utility of either can extend no further than the light it sheds on how the enacting Legislature understood the statutory text. Trying to figure out how to square the Subcommittee Working Paper’s understanding with the House Report’s understanding, or which is more reflective of the understanding of the enacting legislators, is a hopeless task.”); cf. Hamdan, 548 U.S. at 666, 126 S.Ct. 2749 (Scalia, J., dissenting) (“Whether the floor statements are spoken where no Senator hears, or writ-
&sect;451 Siebold meticulously outlined the interplay between election regulations promulgated by a state government and Congress respectively. In the process, the United States Supreme Court took care to emphasize the respect that should be accorded the procedures implemented by states. See Siebold, 100 U.S. at 394 (“State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.”) (emphasis added).

The Supreme Court recognized the right of Congress to exercise its power to enact voting regulations that would supersede regulations promulgated by a state. See id. at 393. However, the Supreme Court also noted that “we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations.” Id.

The Supreme Court further reasoned that the power of Congress to enact statutes governing state matters “does not derogate from the power of the State to execute its laws at the same time and in the same places…” Id. at 395 (emphasis added). The laws of the state are preempted if, and only if, “both cannot be executed at the same time....” Id. (emphasis added).

In Siebold, there was no dispute regarding a conflict between the state and federal regulations. Rather, the question raised was whether Congress may enact partial regulations to be implemented together with state regulations governing election procedures. See id. at 382. Having answered that question in the affirmative, the Supreme Court denied the writ of habeas corpus filed by defendants who were convicted of violating the federal laws. See id. at 374, 399.

Foster, the more recent case, addressed an actual conflict between a state law and a federal law. Indeed, in Foster a blatant conflict existed between federal statutes requiring Congressional elections to be held “the Tuesday after the first Monday in November in an even-numbered year” and a state statutory scheme under which no election was held on the date designated by Congress if a candidate received a majority of the votes during an earlier “open primary” election. 522 U.S. at 68–69, 118 S.Ct. 464.

The Supreme Court explained that the issue to be decided was “a narrow one turning entirely on the meaning of the state and federal statutes ...” Id. at 71, 118 S.Ct. 464 (emphasis added). The Court defined election as encompassing “the combined actions of voters and officials meant to make a final selection of an officeholder ...” Id. The Court noted that Congress had established the Tuesday following the first Monday in November as “the day” for election. Id. Because the system in Louisiana was “concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress,” the Louisiana statute conflicted with 2 U.S.C. § 7, and was preempted. Id. at 73, 118 S.Ct. 464.

Because no Congressional election was to be held on the date Congress explicitly designated as “the day” for holding Congressional elections, the Louisiana statutory scheme clearly and directly conflicted with § 7. Reiterating that federal law “mandates holding all elections for Congress ... on
a single day throughout the Union,” *id.* at 70, 118 S.Ct. 464, the Court voided Louisiana’s statutory scheme. *See id.* at 74, 118 S.Ct. 464.

Unlike the statutory scheme voided in *Foster*, Proposition 200’s proof-of-citizenship provision does not present the blatant conflict addressed by the Supreme Court in that case. Indeed, the majority rests its analysis on what it perceives to be the “expansive” sweep of the Elections Clause. *Majority Opinion*, p. 391 n. 8. However, the message from *Siebold* is to the opposite effect. After taking great pains to emphasize the equal role of the states in preserving the integrity of federal elections, the Supreme Court counseled that we should not hasten to declare preemption of a state statutory scheme. Indeed, *Siebold* expressly held that the paramountcy of federal law extends only “so far as the two are inconsistent, and no farther....” *Siebold*, 100 U.S. at 386. The Court clarified that state and federal enactments conflict only “[i]f both cannot be performed ...” *Id.*

*Foster* couched its holding in similar fashion, clarifying that the preeminence of federal statutes over state statutes applies only to the extent that the two conflict, and only “so far as the conflict extends ...” *Foster*, 522 U.S. at 69, 118 S.Ct. 464, (*quoting Siebold*, 100 U.S. at 384).

In making the determination whether the Louisiana statutory scheme violated 2 U.S.C. § 7, the Supreme Court focused on the word “election” as used in § 7. *Id.* at 71. The Court consulted a dictionary for the definition of “election” to determine if a conflict existed between Louisiana’s statutory scheme and § 7.

It is important to remember that the Supreme Court opined that State enactments are superseded by Federal enactments only “[i]f both cannot be performed ...” *Siebold*, 100 U.S. at 386. As applied in *Foster*, the state statutory scheme was *453* voided because it was impossible to hold a Congressional election on the designated day if the election was in fact completed on an earlier date. *See Foster*, 522 U.S. at 73.

In my view, the majority opinion has stretched the principle established in *Siebold* and applied in *Foster* beyond its intended bounds. *FN2*

*FN2*. I do not agree that the cases cited on pages 4126–27 n.8 of the majority opinion establish that the Supreme Court has “construed Congress’s authority under the Election Clause expansively.” Rather, in the earlier years of this nation’s existence, when many states resisted the notion of a centralized government, these cases served to emphasize that federal elections conducted in the various states were subject to federal regulation. *See, e.g., The Ku Klux Cases*, 110 U.S. 651, 657–58, 4 S.Ct. 152, 28 L.Ed. 274 (1884) (“If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption....”); *id.* at 662, 4 S.Ct. 152 (“This proposition answers, also, another objection to the constitutionality of the laws under consideration, namely, that the right to vote for a member of congress ... is governed by the law of each state respectively....”).

Indeed, both *Siebold* and *Foster* took care to delineate that preemption extended only as far as a conflict exists, and no farther. *See Siebold*, 100 U.S. at 386; *Foster*, 522 U.S. at 69, 118 S.Ct. 464. And a conflict exists only if the two regulations cannot coexist. *See Siebold*, 100 U.S. at 386. As discussed above, such is not the case for Proposition 200’s requirement that a prospective voter present proof of citizenship, when considered with the contents of the Federal Form.

The fact that the NVRA contains a provision precluding the requirement of “notarization of other
formal authentication” in no way conflicts with Proposition 200's proof-of-citizenship requirement. Notarization and authentication are concerned with the genuineness of an executed document. See, e.g., Federal Rule of Evidence 901(a) (“The requirement of authentication ... is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”); see also In re Big River Grain, Inc., 718 F.2d 968, 971 (9th Cir.1983) (noting that “the notary's function is to protect against recording false instruments ...”). In contrast, Proposition 200's proof-of-citizenship requirement has nothing to do with notarization or authentication and everything to do with affirming eligibility for registration. Because the requirements of both the NVRA and Proposition 200 may be met without conflict, they can easily co-exist under the Election Clause. See Siebold, 100 U.S. at 386; Foster, 522 U.S. at 69, 118 S.Ct. 464. As both statutes may be enforced with no conflict, the NVRA does not pre-empt Proposition 200. See id. For that reason, I would affirm the district court's grant of summary judgment to the State of Arizona. I respectfully dissent from the majority's conclusion to the contrary.

Gonzalez v. Arizona
Supreme Court of the United States

Ellis GREGORY, Jr. and Anthony P. Nugent, Jr., Judges, Petitioners

v.

John D. ASHCROFT, Governor of Missouri.

No. 90-50.


Decided June 20, 1991.

Missouri state court judges challenged mandatory retirement provision of State Constitution. The United States District Court for the Eastern District of Missouri, William L. Hungate, J., granted Governor's motion to dismiss, and appeal was taken. The Court of Appeals, 898 F.2d 598, affirmed, and certiorari was sought. The Supreme Court, Justice O'Connor, held that: (1) appointed Missouri state judges constitute appointees "on a policymaking level," within meaning of exclusion to Federal Age Discrimination in Employment Act, and (2) Missouri Constitution's mandatory retirement provision does not violate equal protection.

Affirmed.

Justice White, concurred in part, dissented in part, concurred in judgment and filed opinion in which Justice Stevens joined.

Justice Blackmun, dissented and filed opinion in which Justice Marshall joined.

West Headnotes

[1] States 360 4.16(1)

360 States

360I Political Status and Relations

360I(A) In General

360k4.16 Powers of United States and Infringement on State Powers

360k4.16(1) k. In general. Most Cited Cases

(Formerly 360k4.16)

Authority of state's people to determine qualifications of their most important government officials lies at heart of representative government, and is reserved under Tenth Amendment and guaranteed by guaranty clause of Article 4, § 4. U.S.C.A. Const. Art. 4, § 4; Amend. 10.

[2] Judges 227 4.16(2)

227 Judges

227I Appointment, Qualification, and Tenure

227k5 k. Qualification. Most Cited Cases

States 360 4.16(2)

360 States

360I Political Status and Relations

360I(A) In General

360k4.16 Powers of United States and Infringement on State Powers

360k4.16(2) k. Federal laws invading state powers. Most Cited Cases

(Formerly 360k4.17)

Congressional interference with state's decision to establish qualifications for judges upsets usual constitutional balance of federal and state powers, and thus Congress must make its intention to do so unmistakably clear in language of statute.

[3] Commerce 83 82.20

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(K) Miscellaneous Subjects and Regulations

83k82.20 k. Subjects and regulations in general. Most Cited Cases

As against Congress' powers under commerce clause, authority of people of states to determine qualifications of their government officials may be inviolate. U.S.C.A. Const. Art. 1, § 8, cl. 3.
Appointed Missouri state judges constitute appointees “on a policymaking level,” within meaning of exclusion to federal Age Discrimination in Employment Act, absent clear congressional intent to include such judges within coverage of Act, regardless of whether Congress acted pursuant to its commerce clause powers or its powers under the enforcement section of the Fourteenth Amendment. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 14, § 5; Age Discrimination in Employment Act of 1967, § 11(f), as amended, 29 U.S.C.A. § 630(f).


92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4167 k. Hiring or appointment.

Most Cited Cases
(Formerly 92k278.4(2))

States 360 ☞ 4.16(1)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(1) k. In general. Most Cited Cases
(Formerly 360k4.16)
States' power to define qualifications of their officeholders has force even against proscriptions of Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 ☞ 3098(3)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)1 Age
92k3094 Labor, Employment, and Public Officials
92k3098 Retirement Issues
92k3098(3) k. Judges. Most Cited Cases
(Formerly 92k238.5)
State's mandatory retirement provision for judges, challenged on equal protection grounds, was subject to rational basis scrutiny; age is not suspect classification and judges had no fundamental interest in serving as judges. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 92 ☞ 3053

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3053 k. In general. Most Cited Cases
(Formerly 92k213.1(2))
Under rational basis test, Supreme Court will
not overturn law as violative of equal protection unless varying treatment of different groups or persons is so unrelated to achievement of any combination of legitimate purposes that court can only conclude that people's actions in approving it were irrational. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 Constitutional Law 92XXVI Equal Protection 92XXVI(B) Particular Classes 92XXVI(B)1 Age 92k3094 Labor, Employment, and Public Officials 92k3098 Retirement Issues 92k3098(3) k. Judges. Most Cited Cases (Formerly 92k238.5)

Judges 227 Judges
227I Appointment, Qualification, and Tenure
227k7 k. Term and tenure of office in general. Most Cited Cases

Missouri Constitution's mandatory retirement provision for judges reaching age of 70 does not violate equal protection; people could rationally determine that judges' physical and mental capacities would diminish with age and, unlike other state officials, election process might be inadequate to determine which judges' performance had become deficient. U.S.C.A. Const.Amend. 14; V.A.M.S. Const. Art. 5, § 26, subd. 1.

**2396 *452 Syllabus FN*  

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Article V, § 26 of the Missouri Constitution provides a mandatory retirement age of 70 for most state judges. Petitioners, judges subject to § 26, were appointed by the Governor and subsequently were retained in office by means of retention elections in which they ran unopposed, subject only to a “yes or no” vote. Along with other state judges, they filed suit against respondent Governor, alleging that § 26 violated the federal Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Protection Clause of the Fourteenth Amendment. The District Court granted the Governor's motion to dismiss, ruling that there was no ADEA violation because Missouri's appointed judges are not covered “employees” within the Act's terms, and that there was no equal protection violation because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies. The Court of Appeals affirmed.

Held:

1. Missouri's mandatory retirement requirement for judges does not violate the ADEA. Pp. 2399-2406.

(a) The authority of a State's people to determine the qualifications of their most important government officials lies “at the heart of representative government,” and is reserved under the Tenth Amendment and guaranteed by the Guarantee Clause of Article IV, § 4. See, e.g., Sugarman v. Dougall, 413 U.S. 634, 648, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853. Because congressional interference with the Missouri people's decision to establish a qualification for their judges would upset the usual constitutional balance of federal and state powers, Congress must make its intention to do so “unmistakably clear in the language of the statute.” See, e.g., Will v. Michigan Dept. of State Police, 491 U.S. 58, 65, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45. Moreover, where Congress acts pursuant to its Commerce Clause power—as it did in extending the ADEA to the States, see EEOC v. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18—the authority of a State's people to determine their government officials' qualifications may be inviolate.
Application**2397 of the Will plain statement rule to determine whether Congress intended the ADEA to apply to state judges may help the Court to avoid a potential constitutional problem. Pp. 2399-2403.

*453 b) Appointed state judges are not covered by the ADEA. When it extended the Act's substantive provisions to include the States as employers, Congress redefined “employee” to exclude all elected and most high-ranking state officials, including “appointee[s] on the policymaking level.” It is at least ambiguous whether a state judge is such an appointee. Regardless of whether the judge might be considered to make policy in the same sense as executive officials and legislators, the judge certainly is in a position requiring the exercise of discretion concerning issues of public importance, and therefore might be said to be “on the policymaking level.” Thus, it cannot be concluded that the ADEA “makes unmistakably clear,” Will, supra, 491 U.S. at 65, 109 S.Ct., at 2309, that appointed state judges are covered. Pp. 2403-2404.

(c) Even if Congress acted pursuant to its enforcement powers under § 5 of the Fourteenth Amendment, in addition to its Commerce Clause powers, when it extended the ADEA to state employment, the ambiguity in the Act's “employee” definition precludes this Court from attributing to Congress an intent to cover appointed state judges. Although, in EEOC v. Wyoming, supra, 460 U.S., at 243, and n. 18, 103 S.Ct., at 1064, and n. 18, the Court noted that the federalism principles constraining Congress' exercise of its Commerce Clause powers are attenuated when it acts pursuant to its § 5 powers, the Court’s political-function cases demonstrate that the Fourteenth Amendment does not override all such principles, see, e.g., Sugarsman, supra, 431 U.S., at 648, 93 S.Ct., at 2850. Of particular relevance here is Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694, in which the Court established that it will not attribute to Congress an unstated intent to intrude on traditional state authority in the exercise of its § 5 powers. That rule looks much like the plain statement rule applied supra, and pertains here in the face of the statutory ambiguity. Pp. 2404-2406.


(a) Petitioners correctly assert their challenge at the rational basis level, since age is not a suspect classification under the Equal Protection Clause, and since they do not claim that they have a fundamental interest in serving as judges. See, e.g., Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171. In such circumstances, this Court will not overturn a state constitutional provision unless varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that it can only be concluded that the people's actions in approving it were irrational. Ibid. P. 2406.

(b) The Missouri people rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal from office sufficiently inadequate, that they will require all judges to step aside at that age. Because it is an unfortunate fact of life *454 that physical and mental capacity sometimes diminish with age, the people may wish to replace some older judges in order to satisfy the legitimate, indeed compelling, public interest in maintaining a judiciary fully capable of performing judges' demanding tasks. Although most judges probably do not suffer significant deterioration at age 70, the people could reasonably conceive the basis for the classification to be true. See Bradley, supra, 440 U.S., at 111, 99 S.Ct., at 949-950. Voluntary retirement will not always be sufficient to serve acceptably the goal of a fully functioning judiciary, nor may impeachment, with its public humiliation and elaborate procedural machinery. The election process may also be inadequate, since most voters never observe**2398 judges in action nor read their opinions; since state judges serve longer terms than other officials, making them-deliberately-less dependent on the
people's will; and since infrequent retention elections may not serve as an adequate check on judges whose performance is deficient. That other state officials are not subject to mandatory retirement is rationally explained by the facts that their performance is subject to greater public scrutiny, that they are subject to more standard elections, that deterioration in their performance is more readily discernible, and that they are more easily removed than judges. Pp. 2406-2408.

898 F.2d 598 (CA8 1990), affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, and SCOTUS, JJ., joined, and in Parts I and III of which WHITE and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which STEVENS, J., joined, post, p. 2408. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 2414. Jim J. Shoemake argued the cause for petitioners. With him on the briefs were Thomas J. Guilfoil and Bruce Dayton Livingston.

James B. Deutsch, Deputy Attorney General of Missouri, argued the cause for respondent. With him on the brief were William L. Webster, Attorney General, and Michael L. Boicourt, Assistant Attorney General.*

*Cathy Ventrell-Monsees filed a brief for the American Association of Retired Persons as amicus curiae urging reversal.


Daniel G. Spraul filed a brief for Judge John W. Keefe as amicus curiae.

*455 Justice O'CONNOR delivered the opinion of the Court.

Article V, § 26, of the Missouri Constitution provides that “[a]ll judges other than municipal judges shall retire at the age of seventy years.” We consider whether this mandatory retirement provision violates the federal Age Discrimination in Employment Act of 1967 (ADEA or Act), 81 Stat. 602, as amended, 29 U.S.C. §§ 621-634, and whether it comports with the federal constitutional prescription of equal protection of the laws.

I

Petitioners are Missouri state judges. Judge Ellis Gregory, Jr., is an associate circuit judge for the Twenty-first Judicial Circuit. Judge Anthony P. Nugent, Jr., is a judge of the Missouri Court of Appeals, Western District. Both are subject to the § 26 mandatory retirement provision. Petitioners were appointed to office by the Governor of Missouri, pursuant to the Missouri Non-Partisan Court Plan, Mo. Const., Art. V, §§ 25(a)-25(g). Each has, since his appointment, been retained in office by means of a retention election in which the judge ran unopposed, subject only to a “yes or no” vote. See Mo.
Petitioners and two other state judges filed suit against John D. Ashcroft, the Governor of Missouri, in the United States District Court for the Eastern District of Missouri, challenging the validity of the mandatory retirement provision. The judges alleged that the provision violated both the ADEA and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Governor filed a motion to dismiss.

The District Court granted the motion, holding that Missouri's appointed judges are not protected by the ADEA because they are “appointees ... 'on a policymaking level' ” and therefore are excluded from the Act's definition of “employee.” App. to Pet. for Cert. 22. The court held also that the mandatory retirement provision does not violate the Equal Protection Clause because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies. Id., at 23.

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal. 898 F.2d 598 (1990). That court also held that appointed judges are “'appointee[s] on the policymaking level,' ” and are therefore not covered under the ADEA. Id., at 604. The Court of Appeals held as well that Missouri had a rational basis for distinguishing judges who had reached the age of 70 from those who had not. Id., at 606.

We granted certiorari on both the ADEA and equal protection questions, 498 U.S. 979, 111 S.Ct. 507, 112 L.Ed.2d 519 (1990), and now affirm.

II

The ADEA makes it unlawful for an “employer” “to discharge any individual” who is at least 40 years old “because of such individual's age.” 29 U.S.C. §§ 623(a), 631(a). The term “employer” is defined to include “a State or political subdivision of a State.” § 630(b)(2). Petitioners work for the State of Missouri. They contend that the Missouri mandatory retirement requirement for judges violates the ADEA.

As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In Tafflin v. Levitt, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990), “[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.” Over 120 years ago, the Court described the constitutional scheme of dual sovereigns:

"'[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' ... '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” Texas v. White, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting Lane County v. Oregon, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).

The Constitution created a Federal Government of limited powers. “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.” U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it:
“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. See generally McConnell, Federalism: Evaluating the Founders' Design, 54 U.Chi.L.Rev. 1484, 1491-1511 (1987); Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum.L.Rev. 1, 3-10 (1988).

Perhaps the principal benefit of the federalist system is a check on abuses of government power. “The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’ ” Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S.Ct. 2342, 3147, 87 L.Ed.2d 171 (1985), quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028, 83 L.Ed.2d 1016 (1985) (Powell, J., dissenting). Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would suppress completely “the attempts of the government to establish a tyranny”:

“In a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.” The Federalist No. 28, pp. 180-181 (C. Rossiter ed. 1961).

James Madison made much the same point: “In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.” Id., No. 51, p. 323.

One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this “double security” is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.
advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. “It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.” Taylor v. Beckham, 178 U.S. 548, 570-571, 20 S.Ct. 890, 898, 44 L.Ed. 1187 (1900). See also **2401Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 161, 12 S.Ct. 375, 381-382, 12 S.Ct. 375, 381-382, 36 L.Ed. 103 (1892) (“Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen”).

Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides” this balance. **2402Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 [105 S.Ct. 3142, 3147, 87 L.Ed.2d 171] (1985); see also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 [104 S.Ct. 900, 907, 79 L.Ed.2d 67] (1984). Atascadero was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947). ‘In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.’ United States v. Bass, 404 U.S. 336, 349 [92 S.Ct. 515, 523, 30 L.Ed.2d 488] (1971).” Will v. Michigan Dept. of State Police, 491 U.S. 58, 65, 109 S.Ct. 2304, 2308, 105 L.Ed.2d 45 (1989).

This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

In a recent line of authority, we have acknowledged the unique nature of state decisions that “go to the heart of representative government.” Sugarman v. Dougall, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973). Sugarman was the first in a series of cases to consider the restrictions imposed by the Equal Protection Clause of the Fourteenth Amendment on the ability of state and local governments to prohibit aliens from public employment. In that case, the Court struck down under the Equal Protection Clause a New York City law that provided a flat ban against the employment of aliens in a wide variety of city jobs. Ibid.

The Court did not hold, however, that alienage could never justify exclusion from public employment. We recognized explicitly the States’ constitutional power to establish the qualifications for those
who would govern:

"Just as 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth *462 Amendment, the power to regulate elections,' * Oregon v. Mitchell, 400 U.S. 112, 124-125 [91 S.Ct. 260, 264-265, 27 L.Ed.2d 272] (1970) (footnote omitted) (opinion of Black, J.); see * id., at 201 [91 S.Ct., at 303] (opinion of Harlan, J.), and * id., at 293-294 [91 S.Ct., at 348-349] (opinion of Stewart, J.), "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." * Boyd v. Thayer, 143 U.S. 135, 161 [12 S.Ct. 375, 381-382, 36 L.Ed. 103] (1892). See * Luther v. Borden, 7 How. 1, 41 [12 L.Ed. 581] (1849); * Pope v. Williams, 193 U.S. 621, 632-633 [24 S.Ct. 573, 575-576, 48 L.Ed. 817] (1904). Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' * Dunn v. Blumstein, 405 U.S. [330, 344, 92 S.Ct. 995, 1004, 31 L.Ed.2d 274] (1972). And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective and important nonelective executive,**2402 legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." * Ibid.

We explained that, while the Equal Protection Clause provides a check on such state authority, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." * Id., at 648, 93 S.Ct., at 2850. This rule "is no more than ... a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders. U.S. Const. Art. IV, § 4; U.S. Const. Amdt. X; Luther v. Borden, supra; see * In re Duncan, 139 U.S. 449, 461 [11 S.Ct. 573, 577, 35 L.Ed. 219] (1891)." * Ibid.

In several subsequent cases we have applied the "political function" exception to laws through which States exclude aliens from positions "intimately related to the process of democratic self-government." See * Bernal v. Fainter, 467 U.S. 216, 220, 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984). See also * Nyquist v. Mauclet, 432 U.S. 1, 11, 97 S.Ct. 2120, 2126, 53 L.Ed.2d 63 (1977); *463 * Foley v. Connelie, 435 U.S. 291, 295-296, 98 S.Ct. 1067, 1070-1071, 55 L.Ed.2d 287 1978); * Ambach v. Norwich, 441 U.S. 68, 73-74, 99 S.Ct. 1589, 1592-1593, 60 L.Ed.2d 49 (1979); * Cabell v. Chavez-Salido, 454 U.S. 432, 439-441, 102 S.Ct. 735, 739-741, 70 L.Ed.2d 677 (1982). "We have ... lowered our standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations 'go to the heart of representative government.' " * Bernal, 467 U.S., at 221, 104 S.Ct., at 2316 (citations omitted).

[1][2][3] These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. * FN4 It is an authority that lies at "the heart of representative government." * Ibid. It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States “guarantee[s] to every State in this Union a Republican Form of Government." * U.S. Const., Art. IV, § 4. See * Sugarman, supra, 413 U.S., at 648, 93 S.Ct., at 2850-2851 (citing the Guarantee Clause and the Tenth Amendment). See also * Merritt, 88 Colum.L.Rev., at 50-55.

*FN4 Justice WHITE believes that the "political function" cases are inapposite because they involve limitations on "judicially created scrutiny" rather than "Congress' legislative authority," which is at issue here. * Post, at 2409-2410. He apparently suggests that Congress has greater authority to interfere with state sovereignty when acting pursuant to its Commerce
Clause powers than this Court does when applying the Fourteenth Amendment. Elsewhere in his opinion, Justice WHITE emphasizes that the Fourteenth Amendment was designed as an intrusion on state sovereignty. See post, at 2411. That being the case, our diminished scrutiny of state laws in the “political function” cases, brought under the Fourteenth Amendment, argues strongly for special care when interpreting alleged congressional intrusions into state sovereignty under the Commerce Clause.

The authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit. Other constitutional provisions, most notably the Fourteenth Amendment, proscribe certain qualifications; our review of citizenship requirements under the political function exception is less exacting, but it is not absent. Here, we must decide what Congress did in extending the ADEA to the States, pursuant to its powers under the Commerce Clause. See EEOC v. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (the extension of the ADEA to employment by state and local governments was a valid exercise of Congress’ powers under the Commerce Clause). As against Congress’ powers “[t]o regulate Commerce ... among the several States,” U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.

We are constrained in our ability to consider the limits that the state-federal balance places on Congress’ powers under the Commerce Clause. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (declining to review limitations placed on Congress’ Commerce Clause powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in Garcia has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. “[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states’ interests.” L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988).

B

In 1974, Congress extended the substantive provisions of the ADEA to include the States as employers. Pub.L. 93-259, § 28(a), 88 Stat. 74, 29 U.S.C. § 630(b)(2). At the same time, Congress amended the definition of “employee” to exclude all elected and most high-ranking government officials. Under the Act, as amended:

*465 “The term ‘employee’ means an individual employed by any employer except that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.” 29 U.S.C. § 630(f).

Governor Ashcroft contends that the § 630(f) exclusion of certain public officials also excludes judges, like petitioners, who are appointed to office by the Governor and are then subject to retention election. The Governor points to two passages in § 630(f). First, he argues, these judges are selected by an elected official and, because they make policy, are “appointee[s] on the policymaking level.”

Petitioners counter that judges merely resolve factual disputes and decide questions of law; they do not make policy. Moreover, petitioners point out that the policymaking-level exception is part of a trilogy, tied closely to the elected-official excep-
tion. Thus, the Act excepts elected officials and: (1) “any person chosen by such officer to be on such officer’s personal staff”; (2) “an appointee on the policymaking level”; and (3) “an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.” Applying the maxim of statutory construction *noscitur a sociis*—that a word is known by the company it keeps—petitioners argue that since (1) and (3) refer only to those in close working relationships with elected officials, so too must (2). Even if it can be said that judges may make policy, petitioners contend, they do not do so at the behest of an elected official.

Governor Ashcroft relies on the plain language of the statute: It exempts persons appointed “at the policymaking level.” The Governor argues that state judges, in fashioning and applying the common law, make policy. Missouri is a common law state. See Mo.Rev.Stat. § 1.010 (1986) (adopting “[t]he common law of England” consistent with federal and state law). The common law, unlike a constitution or statute, provides no definitive text; it is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community. As Justice Holmes put it:

**2404** “The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis.” O. Holmes, The Common Law 35-36 (1881).

Governor Ashcroft contends that Missouri judges make policy in other ways as well. The Missouri Supreme Court and Courts of Appeals have supervisory authority over inferior courts. Mo. Const., Art. V, § 4. The Missouri Supreme Court has the constitutional duty to establish rules of practice and procedure for the Missouri court system, and inferior courts exercise policy judgment in establishing local rules of practice. See Mo. Const., Art. V, § 5. The state courts have supervisory powers over the state bar, with the Missouri Supreme Court given the authority to develop disciplinary rules. See Mo.Rev.Stat. §§ 484.040, 484.200-484.270 (1986); Rules Governing the Missouri Bar and the Judiciary (1991).

[4] The Governor stresses judges’ policymaking responsibilities, but it is far from plain that the statutory exception requires that judges actually make policy. The statute refers to appointees “on the policymaking level,” not to appointees “who make policy.” It may be sufficient that the appointee*467* is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature.

Nonetheless, “appointee at the policymaking level,” particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not “employees” would seem the most efficient phrasing. But in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included. This does not mean that the Act must mention judges explicitly, though it does not. Cf. *Dellmuth v. Muth*, 491 U.S. 223, 233, 109 S.Ct. 2397, 2403, 105 L.Ed.2d 181 (1989) (SCALIA, J., concurring). Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, “appointee on the policymaking level” is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.
The ADEA plainly covers all state employees except those excluded by one of the exceptions. Where it is unambiguous that an employee does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included. It is at least ambiguous whether a state judge is an “appointee on the policymaking level.”

Governor Ashcroft points also to the “person elected to public office” exception. He contends that because petitioners—although appointed to office initially—are subject to retention election, they are “elected to public office” under the ADEA. Because we conclude that petitioners fall presumptively under the policymaking-level exception, we need not answer this question.

C

The extension of the ADEA to employment by state and local governments was a valid exercise of Congress’ powers under the Commerce Clause. *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). In *Wyoming*, we reserved the question whether Congress might also have passed the ADEA extension pursuant to its powers under § 5 of the Fourteenth Amendment, and whether the extension would have been a valid exercise of that power. *Id.*, at 243, and n. 18, 103 S.Ct., at 1064, and n. 18. We noted, however, that the principles of federalism that constrain Congress’ exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments. *Id.*, at 243, and n. 18, 103 S.Ct., at 1064, and n. 18, citing *City of Rome v. United States*, 446 U.S. 156, 179, 100 S.Ct. 1548, 1563, 64 L.Ed.2d 119 (1980). This is because those “Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.” *Id.*, at 179, 100 S.Ct., at 1563. One might argue, therefore, that if Congress passed the ADEA extension under its § 5 powers, the concerns about federal intrusion into state government that compel the result in this case might carry less weight.

By its terms, the Fourteenth Amendment contemplates interference with state authority: “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amdt. 14. But this Court has never held that the Amendment may be applied in complete disregard for a State’s constitutional powers. Rather, the Court has recognized that the States’ power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment.

We return to the political-function cases. In *Sugarman*, the Court noted that “aliens as a class ‘are a prime example of a “discrete and insular” minority’” (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 [58 S.Ct. 778, 783-784, n. 4, 82 L.Ed. 1234 (1938)],’ and that classifications based on alienage are ‘subject to close judicial scrutiny.’” 413 U.S., at 642, 93 S.Ct., at 2847, quoting *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971). The *Sugarman* Court held that New York City had insufficient interest in preventing aliens from holding a broad category of public jobs to justify the blanket prohibition. 413 U.S., at 647, 93 S.Ct., at 2850. At the same time, the Court established the rule that scrutiny under the Equal Protection Clause “will not be so demanding where we deal with matters resting firmly within a State’s constitutional prerogatives.” *Id.*, at 648, 93 S.Ct., at 2850. Later cases have reaffirmed this practice. See *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978); *Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979); *Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed.2d 677 (1982). These cases demonstrate that the Fourteenth Amendment does not override all principles of federalism.

Of particular relevance here is *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). The question in that case was whether Congress, in passing a section of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1982 ed.)
intended to place an obligation on the States to provide certain kinds of treatment to the disabled. Respondent Halderman argued that Congress passed § 6010 pursuant to § 5 of the Fourteenth Amendment, and therefore that it was mandatory on the States, regardless of whether they received federal funds. Petitioner and the United States, as respondent, argued that, in passing § 6010, Congress acted pursuant to its spending power alone. Consequently, § 6010 applied only to States accepting federal funds under the Act.

The Court was required to consider the “appropriate test for determining when Congress intends to enforce” the guarantees of the Fourteenth Amendment. 451 U.S., at 16, 101 S.Ct., at 1539. We adopted a rule fully cognizant of the traditional power of the States: “Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.” Ibid. Because Congress nowhere stated its intent to impose mandatory obligations on the States under its § 5 powers, we concluded that Congress did not do so. Ibid.

*470 The Pennhurst rule looks much like the plain statement rule we apply today. In EEOC v. Wyoming, the Court explained that Pennhurst established a rule of statutory construction to be applied where statutory intent is ambiguous. 460 U.S., at 244, n. 18, 103 S.Ct., at 1064, n. 18. In light of the ADEA's clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included. In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.

III

Petitioners argue that, even if they are not covered by the ADEA, the Missouri Constitution's mandatory retirement provision for judges violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioners contend that there is no rational basis for the decision of the people of Missouri to preclude those aged 70 and over from serving as their judges. They claim that the mandatory retirement provision makes two irrational distinctions: between judges who have reached age 70 and younger judges, and between judges 70 and over and other state employees of the same age who are not subject to mandatory retirement.

[6][7] Petitioners are correct to assert their challenge at the level of rational basis. This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-314, 96 S.Ct. 2562, 2566-2567, 49 L.Ed.2d 520 (1976); Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171 (1979); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985). Nor do petitioners claim that they have a fundamental interest in serving as judges. The State need therefore assert only a rational basis for its age classification. See Murgia, supra, 427 U.S., at 314, 96 S.Ct., at 2567; Bradley, 440 U.S., at 97, 99 S.Ct., at 942. In cases where a classification burdens neither a suspect group nor a fundamental interest, “courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.” Ibid. In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole. This constitutional provision reflects both the considered judgment of the state legislature that proposed it and that of the citizens of Missouri who voted for it. See 1976 Mo.Laws 812 (proposing the mandatory retirement provision of § 26); Mo. Const., Art. XII, §§ 2(a), 2(b) (describing the amendment process). “[W]e will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination...
of legitimate purposes that we can only conclude that the [people's] actions were irrational.” Bradley, supra, at 97, 99 S.Ct., at 943. See also Pennell v. San Jose, 485 U.S. 1, 14, 108 S.Ct. 849, 859, 99 L.Ed.2d 1 (1988).

[8] Governor Ashcroft cites O’Neil v. Baine, 568 S.W.2d 761 (Mo.1978) (en banc), as a fruitful source of rational bases. In O’Neil, the Missouri Supreme Court-to whom Missouri Constitution Article V, § 26, applies-considered an equal protection challenge to a state statute that established a mandatory retirement age of 70 for state magistrate and probate judges. The court upheld the statute, declaring numerous legitimate state objectives it served: “The statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system”; “the statute ... draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not”; “mandatory retirement increases the opportunity for qualified persons ... to share in the judiciary and permits an orderly attrition through retirement”; “such a mandatory provision also assures predictability and ease in establishing and administering judges’ pension plans.” Id., at 766-767. Any one of these explanations is sufficient to rebut the claim that “the varying treatment of different groups or persons [in § 26] is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people’s] actions were irrational.” Bradley, supra, 440 U.S., at 97, 99 S.Ct., at 943.

The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. See Bradley, supra, at 111-112, 99 S.Ct., at 949-950; Murgia, supra, 427 U.S., at 315, 96 S.Ct., at 2568. The people may therefore wish to replace some older judges. Voluntary retirement will not always be sufficient. Nor may impeachment—with its public humiliation and elaborate procedural machinery—serve acceptably the goal of a fully functioning judiciary. See Mo. Const., Art. VII, §§ 1-3.

The election process may also be inadequate. Whereas the electorate would be expected to discover if their governor or state legislator were not performing adequately and vote the official out of office, the same may not be true of judges. Most voters never observe state judges in action, nor read judicial opinions. State judges also serve longer terms of office than other public officials, making them-deliberately-less dependent on the will of the people. Compare Mo. Const., Art. V, § 19 (Supreme Court justices and Court of Appeals judges serve 12-year terms; Circuit Court judges 6 years), with Mo. Const., Art. IV, § 17 (Governor, Lieutenant Governor, secretary of state, state treasurer, and attorney general serve 4-year terms) and Mo. Const., Art. III, § 11 (state representatives serve 2-year terms; state senators 4 years). Most of these judges do not run in ordinary elections. See Mo. Const., Art. V, § 25(a). The people of Missouri rationally could conclude that retention elections—in which state judges run unopposed at relatively long intervals—do not serve as an adequate check on judges whose performance is deficient. Mandatory retirement is a reasonable response to this dilemma.

*473 This is also a rational explanation for the fact that state judges are subject to a mandatory retirement provision, while other state officials—whose performance is subject to greater public scrutiny, and who are subject to more standard elections—are not. Judges' general lack of accountability explains also the distinction between judges and other state employees, in whom a deterioration in performance is more readily discernible and who are more easily removed.

The Missouri mandatory retirement provision, like all legal classifications, is founded on a generalization. It is far from true that all judges suffer
significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all. But a State “‘does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.’ ”

Murgia, 427 U.S., at 316, 96 S.Ct., at 2568, quoting Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970). “In an equal protection case of this type ... those challenging the ... judgment [of the people] must convince the court that **2408 the ... facts on which the classification is apparently based could not reasonably be conceived to be true by the ... decisionmaker.” Bradley, 440 U.S., at 111, 99 S.Ct., at 949. The people of Missouri rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70. This classification does not violate the Equal Protection Clause.

IV

The people of Missouri have established a qualification for those who would be their judges. It is their prerogative as citizens of a sovereign State to do so. Neither the ADEA nor the Equal Protection Clause prohibits the choice they have made. Accordingly, the judgment of the Court of Appeals is Affirmed.

*474 Justice WHITE, with whom Justice STEVENS joins, concurring in part, dissenting in part, and concurring in the judgment.

I agree with the majority that neither the Age Discrimination in Employment Act (ADEA) nor the Equal Protection Clause prohibits Missouri’s mandatory retirement provision as applied to petitioners, and I therefore concur in the judgment and in Parts I and III of the majority’s opinion. I cannot agree, however, with the majority's reasoning in Part II of its opinion, which ignores several areas of well-established precedent and announces a rule that is likely to prove both unwise and infeasible. That the majority's analysis in Part II is completely unnecessary to the proper resolution of this case makes it all the more remarkable.

I

In addition to petitioners' equal protection claim, we granted certiorari to decide the following question:

“Whether appointed Missouri state court judges are 'appointee[s] on the policymaking level' within the meaning of the Age Discrimination in Employment Act ('ADEA'), 28 U.S.C. §§ 621-34 (1982 & Supp.V 1987), and therefore exempted from the ADEA's general prohibition of mandatory retirement and thus subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution.” Pet. for Cert. i.

The majority, however, chooses not to resolve that issue of statutory construction. Instead, it holds that whether or not the ADEA can fairly be read to exclude state judges from its scope, “[w]e will not read the ADEA to cover state judges unless Congress has made it clear that judges are included.” Ante, at 2404 (emphasis in original). I cannot agree with this “plain statement” rule because it is unsupported by the decisions upon which the majority relies, contrary to our Tenth Amendment jurisprudence, and fundamentally unsound.

*475 Among other things, the ADEA makes it “unlawful for an employer-(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.” 29 U.S.C. § 623(a). In 1974, Congress amended the definition of “employer” in the ADEA to include “a State or political subdivision of a State.” § 630(b)(2). With that amendment, “there is no doubt what the intent of Congress was: to extend the application of the ADEA to the States.” EEOC v. Wyoming, 460 U.S. 226, 244, n. 18, 103 S.Ct. 1054, 1064, n. 18, 75 L.Ed.2d 18 (1983).

The dispute in this case therefore is not wheth-
er Congress has outlawed age discrimination by the States. It clearly has. The only question is whether petitioners fall within the definition of "employee" in the Act, § 630(f), which contains exceptions for elected officials and certain appointed officials. If petitioners are "employee[s]," Missouri's mandatory retirement provision clearly conflicts with the antidiscrimination provisions of the AD- 

The majority also relies heavily on our cases addressing the constitutionality of state exclusion of aliens from public employment. See ante, at 2401-2402, 2404-2406. In those cases, we held that although restrictions based on alienage ordinarily are subject to strict scrutiny under the Equal Protection Clause, see Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971), the scrutiny will be less demanding for exclusion of aliens "from positions intimately related to the process of democratic self-government." Bernal v. Fainter, 467 U.S. 216, 220, 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984). This narrow "political-function" exception to the strict-scrutiny standard is based on the "State's historical power to exclude aliens from participation in its democratic political institutions." Sugarman v. Dougall, 413 U.S. 634, 648, 93 S.Ct. 2842, 2850-2851, 37 L.Ed.2d 853 (1973).

It is difficult to see how the "political-function" exception supports the majority's plain statement rule. First, the exception merely reflects a determination of the scope of the rights of aliens under the Equal Protection Clause. Reduced scrutiny is appropriate for certain political functions because "the right to govern is reserved to citizens." Foley v. Connelie, 435 U.S. 291, 297, 98
S.Ct. 1067, 1071, 55 L.Ed.2d 287 (1978); see also Sugarman, supra, 413 U.S., at 648-649, 93 S.Ct., at 2850-2851. This conclusion in no way establishes a method for interpreting rights that are statutorily created by Congress.**2410 such as the protection from age discrimination in the ADEA. Second, it is one thing to limit judicially created scrutiny, and it is quite another to fashion a restraint on Congress' legislative authority, as does the majority; the latter is both counter-majoritarian and an intrusion on a coequal branch of the Federal Government. Finally, the majority does not explicitly restrict its rule to "functions that go to the heart of representative government," 413 U.S., at 647, 93 S.Ct., at 2850, and may in fact be extending it much further to all "state governmental functions." See ante, at 2406.

The majority's plain statement rule is not only unprecedented, it directly contravenes our decisions in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), and South Carolina v. Baker, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988). In those cases we made it clear "that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." Id., at 512, 108 S.Ct., at 1360. We also rejected as "unsound in principle and unworkable in practice" any test for state immunity that requires a judicial determination of which state activities are "traditional," "integral," or "necessary." Garcia, supra, 469 U.S., at 546, 105 S.Ct., at 1015. The majority disregards those decisions in its attempt to carve out areas of state activity that will receive special protection from federal legislation.

*478 The majority’s approach is also unsound because it will serve only to confuse the law. First, the majority fails to explain the scope of its rule. Is the rule limited to federal regulation of the qualifications of state officials? See ante, at 2403. Or does it apply more broadly to the regulation of any "state governmental functions"? See ante, at 2406. Second, the majority does not explain its requirement that Congress’ intent to regulate a particular state activity be "plain to anyone reading [the federal statute]." See ante, at 2404. Does that mean that it is now improper to look to the purpose or history of a federal statute in determining the scope of the statute’s limitations on state activities? If so, the majority’s rule is completely inconsistent with our pre-emption jurisprudence. See, e.g., Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714 (1985) (pre-emption will be found where there is a "clear and manifest purpose" to displace state law) (emphasis added). The vagueness of the majority’s rule undoubtedly will lead States to assert that various federal statutes no longer apply to a wide variety of state activities if Congress has not expressly referred to those activities in the statute. Congress, in turn, will be forced to draft long and detailed lists of which particular state functions it meant to regulate.

The imposition of such a burden on Congress is particularly out of place in the context of the ADEA. Congress already has stated that all "individual[s] employed by any employer" are protected by the ADEA unless they are expressly excluded by one of the exceptions in the definition of "employee." See 29 U.S.C. § 630(f). The majority, however, turns the statute on its head, holding that state judges are not protected by the ADEA because "Congress has [not] made it clear that judges are included." Ante, at 2404 (emphasis in original). Cf. EEOC v. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), where we held that state game wardens are covered by the ADEA, even though such employees are not expressly included within the ADEA’s scope.

*479 The majority asserts that its plain statement rule is helpful in avoiding a "potential constitutional problem." Ante, at 2403. It is far from clear, however, why there would be a constitutional problem if the ADEA applied to state judges, in light of our decisions in Garcia and Baker, discussed above. As long as “the national political
process did not operate in a defective manner, the Tenth Amendment is not implicated.**2411 Baker, supra, 485 U.S., at 513, 108 S.Ct., at 1361. There is no claim in this case that the political process by which the ADEA was extended to state employees was inadequate to protect the States from being “unduly burden[ed]” by the Federal Government. See Garcia, supra, 469 U.S., at 556, 105 S.Ct., at 1020. In any event, as discussed below, a straightforward analysis of the ADEA’s definition of “employee” reveals that the ADEA does not apply here. Thus, even if there were potential constitutional problems in extending the ADEA to state judges, the majority’s proposed plain statement rule would not be necessary to avoid them in this case. Indeed, because this case can be decided purely on the basis of statutory interpretation, the majority’s announcement of its plain statement rule, which purportedly is derived from constitutional principles, violates our general practice of avoiding the unnecessary resolution of constitutional issues.

My disagreement with the majority does not end with its unwarranted announcement of the plain statement rule. Even more disturbing is its treatment of Congress’ power under § 5 of the Fourteenth Amendment. See ante, at 2404-2406. Section 5 provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Despite that sweeping constitutional delegation of authority to Congress, the majority holds that its plain statement rule will apply with full force to legislation enacted to enforce the Fourteenth Amendment. The majority states: “In the face of ... ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its *480 Commerce Clause powers or § 5 of the Fourteenth Amendment.” Ante, at 2406 (emphasis added).FN1

FN1. In EEOC v. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), we held that the extension of the ADEA to the States was a valid exercise of congressional power under the Commerce Clause. We left open, however, the issue whether it was also a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. Cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 453, n. 9, 96 S.Ct. 2666, 2670, n. 9, 49 L.Ed.2d 614 (1976) (extension of Title VII of Civil Rights Act of 1964 to States was pursuant to Congress’ § 5 power). Although we need not resolve the issue in this case, I note that at least two Courts of Appeals have held that the ADEA was enacted pursuant to Congress’ § 5 power. See Heiar v. Crawford County, 746 F.2d 1190, 1193-1194 (CA7 1984); Ramirez v. Puerto Rico Fire Service, 715 F.2d 694, 700 (CA1 1983).

The majority’s failure to recognize the special status of legislation enacted pursuant to § 5 ignores that, unlike Congress’ Commerce Clause power, “[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.” Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). Indeed, we have held that “principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation.’ Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.” City of Rome v. United States, 446 U.S. 156, 179, 100 S.Ct. 1548, 1562-1563, 64 L.Ed.2d 119 (1980); see also EEOC v. Wyoming, supra, 460 U.S., at 243, n. 18, 103 S.Ct., at 1064, n. 18.

The majority relies upon Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), see ante, at 2405-2406, but that case does not support its ap-
proach. There, the Court merely stated that “we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.” 451 U.S., at 16, 101 S.Ct., at 1539. In other words, the Pennhurst presumption was designed only to answer the question whether a particular piece of legislation was enacted pursuant to § 5. That is very different from the majority's apparent holding that even when Congress is acting pursuant to § 5, it nevertheless must specify the precise details of its enactment.

The majority's departures from established precedent are even more disturbing when it is realized, as discussed below, that this case can be affirmed based on simple statutory construction.

II

The statute at issue in this case is the ADEA's definition of “employee,” which provides:

“The term ‘employee’ means an individual employed by any employer except that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.” 29 U.S.C. § 630(f).

A parsing of that definition reveals that it excludes from the definition of “employee” (and thus the coverage of the ADEA) four types of (noncivil service) state and local employees: (1) persons elected to public office; (2) the personal staff of elected officials; (3) persons appointed by elected officials to be on the policymaking level; and (4) the immediate advisers of elected officials with respect to the constitutional or legal powers of the officials' offices.

The question before us is whether petitioners fall within the third exception. Like the Court of Appeals, see 898 F.2d 598, 600 (CA8 1990), I assume that petitioners, who were initially appointed to their positions by the Governor of Missouri, are “appointed” rather than “elected” within the meaning of the ADEA. For the reasons below, I also conclude that petitioners are “on the policymaking level.”


“Policy” is defined as “a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions.” Webster's Third New International Dictionary 1754 (1976). Applying that definition, it is clear that the decisionmaking engaged in by common-law judges, such as petitioners, places them “on the policymaking level.” In resolving disputes, although judges do not operate with unconstrained discretion, they do choose “from among alternatives” and elaborate their choices in order “to guide and ... determine present and future decisions.” The quotation from Justice Holmes in the majority's opinion, see ante, at 2404, is an eloquent description of the policymaking nature of the judicial function. Justice Cardozo also stated it well:

“Each [common-law judge] indeed is legislating within the limits of his competence. No doubt the
limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law.... [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made.” B. Cardozo, The Nature of the Judicial Process 113-115 (1921).

Moreover, it should be remembered that the statutory exception refers to appointees “on the policymaking level,” not “policymaking employees.” Thus, whether or not judges actually make policy, they certainly are on the same level as policymaking officials in other branches of government and therefore are covered by the exception. The degree of responsibility vested in judges, for example, is comparable to that of other officials that have been found by the lower courts to be on the policymaking level. See, e.g., EEOC v. Reno, 758 F. 2d 581 (CA11 1985) (assistant state attorney); EEOC v. Board of Trustees of Wayne Cty. Community College, 723 F. 2d 509 (CA6 1983) (president of community college).

Petitioners argue that the “appointee[s] on the policymaking level” exception should be construed to apply “only to persons who advise or work closely with the elected official that chose the appointee.” Brief for Petitioners 18. In support of that claim, petitioners point out that the exception is “sandwiched” between the “personal staff” and “immediate adviser” exceptions in § 630(f), and thus should be read as covering only similar employees.

Petitioners’ premise, however, does not prove their conclusion. It is true that the placement of the “appointee” exception between the “personal staff” and “immediate adviser” exceptions suggests a similarity among the three. But the most obvious similarity is simply that each of the three sets of employees are connected in some way with elected officials: The first and third sets have a certain working relationship with elected officials, while the second is appointed by elected officials. There is no textual support for concluding that the second set must also have a close working relationship with elected officials. Indeed, such a reading would tend to make the “appointee” exception superfluous since the “personal staff” and “immediate adviser” exceptions would seem to cover most appointees who are in a close working relationship with elected officials.

Petitioners seek to rely on legislative history, but it does not help their position. There is little legislative history discussing the definition of “employee” in the ADEA, so petitioners point to the legislative history of the identical definition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f). If anything, that history tends to confirm that the “appointee[s] on the policymaking level” exception was designed to exclude from the coverage of the ADEA all high-level appointments throughout state government structures, including judicial appointments.

For example, during the debates concerning the proposed extension of Title VII to the States, Senator Ervin repeatedly expressed his concern that the (unamended) definition of “employee” would be construed to reach those “persons who exercise the legislative, executive, and judicial powers of the States and political subdivisions of the States.” 118 Cong.Rec. 1838 (1972) (emphasis added). Indeed, he expressly complained that “[t]here is not even an exception in the [unamended] bill to the effect that the EEOC will not have jurisdiction over ... State judges, whether they are elected or appointed to office.” Id., at 1677. Also relevant is Senator Taft’s comment that, in order to respond to Senator Ervin’s concerns, he was willing to agree to an exception not only for elected officials, but also for “those at the top decisionmaking levels in the executive and judicial branch as well.” Id., at 1838.

The definition of “employee” subsequently was modified to exclude the four categories of employees discussed above. The Conference Committee that added the “appointee[s] on the policymaking level” exception made clear the separate nature of
that exception:

“It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as *485 cabinet officers, and persons with comparable**2414 responsibilities at the local level.” H.R.Conf.Rep. No. 92-899, pp. 15-16 (1972) (emphasis added).

The italicized “or” in that statement indicates, contrary to petitioners’ argument, that appointed officials need not be advisers to be covered by the exception. Rather, it appears that “Congress intended two categories: policymakers, who need not be advisers; and advisers, who need not be policymakers.” EEOC v. Massachusetts, 858 F.2d 52, 56 (CA1 1988). This reading is confirmed by a statement by one of the House Managers, Representative Erlenborn, who explained that “[i]n the conference, an additional qualification was added, exempting those people appointed by officials at the State and local level in policymaking positions.” 118 Cong.Rec., at 7567.

In addition, the phrase “the highest levels” in the Conference Report suggests that Congress’ intent was to limit the exception “down the chain of command, and not so much across agencies or departments.” EEOC v. Massachusetts, 858 F.2d, at 56. I also agree with the First Circuit’s conclusion that even lower court judges fall within the exception because “each judge, as a separate and independent judicial officer, is at the very top of his particular ‘policymaking’ chain of command, responding ... only to a higher appellate court.” Ibid.

For these reasons, I would hold that petitioners are excluded from the coverage of the ADEA because they are “appointee[s] on the policymaking level” under 29 U.S.C. § 630(f). FN3

FN3. The dissent argues that we should defer to the EEOC's view regarding the scope of the “policymaking level” exception. See post, at 2418. I disagree. The EEOC's position is not embodied in any formal issuance from the agency, such as a regulation, guideline, policy statement, or administrative adjudication. Instead, it is merely the EEOC's litigating position in recent lawsuits. Accordingly, it is entitled to little if any deference. See, e.g., Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-213, 109 S.Ct. 468, 473-474, 102 L.Ed.2d 493 (1988); St. Agnes Hospital v. Sullivan, 284 U.S.App.D.C. 396, 401, 905 F.2d 1563, 1568 (1990). Although the dissent does cite to an EEOC decision involving the policymaking exception in Title VII, see post, at 2418, that decision did not state, even in dicta, that the exception is limited to those who work closely with elected officials. Rather, it merely stated that the exception applies to officials “on the highest levels of state or local government.” CCH EEOC Decisions (1983) ¶ 6725. In any event, the EEOC's position is, for the reasons discussed above, inconsistent with the plain language of the statute at issue. “[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.” Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863, 106 L.Ed.2d 134 (1989).

*486 I join Parts I and III of the Court's opinion and concur in its judgment.

Justice BLACKMUN, with whom Justice MARSHALL joins, dissenting.

I agree entirely with the cogent analysis contained in Part I of Justice WHITE’s opinion, ante, at 2408-2412. For the reasons well stated by Justice WHITE, the question we must resolve is whether appointed Missouri state judges are excluded from the general prohibition of mandatory retirement that Congress established in the federal Age Dis-
For two reasons, I do not accept the notion that an appointed state judge is an “appointee on the policymaking level.” First, even assuming that judges may be described as policymakers in certain circumstances, the structure and legislative history of the policymaker exclusion make clear that judges are not the kind of policymakers whom Congress intended to exclude from the ADEA's broad reach. Second, *487 whether or not a plausible argument may be made for judges being policymakers, I would defer to the EEOC's **2415 reasonable construction of the ADEA as covering appointed state judges.

A

Although it may be possible to define an appointed judge as a “policymaker” with only a dictionary as a guide, FN1 we have an obligation to construe the exclusion of an “appointee on the policymaking level” with a sensitivity to the context in which Congress placed it. In construing an undefined statutory term, this Court has adhered steadfastly to the rule that “ ‘words grouped in a list should be given related meaning,’ ” *488 Dole v. Steelworkers, 494 U.S. 26, 36, 110 S.Ct. 929, 935, 108 L.Ed.2d 23 (1990), quoting Massachusetts v. Morash, 490 U.S. 107, 114-115, 109 S.Ct. 1668, 1672-1673, 104 L.Ed.2d 98 (1989), quoting Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8, 105 S.Ct. 2458, 2462, 86 L.Ed.2d 2d 1 (1985), quoting Securities Industry Assn. v. Board of Governors, FRS, 468 U.S. 207, 218, 104 S.Ct. 3003, 3009, 82 L.Ed.2d 158 (1984), and that “ ‘in expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of *488 the whole law, and to its object and policy.’ ” Morash, 490 U.S., at 115, 109 S.Ct., at 1673, quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987). Applying these maxims of statutory construction, I conclude that an appointed state judge is not the kind of “policymaker” whom Congress intended to exclude from the protection of the ADEA.

FN1. Justice WHITE finds the dictionary definition of “policymaker” broad enough to include the Missouri judges involved in this case, because judges resolve disputes by choosing “ ‘from among alternatives' and elaborate their choices in order ‘to guide and ... determine present and future decisions.’ ” Ante, at 2412. See also 898 F.2d 598, 601 (CA8 1990), (case below), quoting EEOC v. Massachusetts, 858 F.2d 52, 55 (CA1 1988). I hesitate to classify judges as policymakers, even at this level of abstraction. Although some part of a judge’s task may be to fill in the interstices of legislative enactments, the primary task of a judicial officer is to apply rules reflecting the policy choices made by, or on behalf of, those elected to legislative and executive positions. A judge is first and foremost one who resolves disputes, and not one charged with the duty to fashion broad policies establishing the rights and duties of citizens. That task is reserved primarily for legislators. See EEOC v. Vermont, 904 F.2d 794, 800-801 (CA2 1990).

Nor am I persuaded that judges should be considered policymakers because they sometimes fashion court rules and are otherwise involved in the administration of the state judiciary. See In re Stout, 521 Pa. 571, 583-586, 559 A.2d 489, 495-497 (1989). These housekeeping tasks are at most ancillary to a judge’s primary function described above.

The policymaker exclusion is placed between
the exclusion of “any person chosen by such [elected] officer to be on such officer’s personal staff” and the exclusion of “an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.” See 29 U.S.C. § 630(f).

Reading the policymaker exclusion in light of the other categories of employees listed with it, I conclude that the class of “appointee[s] on the policymaking level” should be limited to those officials who share the characteristics of personal staff members and immediate advisers, i.e., those who work closely with the appointing official and are directly accountable to that official. Additionally, I agree with the reasoning of the Second Circuit in EEOC v. Vermont, 904 F.2d 794 (1990):

“Had Congress intended to except a wide-ranging category of policymaking individuals operating wholly independently of the elected official, it would probably have placed that expansive category at the end of the series, not in the middle.” Id., at 798.

Because appointed judges are not accountable to the official who appoints them and are precluded from working closely with that official once they have been appointed, they are not “appointee[s] on the policymaking level” for purposes of 29 U.S.C. § 630(f).

FN2 I disagree with Justice WHITE’s suggestion that this reading of the policymaking exclusion renders it superfluous. Ante, at 2413. There exist policymakers who work closely with an appointing official but who are appropriately classified as neither members of his “personal staff” nor “immediate adviser[s] with respect to the exercise of the constitutional or legal powers of the office.” Among others, certain members of the Governor’s Cabinet and high level state agency officials well might be covered by the policymaking exclusion, as I construe it.

**2416 **489 B

The evidence of Congress’ intent in enacting the policymaking exclusion supports this narrow reading. As noted by Justice WHITE, ante, at 2413, there is little in the legislative history of § 630(f) itself to aid our interpretive endeavor. Because Title VII of the Civil Rights Act of 1964, § 701(f), as amended, 42 U.S.C. § 2000e(f), contains language identical to that in the ADEA’s policymaking exclusion, however, we accord substantial weight to the legislative history of the cognate Title VII provision in construing § 630(f). See Lorillard v. Pons, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978) (noting that “the prohibitions of the ADA were derived in haec verba from Title VII”). See also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 621-622, 83 L.Ed.2d 523 (1985); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756, 99 S.Ct. 2066, 2071-2072, 60 L.Ed.2d 609 (1979); EEOC v. Vermont, 904 F.2d, at 798.

When Congress decided to amend Title VII to include States and local governments as employers, the original bill did not contain any employee exclusion. As Justice WHITE notes, ante, at 2413, the absence of a provision excluding certain state employees was a matter of concern for Senator Ervin, who commented that the bill, as reported, did not contain a provision “to the effect that the EEOC will not have jurisdiction over ... State judges, whether they are elected or appointed to office....” 118 Cong.Rec. 1677 (1972). Because this floor comment refers to appointed judges, Justice WHITE concludes that the later amendment containing the exclusion of “an appointee on the policymaking level” was drafted in response to the concerns raised by Senator Ervin and others, ante, at 2413-2414, and therefore should be read to include judges.

Even if the only legislative history available was the above-quoted statement of Senator Ervin and the final amendment containing the policymaking exclusion, I would be reluctant to accept Justice WHITE’s analysis. It would be odd to con-
clude that the general exclusion of those “on the policymaking level” was added in response to Senator Ervin’s very specific concern about appointed judges. Surely, if Congress had desired to exclude judges—and was responding to a specific complaint that judges would be within the jurisdiction of the EEOC—it would have chosen far clearer language to accomplish this end. In any case, a more detailed look at the genesis of the policymaking exclusion seriously undermines the suggestion that it was intended to include appointed judges.

FN3 The majority acknowledges this anomaly by noting that “‘appointee [on] the policymaking level,’ particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not ‘employees’ would seem the most efficient phrasing.” Ante, at 2404. The majority dismisses this objection not by refuting it, but by noting that “we are not looking for a plain statement that judges are excluded.” Ibid. For the reasons noted in Part I of Justice WHITE’s opinion, this reasoning is faulty; appointed judges are covered unless they fall within the enumerated exclusions.

After commenting on the absence of an employee exclusion, Senator Ervin proposed the following amendment:

“[T]he term ‘employee’ as set forth in the original act of 1964 and as modified by the pending bill shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such person to advise him in respect to the exercise of the constitutional or legal powers of his office.” 118 Cong. Rec. 4483 (1972).

**2417** Noticeably absent from this proposed amendment is any reference to those on the policymaking level or to judges. Senator Williams then suggested expanding the proposed amendment to include the personal staff of the elected individual, leading Senators Williams and Ervin to engage in the following discussion about the purpose of the amendment:

*491* “Mr. WILLIAMS: ....

“... First, State and local governments are now included under the bill as employers. The amendment would provide, for the purposes of the bill and for the basic law, that an elected individual is not an employee and, therefore, the law could not cover him. The next point is that the elected official would, in his position as an employer, not be covered and would be exempt in the employment of certain individuals.

....

“... [B]asically the purpose of the amendment ... [is] to exempt from coverage those who are chosen by the Governor or the mayor or the county supervisor, whatever the elected official is, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line of advisers. Is that basically the purpose of the Senator’s amendment?

“Mr. ERVIN: I would say to my good friend from New Jersey that that is the purpose of the amendment.” Id., at 4492-4493.

Following this exchange, Senator Ervin’s amendment was expanded to exclude “any person chosen by such officer to be a personal assistant.” Id., at 4493. The Senate adopted these amendments, voting to exclude both personal staff members and immediate advisers from the scope of Title VII.

The policymaker exclusion appears to have arisen from Senator Javits’ concern that the exclusion for advisers would sweep too broadly, including hundreds of functionaries such as “lawyers, ... stenographers, subpoena servers, researchers, and so forth.” Id., at 4097. Senator Javits asked “to have overnight to check into what would be the status of
that rather large group of employees,” noting that he “realize[d] that ... Senator [Ervin was] ... seeking to confine it to the higher officials in a policymaking or policy advising capacity.” *492 Ibid. In an effort to clarify his point, Senator Javits later stated:

“The other thing, the immediate advisers, I was thinking more in terms of a cabinet, of a Governor who would call his commissioners a cabinet, or he may have a cabinet composed of three or four executive officials, or five or six, who would do the main and important things. That is what I would define those things expressly to mean.” Id., at 4493.

Although Senator Ervin assured Senator Javits that the exclusion of personal staff and advisers affected only the classes of employees that Senator Javits had mentioned, ibid., the Conference Committee eventually adopted a specific exclusion of an “appointee on the policymaking level” as well as the exclusion of personal staff and immediate advisers contained in the Senate bill. In explaining the scope of the exclusion, the conferees stated:

“It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees[’] intent that this exemption shall be construed narrowly.” S.Conf.Rep. No. 92-681, pp. 15-16 (1972).

The foregoing history decisively refutes the argument that the policymaker exclusion was added in response to Senator Ervin's concern that appointed state judges would be protected by Title VII. Senator Ervin's own proposed amendment did not exclude those on the policymaking level. Indeed, Senator Ervin indicated that all of the policymakers **2418 he sought to have excluded from the coverage of Title VII were encompassed in the exclusion of personal staff and immediate advisers. It is obvious that judges are neither staff nor immediate*493 advisers of any elected official. The only indication as to whom Congress understood to be “appointee[s] on the policymaking level” is Senator Javits' reference to members of the Governor's cabinet, echoed in the Conference Committee's use of “cabinet officers” as an example of the type of appointee at the policymaking level excluded from Title VII's definition of “employee.” When combined with the Conference Committee's exhortation that the exclusion be construed narrowly, this evidence indicates that Congress did not intend appointed state judges to be excluded from the reach of Title VII or the ADEA.

C

This Court has held that when a statutory term is ambiguous or undefined, a court construing the statute should defer to a reasonable interpretation of that term proffered by the agency entrusted with administering the statute. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781-2782, 81 L.Ed.2d 694 (1984). Thus, even were I to conclude that one might read the exclusion of an “appointee on the policymaking level” to include state judges, our precedent would compel me to accept the EEOC's contrary reading of the exclusion if it were a “permissible” interpretation of this ambiguous term. Id., at 843, 104 S.Ct., at 2781-2782. This Court has recognized that “it is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference.” EEOC v. Commercial Office Products Co., 486 U.S. 107, 115, 108 S.Ct. 1666, 1671, 100 L.Ed.2d 96 (1988). The EEOC's interpretation of ADEA provisions is entitled to the same deference as its interpretation of analogous provisions in Title VII. See Oscar Mayer & Co. v. Evans, 441 U.S., at 761, 99 S.Ct., at 2074, citing Griggs v. Duke Power Co., 401 U.S. 424, 434, 91 S.Ct. 849, 855, 28
The EEOC consistently has taken the position that an appointed judge is not an “appointee on the policymaking level” within the meaning of 29 U.S.C. § 630(f). See *EEOC v. Vermont*, 904 F.2d 794 (CA2 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (CA1 1988); *EEOC v. Illinois*, 721 F.Supp. 156 (ND Ill.1989). Relying on the legislative history detailed above, the EEOC has asserted that Congress intended the policymaker exclusion to include only “‘an elected official’s first line advisers.’” *EEOC v. Massachusetts*, 858 F.2d, at 55. See also CCH EEOC Decisions (1983) ¶ 6725 (discussing the meaning of the policymaker exclusion under Title VII, and stating that policymakers “must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials”). As is evident from the foregoing discussion, I believe this to be a correct reading of the statute and its history. At a minimum, it is a “permissible” reading of the indisputably ambiguous term “appointee on the policymaking level.” Accordingly, I would defer to the EEOC’s reasonable interpretation of this term.

**FN4**. Relying on *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), Justice WHITE would conclude that the EEOC’s view of the scope of the policymaking exclusion is entitled to “little if any deference” because it is merely the EEOC’s litigating position in recent lawsuits.” *Ante*, at 2414, n. 3. This case is distinguishable from *Bowen*, where the Court declined to defer “to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice,” 488 U.S., at 212, 109 S.Ct., at 473-474, the EEOC here has issued an administrative ruling construing Title VII’s cognate policymaking exclusion that is entirely consistent with the agency’s subsequent “litigation position” that appointed judges are not the kind of officials on the policymaking level whom Congress intended to exclude from ADEA coverage. See CCH EEOC Decisions (1983) ¶ 6725. Second, the Court in *Bowen* emphasized that the agency had failed to offer “a reasoned and consistent view of the scope of” the relevant statute and had proffered an interpretation of the statute that was “contrary to the narrow view of that provision advocated in past cases.” See 488 U.S., at 212-213, 109 S.Ct., at 473-474. In contrast, however, the EEOC never has wavered from its view that the policymaking exclusion does not apply to appointed judges. Thus, this simply is not a case in which a court is asked to defer to “nothing more than an agency’s convenient litigating position.” *Id.*, at 213, 109 S.Ct., at 474. For all the reasons that deference was inappropriate in *Bowen*, it is appropriate here.

**FN5**. Congress enacted the ADEA with the express purpose “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.” 29 U.S.C. § 621. Congress provided for only limited exclusions from the coverage of the ADEA, and exhorted courts applying this law to construe such exclusions narrowly. The statute’s structure and legislative history reveal that Congress did not intend an appointed state judge to be beyond the scope of the ADEA’s protective reach. Further, the EEOC, which is charged with the enforcement of the ADEA, has determined that an appointed state judge is covered by the ADEA. This Court’s precedent dictates that we defer to the EEOC’s per-
missible interpretation of the ADEA.


I dissent.

Gregory v. Ashcroft

END OF DOCUMENT
Supreme Court of the United States
FRANK GUINN and J. J. Beal
v.
UNITED STATES.
No. 96.
Argued October 17, 1913.
Decided June 21, 1915.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit presenting questions as to the validity, under the 15th Amendment to the Federal Constitution, of an amendment to the Oklahoma Constitution fixing standards for suffrage. Answered by holding that the state standards were invalid.

The facts are stated in the opinion.

West Headnotes

Conspiracy 91 C$$\rightarrow$$29.5(2)

91 Conspiracy
91II Criminal Responsibility
91II(A) Offenses
91k29.5 Conspiracy Against Exercise of Civil Rights
91k29.5(2) k. Rights or Privileges Involved. Most Cited Cases
(Formerly 91k29.6, 91k29)
State election officials, who conspire to deprive legal citizens of their right to vote under Const.U.S. Amend. 15, are indictable under Pen.Code, § 19.

Statutes 361 C$$\rightarrow$$64(2)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(2) k. Acts Relating to Particular Subjects in General. Most Cited Cases

Neither forms of classification nor methods of enumeration should be made the basis for striking down a voting standard prescribed by a state, which was legally enacted, because of invalidity under the federal Constitution of another test with which the legal provisions may have been associated.

Statutes 361 C$$\rightarrow$$64(2)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(2) k. Acts Relating to Particular Subjects in General. Most Cited Cases

The invalidity under U.S.C.A.Const.Amend. 15, of the exemption from the literacy test prescribed by 1910 amendment of Okl.St.Ann.Const. art. 3, § 4a, as condition of voting which that amendment makes that persons of certain age were entitled to vote and their lineal descendants, renders invalid the literacy test itself.

Conspiracy 91 C$$\rightarrow$$48.2(2)

91 Conspiracy
91II Criminal Responsibility
91II(B) Prosecution
91k48 Trial
91k48.2 Instructions
91k48.2(2) k. Particular Conspiracies. Most Cited Cases

No error was committed in instructing the jury in a prosecution of state election officials under Pen.Code, § 19, 18 U.S.C.A. § 51, for conspiring to deprive legal citizens of their right to vote that the 1910 amendment of Const. art. 3, § 4a, Okl.St.Ann., was repugnant to U.S.C.A.Const. Amend. 15.

Criminal Law 110 C$$\rightarrow$$15

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
The repeal by Act Feb. 8, 1894, 28 Stat. 36, of all the sections of Rev.St. tit. 70, relating to offenses against the elective franchise, did not withdraw all offenses by election officers from operation of section 5508, 18 U.S.C.A. § 241, making it criminal to conspire to injure rights of citizen secured by the Constitution or laws.

Elections 144 (12(5))

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k12 Denial or Abridgment on Account of Race

144k12(2) Discriminatory Practices Proscribed

144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases

The exemption from literacy test prescribed by 1910 amendment of Const. art. 3, § 4a, Okl.St.Ann., as condition for voting is an abridgment of the right to vote on account of race, color, or previous condition of servitude, contrary to U.S.C.A. Const.Amend. 15.


*350 Solicitor General Davis for the United States.

Messrs. John H. Burford and John Embry by permission of the Attorney General in support of the government's position.

*353 Mr. Moorfield Storey for National Association for the Advancement of Colored People.

*354 Mr. J. H. Adriaans as amicus curiae.

Mr. Chief Justice White delivered the opinion of the court:

This case is before us on a certificate drawn by the court below as the basis of two questions which are submitted for our solution in order to enable the court correctly to decide issues in a case which it has under consideration. Those issues arose from an indictment and conviction of certain election officers of the state of Oklahoma (the plaintiffs in error) of the crime of having conspired unlawfully, wilfully, and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election held in that state in 1910, they being entitled to vote under the state law, and which right was secured to them by the 15th Amendment to the Constitution of the United States. The prosecution was directly concerned with § 5508, Revised Statutes, now § 19 of the Penal Code [35 Stat. at L. 1092, chap. 321, Comp. Stat. 1913, § 10183], which is as follows:

‘If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.’

*355 We concentrate and state from the certificate only matters which we deem essential to dispose of the questions asked.

Suffrage in Oklahoma was regulated by § 4a, article 3, of the Constitution under which the state was admitted into the Union. Shortly after the admission there was submitted an amendment to the Constitution making a radical change in that article, which was adopted prior to November 8, 1910. At an election for members of Congress which followed the adoption of this amendment, certain election officers, in enforcing its provisions, refused to allow certain negro citizens to vote who were
clearly **928 entitled to vote under the provision of the Constitution under which the state was admitted; that is, before the amendment; and who, it is equally clear, were not entitled to vote under the provision of the suffrage amendment if that amendment governed. The persons so excluded based their claim of right to vote upon the original Constitution and upon the assertion that the suffrage amendment was void because in conflict with the prohibitions of the 15th Amendment, and therefore afforded no basis for denying them the right guaranteed and protected by that Amendment. And upon the assumption that this claim was justified and that the election officers had violated the 15th Amendment in denying the right to vote, this prosecution, as we have said, was commenced. At the trial the court instructed that by the 15th Amendment the states were prohibited from discriminating as to suffrage because of race, color, or previous condition of servitude, and that Congress, in pursuance of the authority which was conferred upon it by the very terms of the Amendment, to enforce its provisions had enacted the following (Rev. Stat. § 2004, Comp. Stat. 1913, § 3966):

> "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, territory, district, . . . municipality, or *356 other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, or usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding."

It then instructed as follows:

> "The state amendment which imposes the test of reading and writing any section of the state Constitution as a condition to voting to persons not, on or prior to January 1, 1866, entitled to vote under some form of government, or then residents in some foreign nation, or a lineal descendant of such person, is not valid, but you may consider it in so far as it was in good faith relied and acted upon by the defendants in ascertaining their intent and motive. If you believe from the evidence that the defendants formed a common design and cooperated in denying the colored voters of Union township precinct, or any of them, entitled to vote, the privilege of voting, but this was due to a mistaken belief sincerely entertained by the defendants as to the qualifications of the voters,-that is, if the motive actuating the defendants was honest, and they simply erred in the conception of their duty,-then the criminal intent requisite to their guilt is wanting and they cannot be convicted. On the other hand, if they knew or believed these colored persons were entitled to vote, and their purpose was to unfairly and fraudulently deny the right of suffrage to them, or any of them entitled thereto, on account of their race and color, then their purpose was a corrupt one, and they cannot be shielded by their official positions."

The questions which the court below asks are these:

1. Was the amendment to the Constitution of Oklahoma, heretofore set forth, valid?

2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified *357 candidate for a member of Congress in Oklahoma unless they were able to read and write any section of the Constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a member of Congress in that state, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?*

As these questions obviously relate to the provisions concerning suffrage in the original Constitution and the amendment to those provisions which form the basis of the controversy, we state the text of both. The original clause, so far as material, was this:
The qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote.

And this is the amendment:

No person shall be registered as an elector of this state or be allowed to vote in any election held herein, unless he be able to read and write any section of the Constitution of the state of Oklahoma; but no person who was, on January 1st, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballots to vote.

Considering the questions in the light of the text of the suffrage amendment if is apparent that they are twofold because of the twofold character of the provisions as to suffrage which the amendment contains. The first question is concerned with that provision of the amendment which fixes a standard by which the right to vote is given upon conditions existing on January 1, 1866, and relieves those coming within that standard from the standard based on a literacy test which is established by the other provision of the amendment. The second question asks as to the validity of the literacy test and how far, if intrinsically valid, it would continue to exist and be operative in the event the standard based upon January 1, 1866, should be held to be illegal as violative of the 15th Amendment.

To avoid the which is unnecessary let us at once consider and sift the propositions of the United States on the one hand, and of the plaintiffs in error, on the other, in order to reach with precision the real and final question to be considered. The United States insists that the provision of the amendment which fixes a standard based upon January 1, 1866, is repugnant to the prohibitions of the 15th Amendment because in substance and effect that provision, if not an express, is certainly an open, repudiation of the 15th Amendment, and hence the provision in question was stricken with nullity in its inception by the self-operative force of the Amendment, and, as the result of the same power, was at all subsequent times devoid of any vitality whatever.

For the plaintiffs in error, on the other hand, it is said the states have the power to fix standards for suffrage, and that power was not taken away by the 15th Amendment, but only limited to the extent of the prohibitions which that Amendment established. This being true, as the standard fixed does not in terms make any discrimination on account of race, color, or previous condition of servitude, since all, whether negro or white, who come within its requirements, enjoy the privilege of voting, there is no ground upon which to rest the contention that the provision violates the 15th Amendment. This, it is insisted, must be the case unless it is intended to expressly deny the state's right to provide a standard for suffrage, or what is equivalent thereto, to assert: (a) that the judgment of the state, exercised in the exertion of that power, is subject to Federal judicial review or supervision, or (b) that it may be questioned and be brought within the prohibitions of the Amendment by attributing to the legislative authority an occult motive to violate the Amendment, or by assuming that an exercise of the otherwise lawful power may be invalidated because of conclusions concerning its operation in practical execution and resulting discrimination was arising therefrom, albeit such discrimination was not expressed in the standard fixed, or fairly to be implied, but simply arose from inequalities naturally
inhering in those who must come within the standard in order to enjoy the right to vote.

On the other hand, the United States denies the relevancy of these contentions. It says state power to provide for suffrage is not disputed, although, of course, the authority of the 15th Amendment and the limit on that power which it imposes is insisted upon. Hence, no assertion denying the right of a state to exert judgment and discretion in fixing the qualification of suffrage is advanced, and no right to question the motive of the state in establishing a standard as to such subjects under such circumstances, or to review or supervise the same, is relied upon, and no power to destroy an otherwise valid exertion of authority upon the mere ultimate operation of the power exercised is asserted. And applying these principles to the very case in hand, the argument of the *360 government in substance says: No question is raised by the government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment, and therefore cannot be here assailed either by disregarding the state's power to judge on the subject, or by testing its motive in enacting the provision. The real question involved, so the argument of the government insists, is the repugnancy of the standard which the amendment makes, based upon the conditions existing on January 1st, 1866, because on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the 15th Amendment, and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy. From this it is urged that no legitimate discretion could have entered into the fixing of such standard which involved only the determination to directly set at naught or by indirect avoid the commands of the Amendment. And it is insisted that nothing contrary to these propositions is involved in the contention of the government that if the standard which the suffrage amendment fixes, based upon the conditions existing on January 1, 1866, be found to be void for the reasons urged, the **930 other and literacy test is also void, since that contention rests not upon any assertion on the part of the government of any abstract repugnancy of the literacy test to the prohibitions of the 15th Amendment, but upon the relation between that test and the other, as formulated in the suffrage amendment, and the inevitable result which it is deemed must follow from holding it to be void if the other is so declared to be.

Looking comprehensively at these contentions of the parties it plaintly results that the conflict between them is *361 much narrower than it would seem to be because the premise which the arguments of the plaintiffs in error attribute to the propositions of the United States is by it denied. On the very face of things it is clear that the United States disclaims the gloss put upon its contentions by limiting them to the propositions which we have hitherto pointed out, since it rests the contentions which it makes as to the assailed provision of the suffrage amendment solely upon the ground that it involves an unmistakable, although it may be a somewhat disguised, refusal to give effect to the prohibitions of the 15th Amendment by creating a standard which, it is repeated, but calls to life the very conditions which that Amendment was adopted to destroy and which it had destroyed.

The questions then are: (1) Giving to the propositions of the government the interpretation which the government puts upon them, and assuming that the suffrage provision has the significance which the government assumes it to have, is that provision as a matter of law repugnant to the 15th Amendment? which leads us, of course, to consider the operation and effect of the 15th Amendment. (2) If yes, has the assailed amendment in so far as it fixes a standard for voting as of January 1, 1866, the meaning which the government attributes to it? which leads us to analyze and interpret that provision of the amendment. (3) If the investigation as to the two prior subjects establishes that the standard fixed as of January 1, 1866, is void, what, if any,
effect does that conclusion have upon the literacy standard otherwise established by the amendment? which involves determining whether that standard, if legal, may survive the recognition of the fact that the other, or 1866, standard, has not and never had any legal existence. Let us consider these subjects under separate headings.

1. The operation and effect of the 15th Amendment. This is its text:

   *(362)* 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.

   (a) Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

   (b) But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the states to abridge or deny the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard to the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify, or deprive the states of their full power as to suffrage except, of course, as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary. Thus the authority over suffrage which the states possess and the limitation which the Amendment imposes are co-ordinate and one may not destroy the other without bringing about the destruction of both.

   (c) While in the true sense, therefore, the Amendment **(363)** gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that, as a consequence of the striking down of a discrimination clause, a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state Constitutions in which, at the time of the adoption of the Amendment, the right of suffrage was conferred **(931)** on all white male citizens, since by the inherent power of the Amendment the word ‘white’ disappeared and therefore all male citizens, without discrimination on account of race, color, or previous condition of servitude, came under the generic grant of suffrage made by the state.

With these principles before us how can there be room for any serious dispute concerning the repugnancy of the standard based upon January 1, 1866 (a date which preceded the adoption of the 15th Amendment), if the suffrage provision fixing that standard is susceptible of the significance which the government attributes to it? Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on the subject would be but to declare that the 15th Amendment not only had not the self-executing
power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment by creating a standard of voting which, on its face, was in substance but a revitalization of conditions which, when they prevailed in the past, had been destroyed by the self-operative force of the Amendment.

2. The standard of January 1, 1866, fixed in the suffrage amendment and its significance.

The inquiry, of course, here is, Does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the 15th Amendment as previously stated? This leads us, for the purpose of the analysis, to recur to the text of the suffrage amendment. Its opening sentence fixes the literacy standard which is allinclusive, since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This, however, is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for. The provision is this:

‘But no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied that right to register and vote because of his inability to so read and write sections of such Constitution.’

We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude, prohibited by the 15th Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the 15th Amendment, and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the 15th Amendment was adopted and the continuance of which the 15th Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment, to make them the basis of the right to suffrage conferred in direct and positive disregard of the 15th Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the 15th Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the 15th Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the 15th Amendment was in view.

While these considerations establish that the standard fixed on the basis of the 1866 test is void, they do not enable us to reply even to the first question asked by the court below, since to do so we must consider the literacy standard established by the suffrage amendment and the possibility of its surviving the determination of the fact that the 1866 standard never took life, since it was void from the beginning because of the operation upon it of the prohibitions of the 15th Amendment. And this brings us to the last heading:
3. The determination of the validity of the literacy test and the possibility of its surviving the disappearance of the 1866 *366 standard with which it is associated in the suffrage amendment.

No time need be spent on the question of the validity of the literacy test, considered **932 alone, since, as we have seen, it establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and, indeed, its validity is admitted. Whether this test is so connected with the other one relating to the situation on January 1, 1866, that the invalidity of the latter requires the rejection of the former, is really a question of state law; but, in the absence of any decision on the subject by the supreme court of the state, we must determine it for ourselves. We are of opinion that neither forms of classification nor methods of enumeration should be made the basis of striking down a provision which was independently legal, and therefore was lawfully enacted, because of the removal of an illegal provision with which the legal provision or provisions may have been associated. We state what we hold to be the rule thus strongly because we are of opinion that on a subject like the one under consideration, involving the establishment of a right whose exercise lies at the very basis of government, a much more exacting standard is required than would ordinarily obtain where the influence of the declared unconstitutionality of one provision of a statute upon another and constitutional provision is required to be fixed. Of course, rigorous as is this rule and imperative as is the duty not to violate it, it does not mean that it applies in a case where it expressly appears that a contrary conclusion must be reached if the plain letter and necessary intentment of the provision under consideration so compels, or where such a result is rendered necessary because to follow the contrary course would give rise to such an extreme and anomalous situation as would cause it to be impossible to conclude that it could have been, upon any hypothesis whatever, within the mind of the law-making power.

*367 Does the general rule here govern, or is the case controlled by one or the other of the exceptional conditions which we have just stated, is, then, the remaining question to be decided. Coming to solve it we are of opinion that by a consideration of the text of the suffrage amendment in so far as it deals with the literacy test, and to the extent that it creates the standard based upon conditions existing on January 1, 1866, the case is taken out of the general rule and brought under the first of the exceptions stated. We say this because, in our opinion, the very language of the suffrage amendment expresses, not by implication nor by forms of classification nor by the order in which they are made, but by direct and positive language the command that the persons embraced in the 1866 standard should not be, under any conditions, subjected to the literacy test,-a command which would be virtually set at naught if, on the obliteraton of the one standard by the force of the 15th Amendment, the other standard should be held to continue in force.

The reasons previously stated dispose of the case and make it plain that it is our duty to answer the first question, No, and the second, Yes; but before we direct the entry of an order to that effect, we come briefly to dispose of an issue the consideration of which we have hitherto postponed from a desire not to break the continuity of discussion as to the general and important subject before us.

In various forms of statement not challenging the instructions given by the trial court concretely considered, concerning the liability of the election officers for their official conduct, it is insisted that, as in connection with the instructions the jury was charged that the suffrage amendment was unconstitutional because of its repugnancy to the 15th Amendment, therefore, taken as a whole, the charge was erroneous. But we are of opinion that this contention is without merit, especially in view *368 of the doctrine long since settled concerning the self-executing power of the 15th Amendment, and of what we have held to be the nature and character of the suffrage amendment in question. The contention
concerning the inapplicability of § 5508, Revised Statutes, now § 19 of the Penal Code, or of its repeal by implication, is fully answered by the ruling this day made in United States v. Mosley, No. 180, 238 U. S. 383, 59 L. Ed. 1355, 35 Sup. Ct. Rep. 904.

We answer the first question, No, and the second question, Yes.

And it will be so certified.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

U.S. 1915
Guinn v. U.S.
L.R.A. 1916A,1124, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340

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United States District Court, E. D. Pennsylvania.

HISPANIC COALITION ON REAPPORTIONMENT; Alfred Delgado, Nitza Santiago, Nayda Cintron, and Julio Olmedo, individually and on behalf of all others similarly situated

v.

LEGISLATIVE REAPPORTIONMENT COMMISSION; Democratic Party City Committee of Philadelphia; David Glancey and Robert O'Donnell in their official capacities, William R. Davis, Secretary of the Commonwealth of Pennsylvania, his successor, if any, agents, assignees, and employees.

Civ. A. No. 82-0480.
April 6, 1982.

Plaintiffs brought action challenging reapportionment of state legislature. Following hearing, a three-judge District Court, Bechtle, J., held that: (1) motion to dismiss as defendants political party's city committee and committee's members would be granted, since those defendants were without authority or power to effect any of the relief sought by plaintiffs, and (2) evidence that chairman of political party's committee made suggestions for a preliminary reapportionment plan which would have resulted in districts which diffused Hispanic vote was insufficient to establish intentional discrimination against Hispanic voters by State Legislative Reapportionment Commission, in absence of evidence that the intent of the political party's committee chairman was shared or adopted by Commission in the development of preliminary plan and the development of the final plan.

Plaintiffs' claims dismissed.

West Headnotes

[1] Declaratory Judgment 118A

118AIII(C) Parties
118Ak299 Proper Parties
118Ak300 k. Subjects of Relief in General. Most Cited Cases

In action challenging state apportionment plan, in which plaintiff sought declaratory and injunctive relief and an order directing the adoption of a reapportionment plan free of alleged constitutional and statutory defects, motion to dismiss as defendants political party's city committee and committee's members would be granted, since those defendants were without authority or power to effect any of the relief sought by plaintiffs.

[2] States 360

360II Government and Officers
360k24 Legislature
360k27 Legislative Districts and Apportionment
360k27(10) k. Judicial Review and Control. Most Cited Cases

Courts, in reviewing reapportionment plans, first focus on inequities caused by states' failures to adjust boundaries of voting districts to accommodate shifts in the distribution of states' respective populations.

[3] States 360

360II Government and Officers
360k24 Legislature
360k27 Legislative Districts and Apportionment
360k27(3) k. Method of Apportionment in General. Most Cited Cases

A reapportionment plan describing districts of substantially equal population may still be invalid if conceived or operated as a purposeful device to further racial or economic discrimination.

[4] Elections 144
144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(6) k. Apportionment and Reapportionment. Most Cited Cases
(Formerly 144k12)

To succeed on a claim based on principle that reapportionment plan is invalid despite substantial equality of population among districts, it is not enough to show merely that the effect of the reapportionment plan is to fence out, dilute or diffuse the vote of a racial or ethnic group; to prevail plaintiffs must demonstrate that the reapportionment plan was designed purposefully to minimize or cancel out voting potential of racial or ethnic minorities. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; U.S.C.A.Const.Amend. 14.

[5] Elections 144 ε(→12(6)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(6) k. Apportionment and Reapportionment. Most Cited Cases
(Formerly 144k12)


[6] States 360 ε(→27(3)

360 States
360II Government and Officers
360k24 Legislature
360k27 Legislative Districts and Apportionment

*579 Angel L. Ortiz, Philadelphia, Pa., Puerto Rican Legal Defense & Ed. Fund, Cesar Perales, Gabe Kaimowitz, Juan Cartagena, New York City, for plaintiffs.


Before GARTH, Circuit Judge, and LUONGO and BECHTLE, District Judges.

MEMORANDUM OPINION

BECHTLE, District Judge.

The regrettable but inevitable disappointment that follows reapportionment has surfaced again in the case before us. Challenged are the district boundaries of a single seat in the Pennsylvania House of Representatives. Plaintiffs contend that those boundaries were designed with the purpose and effect of diluting or diffusing the Hispanic vote in a certain area of Philadelphia, in violation of Section 1983 of Title 42, United States Code, and
Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Plaintiffs seek a variety of declaratory and injunctive relief. On March 16, 1982, the present Court of three judges, duly convened, held a final hearing on the merits. What follows constitutes the Court’s findings of fact and conclusions of law.

I.
Reapportionment of Pennsylvania’s state legislature is governed by a provision of the state’s constitution requiring that a Legislative Reapportionment Commission be constituted for the purpose of reapportioning the Commonwealth in each year following that in which the federal decennial census is reported. Pa.Const. art. 2, § 17(a). The commission is to consist of five members: the majority and minority leaders of both the state Senate and the state House of Representatives, or their designees, and a chairman selected by the first four members in a manner also provided by the state constitution. Id. § 17(b). Within ninety days of the certification of the name of the chairman to the Secretary of the Commonwealth, the officer of the Commonwealth who supervises elections, the commission must file a preliminary reapportionment plan. Within the next thirty days, the commission may make corrections and “any person aggrieved by the preliminary plan” may file exceptions to the plan. If exceptions are filed, the commission has another thirty days from the date of the filing of the exceptions to prepare and file a revised reapportionment plan with the Secretary of the Commonwealth. Id. § 17(c).

With the filing of a revised or final reapportionment plan, the principal work of the commission is finished. A person aggrieved by the final plan, however, may file an appeal directly to the Supreme Court of Pennsylvania within thirty days of the filing of the plan. If shown to be contrary to law, the plan may be remanded by the Supreme Court to the commission for correction. Id. § 17(d). If, however, the Supreme Court decides that the plan is not contrary to law, or if no appeal is taken, then the reapportionment plan “shall have the force of law and the districts therein provided shall be used thereafter in elections to the (Pennsylvania legislature) until the next reapportionment as required under this section ....” Id. § 17(e).

The 1980 United States Census reported that Pennsylvania had a population of 11,866,728. *580 In re Reapportionment Plan for the Pennsylvania General Assembly, 497 Pa. at —— n.5, 442 A.2d 661 at 666 n.5 (1981). Thus, each of Pennsylvania’s 203 seats in the state House of Representatives, including the 29 seats allocable to the City of Philadelphia, would ideally represent 58,456 people. Id. at 666. The United States Census also reported that the Hispanic population of Philadelphia increased from approximately 25,000 in 1970 to approximately 63,000 in 1980. Amended Complaint PP 19-20. Most of these 63,000 Hispanics live in the north central area of Philadelphia focused upon in this case. Id. P 22.

In conformity with the requirements outlined above, defendant Legislative Reapportionment Commission (“Commission”) was duly constituted in January and February of 1981. It consists of Senator Robert C. Jubelirer, Senate Majority Leader, Senator Edward P. Zemprelli, Senate Minority Leader, Representative Samuel E. Hayes, House Majority Leader, Representative James J. Manderino, House Democratic Whip, and the Chairman, selected by them, James O. Freedman, Dean of the University of Pennsylvania School of Law. Once formed, the Commission began its initial task of preparing a preliminary reapportionment plan. Public comment from interested citizens was sought at this stage as it often was throughout the process. See Chronology of the 1981 Pennsylvania Reapportionment Plan, Document No. 10, at 2, 3 (hereinafter cited as “Chronology”).

By the time the preliminary reapportionment plan was being prepared, defendant Democratic Party City Committee of Philadelphia (“City Committee”) and defendant David Glancey, Chairman of defendant City Committee, had developed a number of suggestions on how to reapportion the
City of Philadelphia which they sought to have included in the preliminary reapportionment plan. N.T. 53-54. These suggestions did not take the form of a comprehensive proposal having defined district boundaries with a supporting analysis of the size and composition of the populations in each district. Indeed, the closest the City Committee came to formulating a “plan” was to develop worksheets grouping wards and divisions preferably to be included within the same legislative district. N.T. 53-54.

Defendants Glancey and the City Committee knew, however, that the districts so proposed would split the vote of the Hispanic community among several districts and would leave little opportunity for the election of an Hispanic representative. Nevertheless, the objective of so distributing the Hispanic vote was not to cause the adoption of a final reapportionment plan in which the Hispanic vote was diffused. On the contrary, defendants hoped that the filing of a preliminary plan splintering the Hispanic vote would provoke a strong reaction from that community. The resulting outcry, it was hoped, would cause the Commission to adjust district boundaries in order to form a district with a larger Hispanic population. In a kind of domino effect, the adjustment of boundaries to form a district of greater Hispanic concentration would require corresponding adjustments in neighboring districts. It was hoped that among the districts redrawn would be those in an area of the city where the Democratic Party was doing battle with the Republican Party, and that the adjustments in those districts would result in districts drawn more favorably for the Democratic Party. N.T. 61-63; Exhibit P4 at 19-20.

The suggestions of the City Committee and defendant Glancey that embodied this strategy were never submitted directly to the Commission or any of its individual members, either formally or informally. N.T. 48, 56. Instead, defendant Glancey transmitted them verbally to defendant O’Donnell, who had been asked by Commission member James J. Manderino “to communicate ... the views of folks in Philadelphia and also information, technical and otherwise, about what the impact of the reapportionment plan would be.” N.T. 46, 58 & 75. Prior to the filing of the preliminary plan, however, defendants Glancey and O’Donnell never discussed the specific question whether an Hispanic district ought to be created. N.T. 90. Moreover, neither defendant Glancey nor defendant City Committee was shown to have played any *581 other part in the development of the Commission’s preliminary reapportionment plan. See N.T. 43, 48-49, 66-67.

On August 20, 1981, the Commission filed its preliminary reapportionment plan. Exhibit P5. While many aspects of the preliminary plan provoked comment, the only aspect of importance here is that none of the proposed districts for the state House of Representatives had a population that was more than 15% Hispanic. Furthermore, while some of the City Committee’s informally transmitted suggestions were incorporated in the preliminary plan, others were not. N.T. 46.

Over the next thirty days, the commission received approximately 300 exceptions to the preliminary plan. On September 24, 1981, the Commission held one of twelve public hearings it conducted on the reapportionment plan, and sixty-four interested citizens testified in support of their exceptions. Among those who filed exceptions and presented supporting testimony at the September 24, 1981 hearing were Angel Ortiz, counsel for plaintiffs in this case, and Wilfredo Rojas. See Chronology, Exhibit A. Mr. Ortiz and Mr. Rojas testified that the preliminary reapportionment plan failed to include a district in the House of Representatives that would permit Hispanics an opportunity to elect a representative, even though the increased number and concentration of Hispanics in north central Philadelphia would make such a district possible. Id. Also offered at that hearing was the testimony of James Mahoney, a co-ordinator of the Philadelphia Council of the AFL-CIO, who spoke in support of an alternative reapportionment
plan for the City of Philadelphia that was prepared by the AFL-CIO. See Exhibits P1, P3. Included in that plan was a proposed district for the House of Representatives, the 180th legislative district, in which Hispanics would constitute about 54% of the population. N.T. at 29-30.

Eventually, on October 13, 1981, the Commission filed a final reapportionment plan that contained many changes apparently made in response to the various exceptions filed. See Exhibit P6. Among the boundaries readjusted were those of district 180. As a result, the district as defined in the Commission's revised plan would have a population that was about 40% Hispanic. N.T. at 9; Complaint P 31.

This final reapportionment plan was challenged in twenty-nine petitions for review filed with the Supreme Court of Pennsylvania within the time allowed. One of these petitions for review was filed by several persons of Hispanic origin, including Wilfredo P. Rojas and Angel Ortiz, and two Hispanic organizations. See Chronology, Exhibit B. In that petition for review, appellants asserted that the final reapportionment plan unconstitutionally diluted the Hispanic vote in the vicinity of the proposed 180th legislative district. Appellants also filed a brief in support of their petition in which they requested an evidentiary hearing to permit appellants to present further evidence of racial discrimination. Chronology, Exhibit D.[FN1] Appellants' request for an evidentiary hearing was not granted, and oral argument on twenty-five of the petitions for review was held before that court on December 7, 1981. On December 29, 1981, the Supreme Court filed an opinion approving the plan and declaring it to have the force of law. In re Reapportionment Plan for the Pennsylvania General Assembly, supra. The ten applications for reargument, which included an application filed by the Hispanic appellants just mentioned, were denied. No appeal to the United States Supreme Court was taken.

FN1. The brief filed in support of the petition for review proposed an alternative reapportionment plan for north central Philadelphia, which has been referred to throughout this litigation as the “Sanchez Plan.” See Chronology, Exhibit D; Complaint, Appendix (“Plan 4”). The Sanchez Plan proposed the creation of a legislative district with a population 58% Hispanic. This alternative plan, however, had never been submitted to the Commission. Perhaps for that reason, plaintiffs did not offer this plan in evidence at the final hearing. Instead, the testimony and arguments at the final hearing reflected a demand by plaintiffs for a 56% Hispanic district. See, e.g., N.T. 90-91.

*582* On December 15, 1981, between the date oral argument was heard by the Pennsylvania Supreme Court and the date their decision was rendered, the event primarily responsible for this lawsuit occurred. Mr. Ortiz, counsel for plaintiffs here, conducted an interview, taped for television, of defendant Glancey. During that interview, defendant Glancey made a series of statements suggesting that the defendant City Committee had been very influential with defendant Commission in the process that led to the creation of the preliminary plan. Exhibit P4 at 14-15, 18-19. He then suggested that the “plan” thus submitted by defendant City Committee had been intentionally designed to split the Hispanic vote in north central Philadelphia. Id. at 19-22. As an explanation, defendant Glancey declared that City Committee's purpose in doing so was to provoke an outcry from the Hispanic community that would cause the Commission to make changes resulting in a final plan favorable to the Democratic Party. Id. at 18-19. Reference to this interview was absent from the briefs submitted to the Pennsylvania Supreme Court on behalf of the Hispanic appellants challenging the final plan, presumably because the brief was filed before the interview took place. See Chronology, Exhibit D. The interview was mentioned, albeit in a single sentence, in the Hispanic appellants' application for
reargument, see id., Exhibit F at 4, but that application was denied.

The present litigation was then commenced. Plaintiffs are four individual Hispanic voters who reside in north central Philadelphia, and an unincorporated association formed for the purpose of protecting the interests of Hispanic voters in reapportionment. Originally named as defendants were the Legislative Reapportionment Commission, the Democratic Party City Committee of Philadelphia, David Glancey and Robert O'Donnell. In a subsequent amendment to the complaint, plaintiffs added as a defendant the Secretary of the Commonwealth of Pennsylvania, William R. Davis, who is ultimately responsible for the supervision of elections in Pennsylvania. In their complaint, as amended, plaintiffs allege that the final reapportionment plan was designed with the purpose and effect of diluting or diffusing the Hispanic vote of north central Philadelphia in violation of both 42 U.S.C. s 1983 and s 2 of the Voting Rights Act, 42 U.S.C. s 1973.

The centerpiece of plaintiffs' claims is the Glancey interview, and a transcript of that interview was attached to the original complaint. To reinforce the effect of defendant Glancey's remarks, plaintiffs attached to the complaint affidavits of persons swearing that they heard defendant Glancey make statements suggestive of intentional discrimination against Hispanics in the creation of the reapportionment plan. Finally, plaintiffs also attached copies of newspaper articles suggesting that the preliminary plan was the work of defendants Glancey, O'Donnell and the City Committee, and discriminated against Hispanics.

Soon after the suit was filed, a three-judge court was convened pursuant to 28 U.S.C. s 2284 which provides for the convening of a three-judge court “when an action is filed challenging the constitutionality of ... the apportionment of any statewide legislative body.” Id. s 2284(a). A motion for a temporary restraining order filed by plaintiffs was denied shortly thereafter, and an expedited schedule for briefing and a hearing on plaintiffs' motion for a preliminary injunction was established. On March 16, 1982, the matter finally came before the three-judge court for the hearing on plaintiffs' motion for a preliminary injunction. Since no evidence was to be offered other than what the parties intended to produce at that hearing, however, the hearing was treated, with the consent of all parties, as the final hearing on the merits. N.T. 16-17. At the hearing, plaintiffs called five witnesses and a defendant produced one.[FN2]

Having already set forth in *583 narrative form the Court's findings of fact, the Court now turns to a discussion of the issues to be resolved in reaching its decision.

FN2. Prior to trial, the deposition which plaintiffs sought of Dean James O. Freedman, Chairman of the Legislative Reapportionment Commission, was made subject to a protective order by reason of legislative immunity. See Rulings on Motions for Protective Orders, Document No. 23.

II.

Defendants have raised a variety of defenses which, if sustained, would obviate the need for a ruling on the merits of plaintiffs' claims.[FN3] With one exception, however, the Court will not decide the issues presented by the assertion of those defenses. While many of these defenses might ordinarily and logically be decided first, the weakness of plaintiffs' case on the merits makes resolution of the often difficult issues presented by the defenses both wasteful and unwise.[FN4]

FN3. In summary, the defenses asserted by defendant Commission are as follows: (1) lack of capacity to be sued resulting from the assertedly automatic dissolution of the Commission following Pennsylvania Supreme Court approval of the final plan; (2) legislative immunity under Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980); and (3)
the bar of res judicata arising from the decision of the Supreme Court of Pennsylvania approving the final plan. In addition to the defense discussed in the text, the defenses asserted by defendants Glancey, O'Donnell and City Committee include, first, a claim that plaintiffs' claims are barred because the evidence of intentional discrimination is not newly discovered, and second, collateral estoppel. Finally, defendant Secretary of the Commonwealth asserted the defense of laches.

FN4. Defendant Commission specifically requested that the Court rule on its defense of legislative immunity under *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). It is true, as the Commission argues, that such a course, if it led to a decision in the Commission's favor, might obviate the threat that future commissions would be subjected to the burdens of litigation. Nevertheless, where, as here, the case on the merits is weak, such a technical defense is less important to the litigation and receives less of the attention of the parties in briefing and argument. Consequently, the Court loses much of the same quality that is sought by requiring standing: “that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions.” *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Accordingly, the Court declines to decide the issue of the Commission's immunity.

[1] One defense does merit resolution. On February 19, 1982, defendants Glancey, O'Donnell and City Committee filed a motion to dismiss them as defendants. [*FN5*] The argument made in support of this motion, simply stated, is that defendants Glancey, O'Donnell and City Committee do not play any part in Pennsylvania's reapportionment and election process, and thus have no power to provide plaintiffs with any relief. Since analysis of the relief requested demonstrates the validity of this argument, the motion will be granted.

**FN5.** The Court denied the motion at the March 4, 1982 pretrial conference without prejudice to the right of defendants to raise the issue again at a later stage of the proceedings. The defendants above named accordingly raised the arguments when the Court entertained all defendants' motions for involuntary dismissal under *Fed.R.Civ.P.* 41(b).

In their original complaint, plaintiffs sought three principal items of relief: 1) a declaratory judgment that the reapportionment plan adopted for the Pennsylvania State Legislature violates federal constitutional and statutory law in diluting the voting strength of Hispanics in Philadelphia; 2) preliminary and permanent injunctions against all steps taken under the plan that would permit the selection and election of candidates; and 3) an order directing the adoption of a reapportionment plan free of the alleged constitutional and statutory defects. Plaintiffs sought no monetary damages. In the amended complaint, filed after it became apparent that the defense now at issue would be raised, plaintiffs added a request for an order “(e)njoining preliminarily and permanently (defendants Glancey, O'Donnell and City Committee) from having special status in the process established ... for the creation of a constitutionally permissible plan.” Amended Complaint, Prayer for Relief P 4b.

None of the items of relief requested makes the joinder of defendants Glancey, O'Donnell and City Committee either necessary or proper. The declaratory relief sought, of course, requires no action on any defendant's part. An injunction affecting the process leading to Pennsylvania's primary elections could not conceivably run against these three defendants simply because they have no official du-
ties or functions under the Pennsylvania Election Code, Pa.Stat.Ann. tit. 25 s 2600 et seq., and thus could not do anything to affect the manner or timing of that process. Similarly, defendants Glancey, O'Donnell and City Committee do not occupy any position empowered by Pennsylvania law to control in any way the development of a final reapportionment plan for the state legislature. Finally, even if it had been shown that these three defendants did informally possess some "special status" that allowed them de facto to exert control over the development of the final plan-and such a showing was not made here-joinder would still be unnecessary: if the Court were to find it necessary to order the state to develop a new reapportionment plan free of constitutional and statutory defects, Pennsylvania would have to produce a plan meeting those criteria; if the plan thereafter submitted met those criteria, it would be of no moment that any of the three defendants participated in its creation. Under such circumstances, where certain defendants are clearly without authority or power to effect any of the relief sought by the plaintiffs, a motion to drop those defendants may properly be granted. Committee for Public Education & Religious Liberty v. Rockefeller, 322 F.Supp. 678, 685-686 (S.D.N.Y.1971); Rakes v. Coleman, 318 F.Supp. 181, 192-193 (E.D.Va.1970); 7 C. Wright & A. Miller, Federal Practice and Procedure s 1683, at 322-323 (1972). The Court will so order.

III.

We turn now to the merits of plaintiffs' claims considered in light of the remaining defendants' motion for involuntary dismissal under Fed.R.Civ.P. 41(b).[FN6] Under rule 41(b), any of a plaintiff's claims may be dismissed at the close of plaintiff's case if "upon the facts and the law the plaintiff has shown no right to relief." In deciding whether the facts set forth above entitle the plaintiffs before us to the relief they seek, we must first briefly review the applicable law.

FN6. Defendants' motions under rule 41(b) were timely made at the close of plaintiffs' case. Because the Court deemed it beneficial, in light of the urgency of the matter, to conclude the hearing at a single sitting, and because the only evidence to be presented by any defendant was the brief testimony of a single witness, the court chose not to hear argument on defendants' rule 41(b) motions until the close of all the evidence. The Court explicitly ruled, however, that defendants' motions would not be prejudiced by the Court's decision to hear defendants' evidence first. N.T. 100-102. Accordingly, we may properly rule on defendants' motions for involuntary dismissal as though no evidence had been offered by any defendant.

[2][3][4][5] Courts, in reviewing reapportionment plans, first focused on inequities caused by states' failures to adjust boundaries of voting districts to accommodate shifts in the distribution of the states' respective populations. See, e.g., Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969); Wells v. Rockefeller, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 535 (1969); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). It is now well established, however, that a reapportionment plan describing districts of substantially equal population may still be invalid if "conceived or operated as purposeful devices to further racial or economic discrimination." Whitcomb v. Chavis, 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971). In Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), the Supreme Court stated this principle in the following terms:

State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). A districting
plan may create multimember districts perfectly acceptable under equal *585 population standards, but invidiously discriminatory because they are employed “to minimize or cancel out the voting strength of racial or political elements of the voting population.” Fortson v. Dorsey, 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965).

[6] In the case before us, the only evidence of conduct remotely suggesting intentional discrimination against Hispanic voters is the series of statements made by defendant Glancey in the television interview. There he stated that he had made suggestions for incorporation in the preliminary plan that would have resulted in districts which diffused the Hispanic vote. See Exhibit P4 at 19-21. Defendant Glancey, however, had no power to control the design of either the preliminary or final reapportionment plan, for under Pennsylvania law, that power resides exclusively with the Legislative Reapportionment Commission. Thus, to prevail on the merits, plaintiffs do not make out their case by simply stating that Glancey held the views that the plaintiffs complain of, or that he communicated them to persons who communicated them to the Commission, or that he personally spoke of them to a Commission staff member or a member of the Commission itself. Rather, plaintiffs must point to some evidence that the intent of Glancey was shared or adopted by the Commission, not only in the development of the preliminary plan but in the development of the final plan as well. The record is barren of any such evidence.

Plaintiffs urge the Court to bridge the gap in the evidence of intent by drawing an inference from the circumstances shown. First, plaintiffs point out that defendant Glancey did offer suggestions to the Commission with the purpose of having produced a preliminary plan that fractured the Hispanic vote. Plaintiffs further note that the preliminary plan filed did break up the Hispanic vote so that no district had a population that was more than 15% Hispanic. Plaintiffs then argue that since the Commission thereafter was shown that a district with a 56% Hispanic population could be created, but nevertheless filed a final plan wherein no district contained more than a 40% Hispanic population, the Commission must have intentionally discriminated against Hispanics in response to Glancey's preferences.

Plaintiffs' argument cannot survive even the most cursory examination. Whatever the Commission's reasons for drawing a preliminary plan, without a district of more than 15% Hispanic population, there remains the unalterable truth that the Commission revised that plan to provide for a district with a significantly greater proportion of Hispanic voters equal to 40% of the district's population. It is more reasonable to infer from such a marked upward adjustment that the Commission considered the views of Hispanics and did what it could to accommodate them, than it is to infer that *586 the Commission embraced the views of defendant Glancey. That the Commission failed to provide for a district containing the maximum possible concentration of Hispanic voters does not weaken the inference that the Commission acted properly. Reapportionment brings into play a variety of competing considerations-ethnic, racial, political, economic and otherwise. Compromise is of the essence of the process. Plaintiffs here have not shown that such competing considerations did not exist and cause the Commission to create a district with less than the maximum possible Hispanic population. In the absence of such a showing, the Court cannot conclude that the Commission's failure to create a 56% Hispanic district resulted from purposeful discrimination rather than from neces-
sary accommodation. Accordingly, the motions of defendant Commission and defendant William R. Davis for involuntary dismissal must be granted.

One more point, however, needs to be addressed. Plaintiffs have frequently denounced the conduct of defendants Glancey and the City Committee in channelling suggestions to the Commission that would intentionally minimize Hispanic voting strength in the preliminary reapportionment plan. It is not the business of the Courts to judge either the wisdom, the fairness, or the effectiveness of the political strategy adopted by defendants Glancey and the City Committee. Under our system, the only question properly before the Court in a reapportionment case such as this is whether or not the reapportionment plan adopted is valid under the law in the face of the particular challenge made, as it is in this case. Nevertheless, it must be said that organizations like the City Committee and individuals like defendant Glancey hold the same right held by plaintiffs to communicate their views on reapportionment. Moreover, an individual or organization does not lose its freedom to submit its suggestions just because the suggestions were motivated by considerations which, if shared or adopted by the state, would result in an invalid reapportionment plan. It is the state, or its designated agency, that must guard against the adoption of an unconstitutional plan, and how the state treats suggestions made does not affect a person's right to make them.

IV.

Plaintiffs have endeavored with understandable zeal to obtain a representative in their state's legislature. Defendant Commission heard their position and apparently tried to accommodate those concerns. The plaintiffs' failure to get all they sought is hardly unusual where reapportionment is concerned. As in the ordinary settlement of litigation, the usual mark of success in reapportionment is that no interested group is completely happy with the result.

Plaintiffs' case fails on two grounds. First, plaintiffs have joined three defendants-defendants Glancey, O'Donnell and the City Committee-who are legally incapable of providing any appropriate relief. Moreover, as to the other defendants, plaintiffs have utterly failed to provide the barest trace of evidence to support their claim that defendant Commission designed the legislative districts in Pennsylvania with the intent to discriminate against Hispanic voters. For both reasons, plaintiffs' claims must be dismissed.

D.C.Pa., 1982.
Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission
536 F.Supp. 578

END OF DOCUMENT
Permanent resident alien filed petition for habeas corpus, seeking review of decision of Board of Immigration Appeals (BIA) that he was removable by reason of having pleaded guilty to aggravated felony and was ineligible to apply for discretionary relief from deportation. The United States District Court for the District of Connecticut, Alan H. Nevas, J., 64 F.Supp.2d 47, determined that it had jurisdiction and that repeal of discretionary relief from deportation did not apply retroactively to alien. Immigration and Naturalization Service (INS) appealed. The Court of Appeals, 229 F.3d 406, affirmed. Certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) did not deprive court of jurisdiction to review alien's habeas petition, and (2) provisions of AEDPA and IIRIRA repealing discretionary relief from deportation did not apply retroactively to alien, who pled guilty to sale of controlled substance prior to statutes' enactment.

Affirmed.

Justice Scalia filed dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined, and Justice O'Connor joined in part.

Justice O'Connor filed dissenting opinion.

West Headnotes

[1] Habeas Corpus 197 ⇒ 205

197Habeas Corpus
197I In General
197I(A) In General
197I(A)1 Nature of Remedy in General
197k205 k. Constitutional and statutory provisions. Most Cited Cases

Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal. 28 U.S.C.A. § 2241.

[2] Constitutional Law 92 ⇒ 999

92Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k998 Intent of and Considerations Influencing Legislature
92k999 k. In general. Most Cited Cases
(Formerly 92k48(3))

When a particular interpretation of a statute invokes the outer limits of Congress' power, court expects a clear indication that Congress intended that result.

[3] Constitutional Law 92 ⇒ 994

92Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k994 k. Avoidance of constitutional questions. Most Cited Cases
(Formerly 92k48(1))

If an otherwise acceptable construction of a
statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, court is obligated to construe the statute to avoid such problems.


92 VI Election of Constitutional Provisions
92 VI(C) Determination of Constitutional Questions
92 VI(C)3 Presumptions and Construction as to Constitutionality

92k990 k. In general. Most Cited Cases
(Formerly 92k48(1))
Every reasonable construction of a statute must be resorted to in order to save the statute from unconstitutionality.

[5] Constitutional Law 92 <999

92 VI Election of Constitutional Provisions
92 VI(C) Determination of Constitutional Questions
92 VI(C)3 Presumptions and Construction as to Constitutionality

92k998 k. Intent of and Considerations Influencing Legislature
92k999 k. In general. Most Cited Cases
(Formerly 92k1007, 92k48(4.1))
Courts, when interpreting a statute, will not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

[6] Habeas Corpus 197 <912

197 Habeas Corpus
197 V Suspension of Writ
197k912 k. Constitutional and statutory provisions. Most Cited Cases

[7] Habeas Corpus 197 <912

197 Habeas Corpus
197 V Suspension of Writ
197k912 k. Constitutional and statutory provisions. Most Cited Cases
At the absolute minimum, the Suspension Clause protects the writ of habeas corpus as it existed in 1789. U.S.C.A. Const. Art. 1, § 9, cl. 2.

[8] Habeas Corpus 197 <521

197 Habeas Corpus
197 II Grounds for Relief; Illegality of Restraint
197 II(C) Relief Affecting Particular Persons or Proceedings
197k521 k. Aliens. Most Cited Cases
Section of Antiterrorism and Effective Death Penalty Act (AEDPA) entitled “Elimination of Custody Review by Habeas Corpus,” which repealed statute providing habeas relief for aliens in custody pursuant to a deportation order, did not deprive federal district court of jurisdiction to review alien's habeas corpus petition challenging decision of Board of Immigration Appeals (BIA) that he was ineligible to apply for discretionary relief from deportation. 28 U.S.C.A. § 2241; Immigration and Nationality Act, § 106(a)(10), as amended, 8 U.S.C.(1994 Ed.) § 1105(a)(10).

[9] Habeas Corpus 197 <521

197 Habeas Corpus
197 II Grounds for Relief; Illegality of Restraint
197 II(C) Relief Affecting Particular Persons or Proceedings
197k521 k. Aliens. Most Cited Cases
Provisions of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) limiting judicial review of a final order of removal did not deprive federal district court of jurisdiction to review alien's habeas corpus petition challenging decision of Board of Immigration Appeals (BIA) that he was ineligible to apply for discretionary relief from de-

[10] Aliens, Immigration, and Citizenship

24 Aliens, Immigration, and Citizenship
24V Denial of Admission and Removal
24V(A) In General
24k212 Constitutional and Statutory Provisions
24k216 k. Retroactive operation. Most Cited Cases
(Formerly 24k40)
Provisions of Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) precluding alien who was removable because of conviction for aggravated felony from applying for discretionary relief from deportation did not apply retroactively to alien who pled guilty to sale of controlled substance prior to statutes' enactment. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.(1994 Ed.) § 1182(c); § 242(a)(2)(C), as amended, 8 U.S.C.(1994 Ed.Supp. V) § 1252(a)(2)(C).


361 VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express retroactive provisions. Most Cited Cases
(Formerly 361k263)
Congressional enactments will not be construed to have retroactive effect unless their language requires this result.

[12] Statutes 361

361 VI Construction and Operation
361VI(D) Retroactivity
361k278.3 k. Power to enact and validity.

Most Cited Cases
(Formerly 92k186)
Congress has the power to enact laws with retrospective effect.

[13] Statutes 361

361 VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express retroactive provisions. Most Cited Cases
(Formerly 92k188)
A statute may not be applied retroactively absent a clear indication from Congress that it intended such a result.

[14] Statutes 361

361 VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express retroactive provisions. Most Cited Cases
(Formerly 92k188)
The first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively.

[15] Statutes 361

361 VI Construction and Operation
361VI(D) Retroactivity
361k278.2 k. Nature and scope. Most Cited Cases
(Formerly 361k263)
The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.

[16] Statutes 361

361 VI Construction and Operation
361VI(D) Retroactivity
361k278.2
A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

The judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

**Syllabus**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Before the effective dates of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 212(c) of the Immigration and Nationality Act of 1952 was interpreted to give the Attorney General broad discretion to waive deportation of resident aliens. As relevant here, the large class of aliens depending on § 212(c) relief was reduced in 1996 by § 401 of AEDPA, which identified a broad set of offenses for which convictions would preclude such relief; and by IIRIRA, which repealed § 212(c) and replaced it with a new section excluding from the class anyone “convicted of an aggravated felony,” 8 U.S.C. § 1229b(a)(3). Respondent St. Cyr, a lawful permanent United States resident, pleaded guilty to a criminal charge that made him deportable. He would have been eligible for a waiver of deportation under the immigration law in effect when he was convicted, but his removal proceedings were commenced after AEDPA’s and IIRIRA’s effective dates. The Attorney General claims that those Acts withdrew his authority to grant St. Cyr a waiver. The Federal District Court accepted St. Cyr’s habeas corpus application and agreed that the new restrictions do not apply to removal proceedings brought against an alien who pleaded guilty to a deportable crime before their enactment. The Second Circuit affirmed.

**Held:**


(a) To prevail on its claim that AEDPA and IIRIRA stripped federal courts of jurisdiction to decide a pure question of law, as in this case, petitioner Immigration and Naturalization Service (INS) must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear and unambiguous statement of congressional intent to repeal habeas jurisdiction. Here, that plain statement rule draws additional reinforcement from other canons of statutory construction: First, when a statutory interpretation invokes the outer limits of Congress’ power, there must be a clear indication that Congress intended that result; and second, if an otherwise acceptable construction would raise serious constitutional problems and an alternative interpretation is fairly possible, the statute must be construed to avoid such problems. Pp. 2278–2279.

(b) Construing the amendments at issue to preclude court review of a pure question of law would give rise to substantial constitutional questions. The Constitution’s Suspension Clause, which protects
the privilege of the habeas corpus writ, unquestionably requires some judicial intervention in deportation cases. *Heikkila v. Barber*, 345 U.S. 229, 235, 73 S.Ct. 603, 97 L.Ed. 972. Even assuming that the Clause protects only the writ as it existed in 1789, substantial evidence supports St. Cyr's claim that pure questions of law could have been answered in 1789 by a common-law judge with power to issue the writ. Thus, a serious Suspension Clause issue would arise if the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute. The need to resolve such a serious and difficult constitutional question and the desirability of avoiding that necessity reinforce the reasons for requiring a clear and unambiguous statement of constitutional intent. Pp. 2279–2282.

(c) To conclude that the writ is no longer available in this context would also represent a marked departure from historical immigration law practice. The writ has always been available to review the legality of Executive detention, see, *e.g.*, *Felker v. Turpin*, 518 U.S. 651, 663, 116 S.Ct. 2333, 135 L.Ed.2d 827, and, until the 1952 Act, a habeas action was the sole means of challenging a deportation order's legality, see, *e.g.*, *Heikkila*, 345 U.S., at 235, 73 S.Ct. 603. Habeas courts have answered questions of law in alien suits challenging Executive interpretations of immigration law and questions of law that arose in the discretionary relief context. Pp. 2282–2283.

(d) Neither AEDPA § 401(e) nor three IIRIRA provisions, 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), and (b)(9), express a clear and unambiguous statement of Congress' intent to bar 28 U.S.C. § 2241 petitions. None of these sections even mentions § 2241. Section 401(e)'s repeal of a subsection of the 1961 Act, which provided, *inter alia*, habeas relief for an alien in custody pursuant to a deportation order, is not sufficient to eliminate what the repealed section did not grant—namely, habeas jurisdiction pursuant to § 2241. See *Ex parte Yerger*, 8 Wall. 85, 105–106, 19 L.Ed. 332. The three IIRIRA provisions do not speak with sufficient clarity to bar habeas jurisdiction. They focus on “judicial review” or “jurisdiction to review.” In the immigration context, however, “judicial review” and “habeas corpus” have historically distinct meanings, with habeas courts playing a far narrower role. Pp. 2283–2287.

2. Section 212(c) relief remains available for aliens, like St. Cyr, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect. Pp. 2287–2293.

*291 a) A statute's language must require that it be applied retroactively. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493. The first step in the impermissible-retroactive-effect determination is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively. *Martin v. Hadix*, 527 U.S. 343, 352, 119 S.Ct. 1998, 144 L.Ed.2d 347. Such clarity is not shown by the comprehensiveness of IIRIRA's revision of federal immigration law, see *Landgraf v. USI Film Products*, 511 U.S. 244, 260–261, 114 S.Ct. 1483, 128 L.Ed.2d 229, by the promulgation of IIRIRA's effective date, see *id.*, at 257, 114 S.Ct. 1483, or by IIRIRA § 309(c)(1)'s “saving provision.” Pp. 2287–2290.

(b) The second step is to determine whether IIRIRA attaches new legal consequences to events completed before its enactment, a judgment informed and guided by considerations of fair notice, reasonable reliance, and settled expectations. *Landgraf*, 511 U.S., at 270, 114 S.Ct. 1483. IIRIRA's elimination of § 212(c) relief for people who entered into plea agreements expecting that they would be eligible for such relief clearly attaches a new disability to past transactions or considerations. Plea agreements involve a *quid pro quo* between a criminal defendant and the government, and there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions' immigration
consequences. The potential for unfairness to people like St. Cyr is significant and manifest. Now that prosecutors have received the benefit of plea agreements, facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would be contrary to considerations of fair notice, reasonable reliance, and settled expectations to hold that IIRIRA deprives them of any possibility of such relief. The INS' argument that application of deportation law can never have retroactive effect because deportation proceedings are inherently prospective is not particularly helpful in undertaking Landgraf's analysis, and the fact that deportation is not punishment for past crimes does not mean that the Court cannot consider an alien's reasonable reliance on the continued availability of discretionary relief from deportation **2275 when deciding the retroactive effect of eliminating such relief. That § 212(c) relief is discretionary does not affect the propriety of this Court's conclusion, for there is a clear difference between facing possible deportation and facing certain deportation. Pp. 2290–2293.

229 F.3d 406, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, post, p. 2293. SCALIA, J., filed a dissenting opinion, in *292 which REHNQUIST, C.J., and THOMAS, J., joined, and in which O'CONNOR, J., joined as to Parts I and III, post, p. 2293.

Edwin S. Kneedler, Washington, DC, for petitioner.

Justice STEVENS delivered the opinion of the Court.

Both the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), enacted on April 24, 1996, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), enacted on September 30, 1996, 110 Stat. 3009–546, contain comprehensive amendments to the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. § 1101 et seq. This case raises two important questions about the impact of those amendments. The first question is a procedural one, concerning the effect of those amendments on the availability of habeas corpus jurisdiction under 28 U.S.C. § 2241. The second question is a substantive one, concerning the impact of the amendments on conduct that occurred before *293 their enactment and on the availability of discretionary relief from deportation.

Respondent, Enrico St. Cyr, is a citizen of Haiti who was admitted to the United States as a lawful permanent resident in 1986. Ten years later, on March 8, 1996, he pleaded guilty in a state court to a charge of selling a controlled substance in violation of Connecticut law. That conviction made him deportable. Under pre-AEDPA law applicable at the time of his conviction, St. Cyr would have been eligible for a waiver of deportation at the discretion of the Attorney General. However, removal proceedings against him were not commenced until April 10, 1997, after both AEDPA and IIRIRA became effective, and, as the Attorney General interprets those statutes, he no longer has discretion to grant such a waiver.

In his habeas corpus petition, respondent has alleged that the restrictions on discretionary relief from deportation contained in the 1996 statutes do not apply to removal proceedings brought against an alien who pleaded guilty to a deportable crime before their enactment. The District Court accepted jurisdiction of his application and agreed with his submission. In accord with the decisions of four other Circuits, the Court of Appeals for the Second Circuit affirmed. FN1 229 F.3d 406 (2000). The importance of both questions warranted our grant of certiorari. 531 U.S. 1107, 121 S.Ct. 848, 148 L.Ed.2d 733 (2001).

FN1. See Mahadeo v. Reno, 226 F.3d 3
The character of the pre—AEDPA and pre-IIRIRA law that gave the Attorney General discretion to waive deportation in certain cases is relevant to our appraisal of both the substantive and the procedural questions raised by the petition of the Immigration and Naturalization Service (INS). We shall therefore preface our discussion of those questions with an overview of the sources, history, and scope of that law.

Subject to certain exceptions, § 3 of the Immigration Act of 1917 excluded from admission to the United States several classes of aliens, including, for example, those who had committed crimes “involving moral turpitude.” 39 Stat. 875. The seventh exception provided “[t]hat aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.” Id., at 878. Although that provision applied literally only to exclusion proceedings, and although the deportation provisions of the statute did not contain a similar provision, the INS relied on § 3 to grant relief in deportation proceedings involving aliens who had departed and returned to this country after the ground for deportation arose. See, e.g., Matter of L, 1 I. & N. Dec. 1, 2, 1940 WL 7544 (1940).

FN2. The INS was subsequently transferred to the Department of Justice. See Matter of L, 1 I. & N. Dec. 1, n. 1 (1940). As a result, the powers previously delegated to the Secretary of Labor were transferred to the Attorney General. See id., at 2

Section 212 of the Immigration and Nationality Act of 1952, which replaced and roughly paralleled § 3 of the 1917 Act, excluded from the United States several classes of aliens, including those convicted of offenses involving moral turpitude or the illicit traffic in narcotics. See 66 Stat. 182–187. As with the prior law, this section was subject to a proviso granting the Attorney General broad discretion to admit excludable aliens. See id., at 187. That proviso, codified at 8 U.S.C. § 1182(c), stated:

“Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General ...."

Like § 3 of the 1917 Act, § 212(c) was literally applicable only to exclusion proceedings, but it too has been interpreted by the Board of Immigration Appeals (BIA) to authorize any permanent resident alien with “a lawful unrelinquished domicile of seven consecutive years” to apply for a discretionary waiver from deportation. See Matter of Silva, 16 I. & N. Dec. 26, 30, 1976 WL 32326 (1976) (adopting position of Francis v. INS, 532 F.2d 268 (C.A.2 1976)). If relief is granted, the deportation proceeding is terminated and the alien remains a permanent resident.

The extension of § 212(c) relief to the deportation context has had great practical importance, because deportable offenses have historically been defined broadly. For example, under the INA, ali-
ens are deportable upon conviction for two crimes of “moral turpitude” (or for one such crime if it occurred within five years of entry into the country and resulted in a jail term of at least one year). See 8 U.S.C. §§ 1227(a)(2)(A)(i)-(ii) (1994 ed., Supp. V). In 1988, Congress further specified that an alien is deportable upon conviction for any “aggravated felony.” Anti–Drug Abuse Act of 1988, 102 Stat. 4469–4470, § 1227(a)(2)(A)(iii), which was defined to include numerous offenses without regard to how long ago they were committed. **2277 Thus, the class of aliens *296 whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted. Consequently, in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens.

FN4. See 8 U.S.C. § 1101(a)(43) (1994 ed. and Supp. V). While the term has always been defined expansively, it was broadened substantially by IIRIRA. For example, as amended by that statute, the term includes all convictions for theft or burglary for which a term of imprisonment of at least one year is imposed (as opposed to five years pre-IIRIRA), compare § 1101(a)(43)(G) (1994 ed., Supp. V) with § 1101(a)(43)(G) (1994 ed.), and all convictions involving fraud or deceit in which the loss to the victim exceeds $10,000 (as opposed to $200,000 pre-IIRIRA), compare § 1101(a)(43)(M)(i) (1994 ed., Supp. V) with § 1101(a)(43)(M)(i) (1994 ed.). In addition, the term includes any “crime of violence” resulting in a prison sentence of at least one year (as opposed to five years pre-IIRIRA), compare § 1101(a)(43)(F) (1994 ed., Supp. V) with § 1101(a)(43)(F) (1994 ed.), and that phrase is itself broadly defined. See 18 U.S.C. § 16 (“[A]n offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” or “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”).

FN5. See, e.g., Rannik, The Anti–Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver, 28 U. Miami Inter–Am. L.Rev. 123, 150, n. 80 (1996) (providing statistics indicating that 51.5% of the applications for which a final decision was reached between 1989 and 1995 were granted); see also Mattis v. Reno, 212 F.3d 31, 33 (C.A.1 2000) (“[I]n the years immediately preceding the statute’s passage, over half the applications were granted”); Tasios, 204 F.3d, at 551 (same).

In developing these changes, the BIA developed criteria, comparable to common-law rules, for deciding when deportation is appropriate. Those criteria, which have been set forth in several BIA opinions, see, e.g., Matter of Marin, 16 I. & N. Dec. 581, 1978 WL 36472 (1978), include the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien’s residence, the impact of deportation on the family, the number of citizens in the family, and the character of any service in the Armed Forces.

FN6. See Rannik, 28 U. Miami Inter–Am. L.Rev., at 150, n. 80. However, based on these statistics, one cannot form a reliable estimate of the number of individuals who will be affected by today’s decision. Since the 1996 statutes expanded the definition of “aggravated felony” substantially—and retroactively—the number of individuals now subject to deportation absent § 212(c) relief is significantly high-
er than these figures would suggest. In addition, the nature of the changes (bringing under the definition more minor crimes which may have been committed many years ago) suggests that an increased percentage of applicants will meet the stated criteria for § 212(c) relief.

*297 Three statutes enacted in recent years have reduced the size of the class of aliens eligible for such discretionary relief. In 1990, Congress amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years. § 511, 104 Stat. 5052 (amending 8 U.S.C. § 1182(c)). In 1996, in § 440(d) of AEDPA, Congress identified a broad set of offenses for which convictions would preclude such relief. See 110 Stat. 1277 (amending 8 U.S.C. § 1182(c)).


FN7. The new provision barred review for individuals ordered deported because of a conviction for an aggravated felony, for a drug conviction, for certain weapons or national security violations, and for multiple convictions involving crimes of moral turpitude. See 110 Stat. 1277.

In the Attorney General's opinion, these amendments have entirely withdrawn his **2278 § 212(c) authority to waive deportation for aliens previously convicted of aggravated felonies. Moreover, as a result of other amendments adopted in AEDPA and IIRIRA, the Attorney General also maintains that there is no judicial forum available to decide whether these statutes did, in fact, deprive him of the power to grant such relief. As we shall explain below, we disagree on both points. In our view, a federal court does have jurisdiction to decide the merits of the legal question, and *298 the District Court and the Court of Appeals decided that question correctly in this case.

II

The first question we must consider is whether the District Court retains jurisdiction under the general habeas corpus statute, 28 U.S.C. § 2241, to entertain St. Cyr's challenge. His application for a writ raises a pure question of law. He does not dispute any of the facts that establish his deportability or the conclusion that he is deportable. Nor does he contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum. Rather, he contests the Attorney General's conclusion that, as a matter of statutory interpretation, he is not eligible for discretionary relief.

The District Court held, and the Court of Appeals agreed, that it had jurisdiction to answer that question in a habeas corpus proceeding. FN8 The INS argues, however, that four sections of the 1996 statutes—specifically, § 401(e) of AEDPA and three sections of IIRIRA (8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9) (1994 ed., Supp. V))—stripped the courts of jurisdiction to decide the question of law presented by respondent's habeas corpus application.

FN8. See n. 1, supra; n. 33, infra.

[1] For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action FN9 and the long-standing rule requiring a clear statement of congressional intent to repeal habeas jurisdiction. See Ex parte Yerger, 8 Wall. 85, 102, 19 L.Ed. 332 (1869) (“We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law”); Felker v. Turpin, 518 U.S. 651, 660–661, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (noting that “[n]o provision of Title I *299 men-
tions our authority to entertain original habeas petitions, “and the statute “makes no mention of our authority to hear habeas petitions filed as original matters in this Court”). Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal. Ex parte Yerger, 8 Wall., at 105 (“Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act”).


FN10. “In traditionally sensitive areas, ... the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” Gregory v. Ashcroft, 501 U.S. 452, 461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (internal quotation marks and citations omitted); see United States v. Nordic Village, Inc., 503 U.S. 30, 33, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (“Waivers of the [Federal] Government's sovereign immunity, to be effective, must be ‘unequivocally expressed’ ”); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (“Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute”); see also Eskridge & Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L.Rev. 593, 597 (1992) (“[T]he Court ... has tended to create the strongest clear statement rules to confine Congress's power in areas in which Congress has the constitutional power to do virtually anything”).

FN11. Cf. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (“[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective” (internal quotation marks omitted)).


FN12. “As was stated in Hooper v. California, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895), ‘[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from

[6] A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions. Article I, § 9, cl. 2, of the Constitution provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it.” Because of that Clause, some “judicial intervention in deportation cases” is unquestionably “required by the Constitution.” Heikkila v. Barber, 345 U.S. 229, 235, 73 S.Ct. 603, 97 L.Ed. 972 (1953).

[7] Unlike the provisions of AEDPA that we construed in Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), this case involves an alien subject to a federal removal order rather than a person confined pursuant to a state-court conviction. Accordingly, regardless of whether the protection of the Suspension Clause encompasses all cases covered by the 1867 Amendment extending the protection of the writ to state prisoners, cf. id., at 663–664, 116 S.Ct. 2333, or by subsequent legal developments, see LaGuerre v. Reno, 164 F.3d 1035 (C.A.7 1998), at the absolute minimum, the Suspension Clause protects the writ “as it existed in 1789.” FN13


FN13. The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely. Cf. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L.Rev. 961, 980 (1998) (noting that “reconstructing habeas corpus law ... [for purposes of a Suspension Clause analysis] would be a difficult enterprise, given fragmentary documentation, state-by-state disuniformity, and uncertainty about how state practices should be transferred to new national institutions”).

At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest. See, e.g., Swain v. Pressley, 430 U.S. 372, 380, n. 13, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977); id., at 385–386, 533, 73 S.Ct. 1224 (Burger, C. J., concurring) (noting that “the traditional Great Writ was largely a remedy against executive detention”); Brown v. Allen, 344 U.S. 443, 533, 73 S.Ct. 397, 97 L.Ed. 469 (1953) (Jackson, J., concurring in result) (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial”).
In England prior to 1789, in the Colonies,\(^{15}\) and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens.\(^{302}\) It enabled them to challenge Executive and private detention in civil cases as well as criminal.\(^{16}\) Moreover, the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes.\(^{17}\) It was used to command the discharge of seamen who had a statutory exemption from impressment into the British Navy,\(^{18}\) to emancipate slaves,\(^{19}\) and to obtain the freedom of apprentices\(^{20}\) and asylum inmates.\(^{21}\) Most important, for our purposes, those early cases contain no suggestion that habeas relief in cases involving\(^{22}\) Executive detention was only available for constitutional error.

FN14. At common law, “[w]hile habeas review of a court judgment was limited to the issue of the sentencing court’s jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.” Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1238 (1970).

FN15. See W. Duker, A Constitutional History of Habeas Corpus 115 (1980) (noting that “the common-law writ of habeas corpus was in operation in all thirteen of the British colonies that rebelled in 1776”).


FN20. Id., at 79–82.


FN23. See, e.g., Ex parte Boggin, 13 East 549, n. (b), 104 Eng. Rep. 484, n. (a) 2 (K.B.1811) (referring to Chalacombe's Case, in which the court required a response from the Admiralty in a case involving the impressment of a master of a coal vessel, despite the argument that exemptions for “seafaring persons of this description” were given only as a matter of “grace and favour,” not “of right”); Hollingshead's Case, 1 Salkeld 351, 91 Eng. Rep. 307 (K.B.1702) (granting relief on the grounds that the language of the warrant of commitment—authorizing detention until “otherwise discharged by due course of law”—exceeded the authority granted under the statute to commit “till [the bankrupt] submit himself to be examined by the commissioners”); see also Brief for Legal Historians as Amici Curiae 8–10, 18–28.

The dissent, however, relies on Chalacombe's Case as its sole support for the proposition that courts treated Executive discretion as “lying entirely beyond the judicial ken.” See post, at 2302 (opinion of SCALIA, J.). Although Lord Ellenborough expressed “some hesitation” as to whether the case should “stand over for the consideration of the Admiralty,” he concluded that, given the public importance of the question, the response should be called for. 13 East, at 549, n. (b), 104 Eng. Rep., at 484, n.(a) 2. The case ultimately became moot when the Admiralty discharged Chalacombe, but it is significant that, despite some initial hesitation, the court decided to proceed.

**2281 Notwithstanding the historical use of habeas corpus to remedy unlawful Executive action, the INS argues that this case falls outside the traditional scope of the writ at common law. It acknowledges that the writ protected an individual who was held without legal authority, but argues that the writ would not issue where “an official had statutory authorization to detain the individual ... but ... the official was not properly exercising his discretionary power to determine whether the individual should be released.” Brief for Respondent in Calcano-Martinez v. INS, O.T.2000, No. 00–1011, p. 33. In this case, the INS points out, there is no dispute that the INS had authority in law to hold St. Cyr, as he is eligible for removal. St. Cyr counters that there is historical evidence of the writ issuing to redress the *304 improper exercise of official discretion. See n. 23, supra; Hafetz, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts, 107 Yale L.J. 2509 (1998).

St. Cyr's constitutional position also finds some support in our prior immigration cases. In Heikkila v. Barber, the Court observed that the then-existing statutory immigration scheme “had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution,” 345 U.S., at 234–235, 73 S.Ct. 603 (emphasis added)—and that scheme, as discussed below, did allow for review on habeas of questions of law concerning an alien's eligibility for discretionary relief. Therefore, while the INS' historical arguments are not insubstantial, the ambiguities in the scope of the exercise of the writ at common law identified by St. Cyr, and the suggestions in this Court's prior decisions as to the extent to which habeas review could be limited consistent with the Constitution, convince us that the Suspension Clause questions that would be presented by the INS' reading of the immigration statutes before us are difficult and significant.

FN24 The dissent reads into Chief Justice Marshall's opinion in Ex parte Bollman, 4 Cranch 75, 2 L.Ed. 554 (1807), support for a proposition that the Chief Justice did not endorse, either explicitly or implicitly. See post, at 2300–2301 (opinion of SCALIA, J.). He did note that “the first congress of
the United States” acted under “the immediate influence” of the injunction provided by the Suspension Clause when it gave “life and activity” to “this great constitutional privilege” in the Judiciary Act of 1789, and that the writ could not be suspended until after the statute was enacted. 4 Cranch, at 95. That statement, however, surely does not imply that Marshall believed the Framers had drafted a Clause that would proscribe a temporary abrogation of the writ, while permitting its permanent suspension. Indeed, Marshall’s comment expresses the far more sensible view that the Clause was intended to preclude any possibility that “the privilege itself would be lost” by either the inaction or the action of Congress. See, e.g., ibid. (noting that the Founders “must have felt, with peculiar force, the obligation” imposed by the Suspension Clause).

**2282 In sum, even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial *305 evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L.Rev. 1362, 1395–1397 (1953). The necessity of resolving such a serious and difficult constitutional issue—and the desirability of avoiding that necessity—simply reinforce the reasons for requiring a clear and unambiguous statement of congressional intent.

Moreover, to conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law. The writ of habeas corpus has always been available to review the legality of Executive detention. See Felker, 518 U.S., at 663, 116 S.Ct. 2333; Swain v. Pressley, 430 U.S., at 380, n. 13, 97 S.Ct. 1224; id., at 385–386, 97 S.Ct. 1224 (Burger, C. J., concurring); Brown v. Allen, 344 U.S., at 533, 73 S.Ct. 397 (Jackson, J., concurring in result). Federal courts have been authorized to issue writs of habeas corpus since the enactment of the Judiciary Act of 1789, and § 2241 of the Judicial Code provides that federal judges may grant the writ of habeas corpus on the application of a prisoner held “in custody in violation of the Constitution or laws or treaties of the United States.”FN25 28 U.S.C. § 2241. Before and after the enactment in 1875 of the first statute regulating immigration, 18 Stat. 477, that jurisdiction was regularly invoked on behalf of noncitizens, particularly in the immigration context. See, e.g., *306 In re Kaine, 14 How. 103, 14 L.Ed. 345 (1853); United States v. Jung Ah Lung, 124 U.S. 621, 626–632, 8 S.Ct. 663, 31 L.Ed. 591 (1888).


Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court.FN26 See, e.g., United States v. Jung Ah Lung, 124 U.S. 621, 8 S.Ct. 663, 31 L.Ed. 591 (1888); Heikkila, 345 U.S., at 235, 73 S.Ct. 603; Chin Yow v. United States, 208 U.S. 8, 28 S.Ct. 201, 52 L.Ed. 369 (1908); Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 66 L.Ed. 938 (1922). In such cases, other than the question whether there was some evidence to support the order, FN27 the courts generally did not review factual determinations made by the Executive. See Ekiu...
v. United States, 142 U.S. 651, 659, 12 S.Ct. 336, 35 L.Ed. 1146 (1892). However, they did review the Executive's legal determinations. See Gegiow v. Uhl, 239 U.S. 3, 9, 36 S.Ct. 2, 60 L.Ed. 114 (1915) (“The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the **2283 alien may demand his release upon habeas corpus”); see also Neuman, Jurisdiction and the Rule of Law after the 1996 Immigration Act, 113 Harv. L.Rev.1963, 1965–1969 (2000).FN28 In case after case, courts answered questions of law in habeas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws. FN29


FN27. See, e.g., United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106, 47 S.Ct. 302, 71 L.Ed. 560 (1927) (holding that deportation “on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus”).

FN28. “And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus.” Gegiow v. Uhl, 239 U.S. 3, 9, 36 S.Ct. 2, 60 L.Ed. 114 (1915).


Habeas courts also regularly answered questions of law that arose in the context of discretionary relief. See, e.g., United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77, 77 S.Ct. 618, 1 L.Ed.2d 652 (1957). FN30 Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand. See Neuman, 113 Harv. L.Rev., at 1991 (noting the “strong tradition in habeas corpus law ... that subjects the legally erroneous failure to exercise discretion, unlike a substantively unwise exercise of discretion, to inquiry on the writ”). Eligibility that was “governed by specific statutory standards” provided “a right to a ruling on an applicant's eligibility,” even though the actual granting of relief was “not a matter of right under any circumstances, but rather is in all cases a matter of grace.” Jay v. Boyd, 351 U.S. 345, 353–354, 76 S.Ct. 919, 100 L.Ed. 1242 (1956). Thus, even though the actual suspension of deportation authorized by § 19(c) of the Immigration Act of 1917 was a matter of grace, in United States ex rel. Accardi v. Shaughnessy,
347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954), we held that a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law. The exercise of the District Court's habeas corpus jurisdiction to answer a pure question of law in this case is entirely consistent with the exercise of such jurisdiction in *Accardi*. See also *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S., at 77, 77 S.Ct. 618.


Thus, under the pre–1996 statutory scheme—and consistent with its common-law antecedents—it is clear that St. Cyr **2284** could have brought his challenge to the BIA's legal determination in a habeas corpus petition under 28 U.S.C. § 2241. The INS argues, however, that AEDPA and IIRIRA contain four provisions that express a clear and unambiguous statement of Congress' intent to bar petitions brought under § 2241, despite the fact that none of them mention that section. The first of those provisions is AEDPA's § 401(e).

[8] While the title of § 401(e)—“ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS”—would seem to support the INS' submission, the actual text of that provision does not. As we have previously noted, a title alone is not controlling. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (“[T]he title of a statute ... cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase” ” (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528–529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947))). The actual text of § 401(e), unlike its title, merely repeals a subsection of the 1961 statute amending the judicial review provisions of the 1952 Immigration and Nationality Act. See n. 31, *supra*. Neither the title nor the text makes any mention of 28 U.S.C. § 2241.

FN31. The section reads as follows:

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(e) ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—

“(1) in paragraph (8), by adding ‘and’ at the end;

“(2) in paragraph (9), by striking; ‘and’ at the end and inserting a period; and

“(3) by striking paragraph (10).” 110 Stat. 1268.
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Under the 1952 Act, district courts had broad authority to grant declaratory and injunctive relief in immigration cases, including orders adjudicating deportability and those denying suspensions of de-

The INS argues that the inclusion of that exception in the 1961 Act indicates that Congress must have believed that it would otherwise have withdrawn the pre-existing habeas corpus jurisdiction in deportation cases and that, as a result, the repeal of that exception in AEDPA in 1996 implicitly achieved that result. It seems to us, however, that the 1961 exception is best explained as merely confirming the limited scope of the new review procedures. In fact, the 1961 House Report provides that this section “in no way disturbs the Habeas Corpus Act.” FN32 H.R.Rep. No. 1086, 87th Cong., 1st *310 Sess., 29 (1961). Moreover, a number of the courts that considered the interplay between the general habeas provision and INA § 106(a)(10) after the 1961 Act and before the enactment of AEDPA did not read the 1961 Act’s specific habeas provision as supplanting jurisdiction under § 2241.


FN32. Moreover, the focus of the 1961 amendments appears to have been the elimination of Administrative Procedure Act (APA) suits that were brought in the district court and that sought declaratory relief. See, e.g., H.R. No. 2478, 85th Cong., 2d Sess., 9 (1958) (“[H]abeas corpus is a far more expeditious judicial remedy than that of declaratory judgment”); 104 Cong. Rec. 17173 (1958) (statement of Rep. Walter) (stating that courts would be “relieved of a great burden” once declaratory actions were eliminated and noting that habeas corpus was an “expeditious” means of review).

In any case, whether § 106(a)(10) served as an independent grant of habeas jurisdiction or simply as an acknowledgment of continued jurisdiction pursuant to § 2241, its repeal cannot be sufficient to eliminate what it did not originally grant—namely, habeas jurisdiction pursuant to 28 U.S.C. § 2241.

FN33 See Ex parte Yerger, 8 Wall., at 105–106 (concluding that the repeal of “an additional grant of jurisdiction” does not “operate as a repeal of jurisdiction theretofore allowed”); Ex parte McCardle, 7 Wall. 506, 515, 19 L.Ed. 264 (1869) (concluding that the repeal of portions of the 1867 statute conferring appellate jurisdiction on the Supreme Court in habeas proceedings did “not affect the jurisdiction which was previously exercised”).


1252(a)(2)(C), and *311 1252(b)(9) (1994 ed., Supp. V). As amended by § 306 of IIRIRA, 8 U.S.C. § 1252(a)(1) (1994 ed., Supp. V) now provides that, with certain exceptions, including those set out in subsection (b) of the same statutory provision, “[j]udicial review of a final order of removal ... is governed only by” the Hobbs Act’s procedures for review of agency orders in the courts of appeals. Similarly, § 1252(b)(9), which addresses the “[c]onsolidation of questions for judicial review,” provides that “[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.”

Finally, § 1252(a)(2)(C), which concerns “[m]atters not subject to judicial review,” states: “Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed” certain enumerated criminal offenses.


The term “judicial review” or “jurisdiction to review” is the focus of each of these three provisions. In the immigration context, “judicial review” and “habeas corpus” have historically distinct meanings. See Heikkila v. Barber, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972 (1953). In Heikkila, the Court concluded that the finality provisions at issue “preclude[d] judicial review” to the maximum extent possible under the Constitution, and thus concluded that the APA was inapplicable. Id., at 235, 73 S.Ct. 603. Nevertheless, the Court reaffirmed the right to habeas *312 corpus. Ibid. Noting that the limited role played by the courts in habeas corpus proceedings was far narrower than the judicial review authorized by the APA, the Court concluded that “it is the scope of inquiry on habeas corpus that differentiates” habeas review from “judicial review.” Id., at 236, 73 S.Ct. 603; see also, e.g., **2286Terlinden v. Ames, 184 U.S. 270, 278, 22 S.Ct. 484, 46 L.Ed. 534 (1902) (noting that under the extradition statute then in effect there was “no right of review to be exercised by any court or judicial officer,” but that limited review on habeas was nevertheless available); Ekiu, 142 U.S., at 663, 12 S.Ct. 336 (observing that while a decision to exclude an alien was subject to inquiry on habeas, it could not be “impeached or reviewed”). Both §§ 1252(a)(1) and (a)(2)(C) speak of “judicial review”—that is, full, nonhabeas review. Neither explicitly mentions habeas, or 28 U.S.C. § 2241. Accordingly, neither provision*313 speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute.

FN35. Contrary to the dissent, see post, at 2295 (opinion of SCALIA, J.), we do not think, given the longstanding distinction between “judicial review” and “habeas,” that § 1252(e)(2)’s mention of habeas in the subsection governing “[j]udicial review of orders under section 1225(b)(1)” is sufficient to establish that Congress intended to abrogate the historical distinction between two terms of art in the immigration context when enacting IIRIRA.

“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to
each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.” *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

At most, § 1252(e)(2) introduces additional statutory ambiguity, but ambiguity does not help the INS in this case. As we noted above, only the clearest statement of congressional intent will support the INS position. See *supra*, at 2282.

**FN36.** It is worth noting that in enacting the provisions of AEDPA and IIRIRA that restricted or altered judicial review, Congress did refer specifically to several different sources of jurisdiction. See, e.g., § 381, 110 Stat. 3009–650 (adding to grant of jurisdiction under 8 U.S.C. § 1329 (1994 ed., Supp. V) a provision barring jurisdiction under that provision for suits against the United States or its officers or agents). Section 401(e), which eliminated supplemental habeas jurisdiction under the INA, expressly strikes paragraph 10 of § 106(a) of the INA, *not* 28 U.S.C. § 2241. Similarly, § 306 of IIRIRA, which enacted the new INA § 242, specifically precludes reliance on the provisions of the APA providing for the taking of additional evidence, and imposes specific limits on the availability of declaratory relief. See, e.g., 8 U.S.C. § 1535(e)(2) (1994 ed., Supp. V) (explicitly barring aliens detained under “alien terrorist removal” procedures from seeking “judicial review, including application for a writ of habeas corpus, except for a claim by the alien that continued detention violates the alien’s rights under the Constitution”). At no point, however, does IIRIRA make express reference to § 2241. Given the historic use of § 2241 jurisdiction as a means of reviewing deportation and exclusion orders, Congress’ failure to refer specifically to § 2241 is particularly significant. Cf. *Chisom v. Roemer*, 501 U.S. 380, 396, n. 23, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).

The INS also makes a separate argument based on 8 U.S.C. § 1252(b)(9) (1994 ed., Supp. V). We have previously described § 1252(b)(9) as a “zipper clause.” *AADC*, 525 U.S. 471, 483, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). Its purpose is to consolidate “judicial review” of immigration proceedings into one action in the court of appeals, but it applies only “[w]ith respect to review of an order of removal under subsection (a)(1).” 8 U.S.C. § 1252(b) (1994 ed., Supp. V). FN37 Accordingly, this provision, by its own terms, does not bar habeas jurisdiction over removal orders not subject to judicial review under § 1252(a)(1)—including orders against aliens who are removable by reason of having committed one or more criminal offenses. Subsection (b)(9) simply provides for the consolidation of issues to be brought in petitions for “[j]udicial review,” which, as we note above, is a term historically distinct from habeas. See *Mahadeo v. Reno*, 226 F.3d 3, 12 (C.A.1 2000); *Flores–Miramontes v. INS*, 212 F.3d 1133, 1140 (C.A.9 2000). It follows that § 1252(b)(9) does not clearly apply to actions brought pursuant to the general habeas statute, and thus cannot repeal that statute either in part or in whole.

**FN37.** As we noted in *AADC*, courts construed the 1961 amendments as channeling review of final orders to the courts of appeals, but still permitting district courts to exercise their traditional jurisdiction over claims that were viewed as being outside of a “final order.” 525 U.S., at 485, 119 S.Ct. 936. Read in light of this history, § 1252(b)(9) ensures that review of those
types of claims will now be consolidated in a petition for review and considered by the courts of appeals.

If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS' reading of § 1252. But the absence of such a forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions. Cf. Felker, 518 U.S., at 660–661, 116 S.Ct. 2333. Accordingly, we conclude that habeas jurisdiction under § 2241 was not repealed by AE-DPA and IIRIRA.

FN38 The dissent argues that our decision will afford more rights to criminal aliens than to noncriminal aliens. However, as we have noted, the scope of review on habeas is considerably more limited than on APA-style review. Moreover, this case raises only a pure question of law as to respondent's statutory eligibility for discretionary relief, not, as the dissent suggests, an objection to the manner in which discretion was exercised. As to the question of timing and congruent means of review, we note that Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals. See, e.g., Swain v. Pressley, 430 U.S. 372, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977) (“[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention” does not violate the Suspension Clause).

III

[10] The absence of a clearly expressed statement of congressional intent also pervades our review of the merits of St. Cyr's claim. Two important legal consequences ensued from respondent's entry of a guilty plea in March 1996: (1) He became subject to deportation, and (2) he became eligible for a discretionary waiver of that deportation under the prevailing*315 interpretation of § 212(c). When IIRIRA went into effect in April 1997, the first consequence was unchanged except for the fact that the term “removal” was substituted for “deportation.” The issue that remains to be resolved is whether IIRIRA § 304(b) changed the second consequence by eliminating respondent's eligibility for a waiver.

The INS submits that the statute resolves the issue because it unambiguously communicates Congress' intent to apply the provisions of IIRIRA's Title III–A to all removals initiated after the effective date of the statute, and, in any event, its provisions only operate prospectively and not retrospectively. The Court of Appeals, relying primarily on the analysis in our opinion in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), held, contrary to the INS' arguments, that Congress' intentions concerning the application of the “Cancellation of Removal” procedure are ambiguous and that the statute imposes an impermissible retroactive effect on aliens who, in reliance on the possibility of § 212(c) relief, pleaded guilty to aggravated felonies. See 229 F.3d, at 416, 420. We agree.

[11] Retroactive statutes raise special concerns. See Landgraf, 511 U.S., at 266, 114 S.Ct. 1483. “The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.” FN39 **2288 Ibid. Accordingly, “congressional enactments ... will not be construed to have retroactive effect unless their language requires this *316 result.” Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).

FN39 The INS appears skeptical of the notion that immigrants might be con-
sidered an ‘unpopular group.’” See Brief for Petitioner 15, n. 8. But see Legomsky, Fear and Loathing in Congress and the Courts: Immigration and Judicial Review, 78 Texas L.Rev. 1615, 1626 (2000) (observing that, because noncitizens cannot vote, they are particularly vulnerable to adverse legislation).

“[This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the ‘principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.’ Kaiser, 494 U.S., at 855, 110 S.Ct. 1570 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.” Landgraf, 511 U.S., at 265–266, 114 S.Ct. 1483 (footnote omitted).

[12][13][14] Despite the dangers inherent in retroactive legislation, it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect. See id., at 268, 109 S.Ct. 468. A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result. “Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.” Id., at 272–273, 109 S.Ct. 468. Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively. Martin v. Hadix, 527 U.S. 343, 352, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999).

The standard for finding such unambiguous direction is a demanding one. “[C]lases where this Court has found truly ‘retroactive’ effect adequately authorized by statute have *317 involved statutory language that was so clear that it could sustain only one interpretation.” Lindh v. Murphy, 521 U.S. 320, 328, n. 4, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). The INS makes several arguments in favor of its position that IIRIRA achieves this high level of clarity.

First, the INS points to the comprehensive nature of IIRIRA’s revision of federal immigration law. “Congress’s comprehensive establishment of a new immigration framework,” the INS argues, “shows its intent that, after a transition period, the provisions of the old law should no longer be applied at all.” Brief for Petitioner 33–34. We rejected a similar argument, however, in Landgraf, a case that, like this one, involved Congress’ comprehensive revision of an important federal statute. 511 U.S., at 260–261, 114 S.Ct. 1483. By itself, the comprehensiveness of a congressional enactment says nothing about Congress’ intentions with respect to the retroactivity of the enactment’s individual provisions.

FN40 The INS’ argument that refusing to apply § 304(b) retroactively creates an unrecognizable hybrid of old and new is, for the same reason, unconvincing.

The INS also points to the effective date for Title III–A as providing a clear statement of congressional intent to apply IIRIRA’s repeal of § 212(c) retroactively. See IIRIRA § 309(a), 110 Stat. 3009–625. But the mere promulgation of an effective date for a statute does not provide sufficient assurance that Congress specifically considered the potential unfairness that retroactive application would produce. For that reason, a “statement that a statute will become effective on a certain date does not even arguably suggest that it has any applica-
tion to conduct that occurred at **2289 an earlier date.” *Landgraf, 511 U.S., at 257, 114 S.Ct. 1483.

The INS further argues that any ambiguity in Congress' intent is wiped away by the “saving provision” in IIRIRA § 309(c)(1), 110 Stat. 3009–625. Brief for Petitioner 34–36. That provision states that, for aliens whose exclusion or deportation proceedings began prior to the Title III–A effective *318 date, “the amendments made by [Title III–A] shall not apply, and ... the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.” FN41 This rule, however, does not communicate with unmistakable clarity Congress' intention to apply its repeal of § 212(c) retroactively. Nothing in either § 309(c)(1) or the statute's legislative history even discusses the effect of the statute on proceedings based on pre-IIRIRA convictions that are commenced after its effective date. FN42 Section 309(c)(1) is best read as merely setting out the procedural rules to be applied to removal proceedings pending on the effective date of the statute. Because “[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity,” *Landgraf, 511 U.S., at 275, 114 S.Ct. 1483, it was necessary for Congress to identify which set of procedures would apply in those circumstances. As the Conference Report expressly explained, “[§ 309(c)] provides for the transition to new procedures in the case of an alien already in exclusion or deportation proceedings on the effective date.” H.R. Conf. Rep. No. 104–828, p. 222 (1996) (emphasis added).

FN41. “(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

“(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III–A effective date—

“(A) the amendments made by this sub-

title shall not apply, and

“(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.” § 309, 110 Stat. 3009–625.

FN42. The INS' reliance, see Reply Brief for Petitioner 12, on *INS v. Aguirre–Aguirre, 526 U.S. 415, 420, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999), is beside the point because that decision simply observed that the new rules would not apply to a proceeding filed before IIRIRA's effective date.

Another reason for declining to accept the INS' invitation to read § 309(c)(1) as dictating the temporal reach of IIRIRA § 304(b) is provided by Congress' willingness, in other sections of IIRIRA, to indicate unambiguously its intention *319 to apply specific provisions retroactively. IIRIRA's amendment of the definition of “aggravated felony,” for example, clearly states that it applies with respect to “conviction[s] ... entered before, on, or after” the statute's enactment date. § 321(b). FN43 As the Court of Appeals noted,**2290 the fact that Congress*320 made some provisions of IIRIRA expressly applicable to prior convictions, but did not do so in regard to § 304(b), is an indication “that Congress did not definitively decide the issue of § 304's retroactive application to pre-enactment convictions.” See 229 F.3d, at 415. The “saving provision” is therefore no more significant than the specification of an effective date.

FN43. See also IIRIRA § 321(c) (“The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred ...”); § 322(c) (“The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act”); § 342(b) (the amendment adding incitement of ter-
rorist activity as a ground for exclusion “shall apply to incitement regardless of when it occurs”); § 344(c) (the amendment adding false claims of U.S. citizenship as ground for removal “shall apply to representations made on or after the date” of enactment); § 347(c) (amendments rendering alien excludable or deportable any alien who votes unlawfully “shall apply to voting occurring before, on, or after the date” of enactment); § 348(b) (amendment providing for automatic denial of discretionary waiver from exclusion “shall be effective on the date of the enactment ... and shall apply in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has been entered as of such date”); § 350(b) (amendment adding domestic violence and stalking as grounds for deportation “shall apply to convictions, or violations of court orders, occurring after the date” of enactment); § 351(c) (discussing deportation for smuggling and providing that amendments “shall apply to applications for waivers filed before, on, or after the date” of enactment); § 352(b) (amendments adding renunciation of citizenship to avoid taxation as a ground for exclusion “shall apply to individuals who renounce United States citizenship on and after the date” of enactment); § 380(c) (amendment imposing civil penalties on aliens for failure to depart “shall apply to actions occurring on or after” effective date); § 384(d)(2) (amendments adding penalties for disclosure of information shall apply to “offenses occurring on or after the date” of enactment); § 531(b) (public charge considerations as a ground for exclusion “shall apply to applications submitted on or after such date”); § 604(c) (new asylum provision “shall apply to applications for asylum filed on or after the first day of the first month beginning more than 180 days after the date” of enactment). The INS argues that the Title III–B amendments containing such express temporal provisions are unrelated to the subject matter of § 304(b).

The presumption against retroactive application of ambiguous statutory provisions, buttressed by “the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien,” INS v. Cardoza—Fonseca, 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), forecloses the conclusion that, in enacting § 304(b), “Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.”

We therefore proceed to the second step of Landgraf’s retroactivity analysis in order to determine whether depriving removable aliens of consideration for § 212(c) relief produces an impermissible retroactive effect for aliens who, like respondent, were convicted pursuant to a plea agreement at a time when their plea would not have rendered them ineligible for § 212(c) relief.

The legislative history is significant because, despite its comprehensive character, it contains no evidence that Congress specifically considered the question of the applicability of IIRIRA § 304(b) to pre-IIRIRA convictions. Cf. Harrison v. PPG Industries, Inc., 446 U.S. 578, 602, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980) (REHNQUIST, J., dissenting) (“In a case where the construction of legislative language such as this makes so sweeping and
so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night’ ")], cited in Chisom v. Roemer, 501 U.S., at 396, n. 23, 111 S.Ct. 2354 (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)).

FN45. The INS argues that we should extend deference under 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), to the BIA’s interpretation of IIRIRA as applying to all deportation proceedings initiated after IIRIRA’s effective date. We only defer, however, to agency interpretations of statutes that, applying the normal “tools of statutory construction,” are ambiguous. Id., at 843, n. 9, 104 S.Ct. 2778; INS v. Cardoza—FONSECA, 480 U.S., at 447–448, 107 S.Ct. 1207. Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, Landgraf, 511 U.S., at 264, 114 S.Ct. 1483, there is, for Chevron purposes, no ambiguity in such a statute for an agency to resolve.

[15][16][17] *321 “The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment.’ ” Martin, 527 U.S., at 357–358, 119 S.Ct. 1998 (quoting Landgraf, 511 U.S., at 270, 114 S.Ct. 1483). A statute has retroactive effect when it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past....” 

FN46. As we noted in Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), this language by Justice Story “does not purport to define the outer limit of impermissible retroactivity.” Id., at 947, 117 S.Ct. 1871. Instead, it simply describes several “sufficient,” as opposed to “necessary,” conditions for finding retroactivity. Ibid.

IIRIRA’s elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly “ ‘attaches a new disability, in respect to transactions or considerations already past.’ ” Id., at 269, 114 S.Ct. 1483. Plea agreements involve a quid pro quo between a criminal defendant and the government. See *322Newton v. Rumery, 480 U.S. 386, 393, n. 3, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous “tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources.” FN47 Ibid. There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. FN48 See Magana–Pizano v. INS, 200 F.3d 603, 612 (C.A.9 1999) (“That an alien charged with a crime ... would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented”); see also 3 Bender, Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999) (“Preserving the cli-
ent’s right to remain in the United States may be more important to the client than any potential jail sentence” (quoted in Brief for National Association of Criminal Defense Lawyers*323 et al. as Amici Curiae 13)). Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.

FN49. See n. 5, supra.

FN47. “If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.” Santobello v. New York, 404 U.S. 257, 260, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).


**2292** The case of Charles Jideonwo, a petitioner in a parallel litigation in the Seventh Circuit, is instructive. Charged in 1994 with violating federal narcotics law, Jideonwo entered into extensive plea negotiations with the Government, the sole purpose of which was to ensure that “ ‘he got less than five years to avoid what would have been a statutory bar on 212(c) relief.’ ” Jideonwo v. INS, 224 F.3d 692, 699 (C.A.7 2000) (quoting the Immigration Judge’s findings of fact). The potential for unfairness in the retroactive application of IIRIRA § 304(b) to people like Jideonwo and St. Cyr is significant and manifest. Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in Jideonwo’s and St. Cyr’s position agreed to plead guilty. FN51. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens’ belief in their continued eligibility for § 212(c) relief, it would surely be contrary to “familiar considerations of fair notice, reasonable reliance, and settled expectations,” *324 Landgraf, 511 U.S., at 270, 114 S.Ct. 2271, 150 L.Ed.2d 347, 69 USLW 4510, 01 Cal. Daily Op. Serv. 5235, 2001 Daily Journal D.A.R. 6475, 14 Fla. L. Weekly Fed. S 401, 2001 DJCAR 3473. to hold that IIRIRA’s subsequent restrictions deprive them of any possibility of such relief.

FN50. Even if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance. See Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 6–8.

FN52. The significance of that reliance is obvious to those who have participated in the exercise of the discretion that was previously available to delegates of the Attorney General under § 212(c). See In re Sori-ano, 16 BIA Immig. Rptr. B1–227, B1–238 to B1–239 (1996) (Rosenberg, Board Member, concurring and dissenting) (“I find compelling policy and practical reasons to go beyond such a limited interpretation as the one the majority proposes in this case. All of these people, and no doubt many others, had settled expectations to which they conformed their conduct”).

The INS argues that deportation proceedings (and the Attorney General's discretionary power to grant relief from deportation) are “inherently prospective” and that, as a result, application of the law of deportation can never have a retroactive effect. Such categorical arguments are not particularly helpful in undertaking Landgraf's commonsense, functional retroactivity analysis. See Martin, 527 U.S., at 359, 119 S.Ct. 1998. Moreover, although we have characterized deportation as “look[ing] prospectively to the respondent's right to remain in this country in the future,” INS v. Lopez—Mendoza, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), we have done so in order to reject the argument that deportation is punishment for past behavior and that deportation proceedings are therefore subject to the “various protections that apply in the context of a criminal trial.” Ibid. As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law. See Landgraf, 511 U.S., at 272, 114 S.Ct. 1483. And our mere statement that deportation is not punishment for past crimes does not mean that we cannot consider an alien's reasonable reliance on the continued availability of discretionary relief from deportation when deciding whether the elimination of such relief has a retroactive effect.

FN53. We are equally unconvinced by the INS' comparison of the elimination of § 212(c) relief for people like St. Cyr with the Clayton Act's elimination of federal courts' power to enjoin peaceful labor actions. In American Steel Foundries v. Tri–City Central Trades Council, 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189 (1921), and Duplex Printing Press Co. v. Deering, 254 U.S. 443, 464, 41 S.Ct. 172, 65 L.Ed. 349 (1921), we applied the Clayton Act's limitations on injunctive relief to cases pending at the time of the statute's passage. But unlike the elimination of § 212(c) relief in this case, which depends upon an alien's decision to plead guilty to an “aggravated felony,” the deprivation of the District Court's power to grant injunctive relief at issue in Duplex Printing did not in any way result from or depend on the past action of the party seeking the injunction. Thus, it could not plausibly have been argued that the Clayton Act attached a “'new disability, in respect to transactions or considerations already past.'” Landgraf, 511 U.S., at 269, 114 S.Ct. 1483.

Finally, the fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion. There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation. Cf. Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 949, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (an increased likelihood of facing a qui tam action constitutes an impermissible
retroactive effect for the defendant); *Lindsey v. Washington*, 301 U.S. 397, 401, 57 S.Ct. 797, 81 L.Ed. 1182 (1937) (“Removal of the possibility of a sentence of less than fifteen years ... operates to [defendants’] detriment” (emphasis added)). Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief. FN54 Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect. FN55

FN54. See n. 5, supra.

FN55. The INS cites several cases affirming Congress' power to retroactively unsettle such expectations in the immigration context. See Brief for Petitioner 40–41, and n. 21. But our recognition that Congress has the power to act retrospectively in the immigration context sheds no light on the question at issue at this stage of the *Landgraf* analysis: whether a particular statute in fact has such a retroactive effect. Moreover, our decision today is fully consistent with a recognition of Congress' power to act retrospectively. We simply assert, as we have consistently done in the past, that in legislating retroactively, Congress must make its intention plain.

Similarly, the fact that Congress has the power to alter the rights of resident aliens to remain in the United States is not determinative of the question whether a particular statute has a retroactive effect. See *Chew Heong v. United States*, 112 U.S. 536, 5 S.Ct. 255, 28 L.Ed. 770 (1884). Applying a statute barring Chinese nationals from reentering the country without a certificate prepared when they left to people who exited the country before the statute went into effect would have retroactively unsettle their reliance on the state of the law when they departed. See *id.*, at 559, 5 S.Ct. 255. So too, applying IIRIRA § 304(b) to aliens who pleaded guilty or *nolo contendere* to crimes on the understanding that, in so doing, they would retain the ability to seek discretionary § 212(c) relief would retroactively unsettle their reliance on the state of the law at the time of their plea agreement.

*326* We find nothing in IIRIRA unmistakably indicating that Congress considered the question whether to apply its repeal of § 212(c) retroactively to such aliens. We therefore hold that § 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.

The judgment is affirmed.

*It is so ordered.*

Justice O'CONNOR, dissenting.

I join Parts I and III of Justice SCALIA's dissenting opinion in this case. I do not join Part II because I believe that, assuming, *arguendo*, that the Suspension Clause guarantees some minimum extent of habeas review, the right asserted by the alien in this case falls outside the scope of that review for the reasons explained by Justice SCALIA in Part II–B of his dissenting opinion. The question whether the Suspension Clause assures habeas jurisdiction in this particular case properly is resolved on this ground alone, and there is no need to say more.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, and with whom Justice O'CONNOR joins as to Parts I and III, dissenting.

The Court today finds ambiguity in the utterly clear language of a statute that forbids the district court (and all *327* other courts) to entertain the claims of aliens **2294** such as respondent St. Cyr,
who have been found deportable by reason of their criminal acts. It fabricates a superclear statement, “magic words” requirement for the congressional expression of such an intent, unjustified in law and unparalleled in any other area of our jurisprudence. And as the fruit of its labors, it brings forth a version of the statute that affords criminal aliens more opportunities for delay-inducing judicial review than are afforded to noncriminal aliens, or even than were afforded to criminal aliens prior to this legislation concededly designed to expedite their removal. Because it is clear that the law deprives us of jurisdiction to entertain this suit, I respectfully dissent.

I

In categorical terms that admit of no exception, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, unambiguously repeals the application of 28 U.S.C. § 2241 (the general habeas corpus provision), and of all other provisions for judicial review, to deportation challenges brought by certain kinds of criminal aliens. This would have been readily apparent to the reader, had the Court at the outset of its opinion set forth the relevant provisions of IIRIRA and of its statutory predecessor, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. I will begin by supplying that deficiency, and explaining IIRIRA’s jurisdictional scheme. It begins with what we have called a channeling or “‘zipper’ clause,” Reno v. American–Arab Anti–Discrimination Comm., 525 U.S. 471, 483, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999)—namely, 8 U.S.C. § 1252(b)(9) (1994 ed., Supp. V). This provision, entitled “Consolidation of questions for judicial review,” provides as follows:

“Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken *328 or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.”

(Emphases added.)

In other words, if any review is available of any “question[n] of law ... arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter,” it is available “only in judicial review of a final order under this section [§ 1252].” What kind of review does that section provide? That is set forth in § 1252(a)(1), which states:

“Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to [the expedited-removal provisions for undocumented aliens arriving at the border found in] section 1225(b)(1) of this title) is governed only by chapter 158 of title 28 [the Hobbs Act], except as provided in subsection (b) of this section [which modifies some of the Hobbs Act provisions] and except that the court may not order the taking of additional evidence under section 2347(c) of [Title 28].”

In other words, if judicial review is available, it consists only of the modified Hobbs Act review specified in § 1252(a)(1).

In some cases (including, as it happens, the one before us), there can be no review at all, because IIRIRA categorically and unequivocally rules out judicial review of challenges to deportation brought by certain kinds of criminal aliens. Section 1252(a)(2)(C) provides:

“Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [one or more enumerated] criminal offense[s] [including drug-trafficking offenses of the sort of which respondent had been convicted].” (Emphases added.)

*329 Finally, the pre-IIRIRA antecedent to the foregoing provisions—AEDPA § 401(e)—and the statutory background **2295 against which that was enacted, confirm that § 2241 habeas review, in the district court or elsewhere, has been unequivoc-
ally repealed. In 1961, Congress amended the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163, by directing that the procedure for Hobbs Act review in the courts of appeals “shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation” under the INA. 8 U.S.C. § 1105a(a) (repealed Sept. 30, 1996) (emphasis added). Like 8 U.S.C. § 1252(a)(2)(C) (1994 ed., Supp. V), this provision squarely prohibited § 2241 district-court habeas review. At the same time that it enacted this provision, however, the 1961 Congress enacted a specific exception: “any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings,” 8 U.S.C. § 1105a(a)(10) (1994 ed.). (This would of course have been surplusage had § 2241 habeas review not been covered by the “sole and exclusive procedure” provision.) Section 401(e) of AEDPA repealed this narrow exception, and there is no doubt what the repeal was thought to accomplish: the provision was entitled “ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.” 110 Stat. 1268. It gave universal preclusive effect to the “sole and exclusive procedure” language of § 1105a(a). And it is this regime that IIRIRA has carried forward.

The Court’s efforts to derive ambiguity from this utmost clarity are unconvincing. First, the Court argues that §§ 1252(a)(2)(C) and 1252(b)(9) are not as clear as one might think—that, even though they are sufficient to repeal the jurisdiction of the courts of appeals, see Calcano-Martinez v. INS, ante, 533 U.S. 348, 351–352, 121 S.Ct. 2268, 150 L.Ed.2d 392, 69 USLW 4510, 01 Cal. Daily Op. Serv. 5235, 2001 Daily Journal D.A.R. 6475, 14 Fla. L. Weekly Fed. S 401, 2001 DJCAR 3473 (Cite as: 533 U.S. 289, 121 S.Ct. 2271)

1252(b)(9): “Judicial review of any determination made under section 1225(b)(1) of this title [governing review of expedited removal orders against undocumented aliens arriving at the border] is available in habeas corpus proceedings ....” (Emphases added.) It is hard to imagine how Congress could have made it any clearer that, when it used the term “judicial review” in IIRIRA, it included judicial review through habeas corpus. Research into the “historical” usage of the term “judicial review” is thus quite beside the point.

FN1. In the course of this opinion I shall refer to some of the Court’s analysis in this companion case; the two opinions are intertwined.

But the Court is demonstrably wrong about that as well. Before IIRIRA was enacted, from 1961 to 1996, the governing immigration statutes unquestionably treated “judicial review” as encompassing review by habeas corpus. As discussed earlier, 8 U.S.C. § 1105a (1994 ed.) made Hobbs Act review “the sole and exclusive procedure for, the judicial review of all final orders of deportation” (emphasis added), but created (in subsection (a)(10)) a limited exception for habeas corpus review. Section 1105a was entitled “Judicial review of orders of deportation and exclusion” (emphasis added), and the exception for habeas corpus stated that “any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings,” § 1105a(a)(10) (emphases added). Apart from this prior statutory usage, many of our own immigration cases belie the Court’s suggestion that the term “judicial review,” when used in the immigration context, does not include review by habeas corpus. See, e.g., United States v. Mendoza-Lopez, 481 U.S. 828, 836–837, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987) (“[A]ny alien held in custody pursuant to an order of deportation may obtain judicial review of that order in a habeas corpus proceeding” (emphases added)); Shaughnessy v. Pedreiro, 349 U.S. 48, 52, 75 S.Ct. 591, 99 L.Ed. 868 (1955) (“Our holding is that
there is a right of judicial review of deportation orders other than by habeas corpus...” (emphases added); see also id., at 49, 75 S.Ct. 591.

The only support the Court offers in support of the asserted “longstanding distinction between ‘judicial review’ and ‘habeas,’ ” ante, at 2286, n. 35, is language from a single opinion of this Court, *Heikkila v. Barber*, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972 (1953). FN2 There, we “differentiate[d]” “habeas corpus” from “judicial review as that term is used in the Administrative Procedure Act.” *Id.*, at 236, 73 S.Ct. 603 (emphasis added). But that simply asserts that habeas corpus review is different from ordinary APA review, which no one doubts. It does not assert that habeas corpus review is not judicial review at all. Nowhere does *Heikkila* make such an implausible contention. FN3

FN2. The recent Circuit authorities cited by the Court, which postdate IIRIRA, see *Mahadeo v. Reno*, 226 F.3d 3, 12 (C.A.1 2000); and *Flores–Miramontes v. INS*, 212 F.3d 1133, 1140 (C.A.9 2000), cited ante, at 2287, hardly demonstrate any historical usage upon which IIRIRA was based. Anyway, these cases rely for their analysis upon a third Court of Appeals decision—*Sandoval v. Reno*, 166 F.3d 225, 235 (C.A.3 1999)—which simply relies on the passage from *Heikkila* under discussion.

FN3. The older, pre–1961 judicial interpretations relied upon by the Court, see ante, at 2285–2286, are similarly unavailing. *Ekiu v. United States*, 142 U.S. 651, 12 S.Ct. 1146 (1892), never purported to distinguish “judicial review” from habeas, and the Court’s attempt to extract such a distinction from the opinion is unpersuasive. *Ekiu* did state that the statute “prevent[ed] the question of an alien immigrant’s right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed,” id., at 663, 12 S.Ct. 336 (emphasis added; italicized words quoted ante, at 2286); but the clear implication was that the question whether the inspector was “acting within the jurisdiction conferred upon him” was reviewable. The distinction pertained, in short, to the scope of judicial review on habeas—not to whether judicial review was available. *Terlinden v. Ames*, 184 U.S. 270, 278, 22 S.Ct. 484, 46 L.Ed. 534 (1902), likewise drew no distinction between “judicial review” and habeas; it simply stated that the extradition statute “gives no right of review to be exercised by any court or judicial officer, and what cannot be done directly [under the extradition statute] cannot be done indirectly through the writ of habeas corpus.” Far from saying that habeas is not a form of judicial review, it says that habeas is an indirect means of review.

*332* The Court next contends that the zipper clause, § 1252(b)(9), “by its own terms, does not bar” § 2241 district-court habeas review of removal orders, ante, at 2286, because the opening sentence of subsection (b) states that “[w]ith respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply ....” (Emphasis added.) But in the broad sense, § 1252(b)(9) does “apply” “to review of an order of removal under subsection (a)(1),” because it mandates that “review of all questions of law and fact ... arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter” must take place in connection with such review. This is “application” enough—and to insist that subsection (b)(9) be given effect only within the review of removal orders that takes place under subsection (a)(1), is to render it meaningless. Moreover, other of the numbered subparagraphs of subsection (b) make clear that the introductory sentence does not at all operate as a limitation upon what follows. Subsection (b)(7) specifies the procedure by which “a defendant in a criminal pro-
cease” charged with failing to depart after being ordered to do so may contest “the validity of [a removal] order” **2297 before trial; and subsection (b)(8) prescribes some of the prerogatives and responsibilities of the Attorney General and the alien after entry of a final removal order. These provisions have no effect if they must apply (even in the broad sense that subsection (b)(9) can be said to apply) “to review of an order of removal under subsection (a)(1).”

Unquestionably, unambiguously, and unmistakably, IIRIRA expressly supersedes § 2241’s general provision for habeas jurisdiction. The Court asserts that *Felker v. Turpin*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), and *Ex parte Yerger*, 8 Wall. 85, 19 L.Ed. 332 (1869), reflect a “longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction,” ante, at 2278. They do no such thing. Those cases simply applied the general principle—not unique to habeas—that “[r]epeals by implication are not favored.” *Felker, supra*, at 660, 116 S.Ct. 2333; *Yerger, supra*, at 105. *Felker* held that a statute which by its terms prohibited only further review by this Court (or by an en banc court of appeals) of a court-of-appeals panel’s “‘grant or denial of ... authorization ... to file a second or successive [habeas] application,’ ” 518 U.S., at 657, 116 S.Ct. 2333 (quoting 28 U.S.C. § 2244(b)(3)(E) (1994 ed., Supp. II)), should not be read to imply the repeal of this Court’s separate and distinct “authority [under 28 U.S.C. § 2241 and 28 U.S.C. § 2254 (1994 ed. and Supp. V)] to hear habeas petitions filed as original matters in this Court,” 518 U.S., at 661, 116 S.Ct. 2333. *Yerger* held that an 1868 Act that by its terms “repeal[ed] only so much of the act of 1867 as authorized appeals, or the exercise of appellate jurisdiction by this court,” should be read to “reach no [further than] the act of 1867,” and did not repeal by implication the appellate jurisdiction conferred by the Judiciary Act of 1789 and other pre–1867 enactments. 8 Wall., at 105. In the present case, unlike in *Felker* and *Yerger*, none of the statutory provisions relied upon—§ 1252(a)(2)(C), § 1252(b)(9), or 8 U.S.C. § 1105a(a) (1994 ed.)—requires us to imply from one statutory provision the repeal of another. All by their terms prohibit the judicial review at issue in this case.

The Court insists, however, that since “[n]either [§ 1252(a)(1) nor § 1252(a)(2)(C)] explicitly mentions habeas, or 28 U.S.C. § 2241,” “neither provision speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute.” Ante, at 2286. Even in those areas of our jurisprudence where we have adopted a “clear statement” rule (notably, the sovereign immunity cases to which the Court adverts, ante, at 2278, n. 10), clear statement has never meant the kind of magic words demanded by the Court today—explicit reference to habeas or to § 2241—rather than reference to “judicial review” in a statute that explicitly calls habeas corpus a form of judicial review. In *Gregory v. Ashcroft*, 501 U.S. 452, 467, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), we said:


In *Gregory*, as in *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34–35, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992), and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241, 246, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), we held that the clear-statement requirement was not met, not because there was no explicit reference to the Eleventh Amendment, but because the statutory intent to eliminate state sovereign immunity was not clear. For the reasons discussed above, the intent to eliminate habeas jurisdiction in the present case is entirely clear, and that is all that is required.

**2298 It has happened before—too frequently, alas—that courts have distorted plain stat-
utory text in order to produce a “more sensible” result. The unique accomplishment of today’s opinion is that the result it produces is as far removed from what is sensible as its statutory construction is from the language of the text. One would have to study our statute books for a long time to come up with a more unlikely disposition. By authorizing § 2241 habeas review in the district court but foreclosing review in the court of appeals, see Calcano-Martinez, ante, 533 U.S. 348, 351–352, 121 S.Ct. 2268, the Court’s interpretation routes all legal challenges to removal orders brought by criminal aliens to the district court, to be adjudicated under that court’s § 2241 habeas authority, which specifies no time limits. After review by that court, criminal aliens will presumably have an appeal as of right to the court of appeals, and can then petition this Court for a writ of certiorari.*335 In contrast, noncriminal aliens seeking to challenge their removal orders—for example, those charged with having been inadmissible at the time of entry, with having failed to maintain their nonimmigrant status, with having procured a visa through a marriage that was not bona fide, or with having become, within five years after the date of entry, a public charge, see 8 U.S.C. §§ 1227(a)(1)(A), (a)(1)(C), (a)(1)(G), (a)(5) (1994 ed., Supp. V)—will still presumably be required to proceed directly to the court of appeals by way of petition for review, under the restrictive modified Hobbs Act review provisions set forth in § 1252(a)(1), including the 30-day filing deadline, see § 1252(b)(1). In fact, prior to the enactment of IIRIRA, criminal aliens also had to follow this procedure for immediate modified Hobbs Act review in the court of appeals. See 8 U.S.C. § 1105a(a) (1994 ed.). The Court has therefore succeeded in perverting a statutory scheme designed to expedite the removal of criminal aliens into one that now affords them more opportunities for (and layers of) judicial review (and hence more opportunities for delay) than are afforded non-criminal aliens—and more than were afforded criminal aliens prior to the enactment of IIRIRA. FN4 This outcome speaks for itself; no Congress ever imagined it.

To excuse the violence it does to the statutory text, the Court invokes the doctrine of constitutional doubt, which it asserts is raised by the Suspension Clause, U.S. Const., Art. I, § 9, cl. 2. This uses one distortion to justify another, transmogrifying a doctrine designed to maintain “a just respect*336 for the legislature,” Ex parte Randolph, 20 F.Cas. 242, 254 (No. 11,558) (C.C.D.Va. 1833) (Marshall, C.J., on circuit), into a means of thwarting the clearly expressed intent of the legislature. The doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional intent, by giving ambiguous provisions a meaning that will avoid constitutional peril, and that will conform with Congress’s presumed intent not to enact measures of dubious validity. The condition precedent for application of the doctrine is that the statute can reasonably be construed to avoid the constitutional difficulty. See, e.g., Miller v. French, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (“We cannot press statutory construction “to the point of disingenuous evasion” even to avoid a constitutional question’ ” (quoting United States v. Locke, 471 U.S. 84, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985); in turn quoting George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379, 53 S.Ct. 620, 77 L.Ed. 1265 (1933))); **2299Salinas v. United States, 522 U.S. 52, 60, 118 S.Ct. 469, 139

FN4. The Court disputes this conclusion by observing that “the scope of review on habeas is considerably more limited than on APA-style review,” ante, at 2287, n. 38 (a statement, by the way, that confirms our contention that habeas is, along with the Administrative Procedure Act (APA), one form of judicial review). It is more limited, to be sure—but not “considerably more limited” in any respect that would disprove the fact that criminal aliens are much better off than others. In all the many cases that (like the present one) involve “question[s] of law,” ibid., the Court’s statutory misconstruction gives criminal aliens a preferred position.
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temporarily withheld operation of the writ, but has permanently altered its content. That is, to be sure, an act subject to majoritarian abuse, as is Congress’s framing (or its determination not to frame) a habeas statute in the first place. But that is not the majoritarian abuse against which the Suspension Clause was directed. It is no more irrational to guard against the common and well known “suspension” abuse, without guaranteeing any particular habeas right that enjoys immunity from suspension, than it is, in the Equal Protection Clause, to guard against unequal application of the laws, without guaranteeing any particular law which enjoys that protection. And it is no more acceptable for this Court to write a habeas law, in order that the Suspension Clause might have some effect, than it would be for this Court to write other laws, in order that the Equal Protection Clause might have some effect.

*339 The Court cites many cases which it says establish that it is a “serious and difficult constitutional issue,” ante, at 2282, whether the Suspension Clause prohibits the elimination of habeas jurisdiction effected by IIRIRA. Every one of those cases, however, pertains not to the meaning of the Suspension Clause, but to the content of the habeas corpus provision of the United States Code, which is quite a different matter. The closest the Court can come is a statement in one of those cases to the effect that the Immigration Act of 1917 “had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution,” Heikkila, 345 U.S., at 234–235, 73 S.Ct. 603. That statement (1) was pure dictum, since the Court went on to hold that the judicial review of petitioner’s deportation order was unavailable; (2) does not specify to what extent judicial review was “required by the Constitution,” which could (as far as the Court’s holding was concerned) be zero; and, most important of all, (3) does not refer to the Suspension Clause, so could well have had in mind the due process limitations upon the procedures for determining deportability that our later cases establish, see Part III, infra.

There is, however, another Supreme Court dictum that is unquestionably in point—an unusually authoritative one at that, since it was written by Chief Justice Marshall in 1807. It supports precisely the interpretation of the Suspension Clause I have set forth above. In Ex parte Bollman, 4 Cranch 75, one of the cases arising out of the Burr conspiracy, the issue presented was whether the Supreme Court had the power to issue a writ of habeas corpus for the release of two prisoners held for trial under warrant of the Circuit Court of the District of Columbia. Counsel for the detainees asserted not only statutory authority for issuance of the writ, but inherent power. See id., at 77–93. The Court would have nothing to do with that, whether under Article III or any other provision. While acknowledging an inherent power of the courts “over their own officers, or *340 to protect themselves, and their members, from being disturbed in the exercise of their functions,” Marshall says that “the power of taking cognizance of any question between individuals, or between the government and individuals,”

“must be given by written law.

“The inquiry, therefore, on this motion will be, whether by any statute compatible with the constitution of the United States, the power to award a writ of habeas corpus, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.” Id., at 94.

In the ensuing discussion of the Judiciary Act of 1789, the opinion specifically addresses the Suspension Clause—not invoking it as a source of habeas jurisdiction, but to the contrary pointing out that without legislated habeas jurisdiction the Suspension Clause would have no effect.

**2301 “It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared ‘that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.’
Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.” *Id.*, at 95.

FN5 The Court claims that I “rea[d] into Chief Justice Marshall’s opinion in *Ex parte Bollman* ... support for a proposition that the Chief Justice did not endorse, either explicitly or implicitly,” *ante*, at 2281, n. 24. Its support for this claim is a highly selective quotation from the opinion, see *ibid*. There is nothing “implici[t]” whatsoever about Chief Justice Marshall’s categorical statement that “the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law,” 4 Cranch, at 94. See also *ibid.*, quoted supra, at 2300 (“[T]he power of taking cognizance of any question between individuals, or between the government and individuals ... must be given by written law”). If, as the Court concedes, “the writ could not be suspended,” *ante*, at 2281, n. 24, within the meaning of the Suspension Clause until Congress affirmatively provided for habeas by statute, then surely Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet, see *infra* this page. The Court’s position that a permanent repeal of habeas jurisdiction is unthinkable (and hence a violation of the Suspension Clause) is simply incompatible with its (and Marshall’s) belief that a failure to confer habeas jurisdiction is not unthinkable.

*341* There is no more reason for us to believe, than there was for the Marshall Court to believe, that the Suspension Clause means anything other than what it says.

B

Even if one were to assume that the Suspension Clause, despite its text and the Marshall Court’s understanding, guarantees some constitutional minimum of habeas relief, that minimum would assuredly not embrace the rarified right asserted here: the right to judicial compulsion of the exercise of Executive discretion (which may be exercised favorably or unfavorably) regarding a prisoner’s release. If one reads the Suspension Clause as a guarantee of habeas relief, the obvious question presented is: *What* habeas relief? There are only two alternatives, the first of which is too absurd to be seriously entertained. It could be contended that Congress “suspends” the writ whenever it eliminates any prior ground for the writ that it adopted. Thus, if Congress should ever (in the view of this Court) have authorized immediate habeas corpus—without the need to exhaust administrative remedies—for a person arrested as an illegal alien, Congress would never be able (in the light of sad experience) to revise that disposition. The Suspension Clause, in other words, would be a one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction. This is, as I say, too absurd to be contemplated, and I shall contemplate it no further.

The other alternative is that the Suspension Clause guarantees the common-law right of habeas corpus, as it was understood when the Constitution was ratified. There is no doubt whatever that this did not include the right to obtain discretionary release. The Court notes with apparent credulity respondent’s contention “that there is historical evidence of the writ issuing to redress the improper exercise of official discretion,” *ante*, at 2281. The only Framing-era or earlier cases it alludes to in support of that contention, see *ante*, at 2281, n. 23, referred to *ante*, at 2281, establish no such thing. In *Ex parte Boggin*, 13 East 549, 104 Eng. Rep. 484
the court did not even bother calling for a response from the custodian, where the applicant failed to show that he was statutorily exempt from impressment under any statute then in force. In *Chalacombe's Case*, reported in a footnote in *Ex parte Boggin*, the court did “let the writ go”—*i.e.*, called for a response from the Admiralty to Chalacombe's petition—even though counsel for the Admiralty had argued that the Admiralty's general policy of not impressing “seafaring persons of [Chalacombe's] description” was “a matter of grace and favour, [and not] of right.” But the court never decided that it had authority to grant the relief requested (since the Admiralty promptly discharged Chalacombe of its own accord); in fact, it expressed doubt whether it had that authority. See 13 East, at 550, n. (6), 104 Eng. Rep., at 484, n. (a) 2 (Lord Ellenborough, C.J.) (“[C]onsidering it merely as a question of discretion, is it not more fit that this should stand over for the consideration of the Admiralty, to whom the matter ought to be disclosed?”). And in *Hollingshead's Case*, 1 Salkeld 351, 91 Eng. Rep. 307 (K.B.1702), the “warrant of commitment” issued by the “commissioners of bankrupt” was “held naught,” since it authorized *343* the bankrupt's continued detention by the commissioners until “otherwise discharged by due course of law,” whereas the statute authorized commitment only “till [the bankrupt] submit himself to be examined by the commissioners.” (Emphasis deleted.) There is nothing pertaining to executive discretion here.

*All* the other framing-era or earlier cases cited in the Court's opinion—indeed, *all the later Supreme Court cases until United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681, in 1954*—provide habeas relief from executive detention only when the custodian had no legal authority to detain. See 3 J. Story, Commentaries on the Constitution of the United States § 1333, p. 206 (1833) (the writ lies to ascertain whether a “sufficient ground of detention appears”). The fact is that, far from forming a traditional basis for issuance of the writ of habeas corpus, the whole “concept of ‘discretion’ was not well developed at common law.” Hafetz, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts, 107 Yale L.J. 2509, 2534 (1998), quoted in Brief for Respondent in *Calcano-Martinez v. INS*, O.T.2000, No. 00–1011, p. 37.

An exhaustive search of cases antedating the Suspension Clause discloses few instances in which courts even discussed the concept of executive discretion; and on the rare occasions when they did, they simply confirmed what seems obvious from the paucity of such discussions—namely, that courts understood executive discretion as lying entirely beyond the judicial ken. See, *e.g.*, *Chalacombe's Case, supra* this page. That is precisely what one would expect, since even the executive's evaluation of the facts—a duty that was a good deal more than discretionary—was not subject to review on habeas. Both in this country, until passage of the Habeas Corpus Act of 1867, and in England, the longstanding rule had been that the truth of the custodian's return could not be controverted. See, *e.g.*, *Opinion on the Writ of Habeas Corpus*, Wilm 77, 107, 97 Eng. Rep. 29, 43 (H.L.1758); Note, Developments in *344* the Law—Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1113–1114, and nn. 9–11 (1970) (quoting Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L.Rev. 451, 453 (1966). And, of course, going beyond inquiry into the legal authority of the executive to detain would have been utterly incompatible with the well-established limitation upon habeas relief for a convicted prisoner: “[O]nce a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court.” *Id.*, at 468, quoted in **2303**Swain v. Pressley, 430 U.S. 372, 384–385, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977) (Burger, C. J., concurring in part and concurring in judgment).

In sum, there is no authority whatever for the proposition that, at the time the Suspension Clause
was ratified—or, for that matter, even for a century and a half thereafter—habeas corpus relief was available to compel the Executive's allegedly wrongful refusal to exercise discretion. The striking proof of that proposition is that when, in 1954, the Warren Court held that the Attorney General's alleged refusal to exercise his discretion under the Immigration Act of 1917 could be reviewed on habeas, see United States ex rel. Accardi v. Shaughnessy, supra, it did so without citation of any supporting authority, and over the dissent of Justice Jackson, joined by three other Justices, who wrote:

“Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function. Habeas corpus, like the currency, can be debased by over-issue quite as certainly as by too niggardly use. We would ... leave the responsibility for suspension of deportation squarely on the Attorney General, where Congress has put it.” Id., at 271, 74 S.Ct. 499.

III

Given the insubstantiality of the due process and Article III arguments against barring judicial review of respondent's claim (the Court does not even bother to mention them, and the Court of Appeals barely acknowledges them), I will address them only briefly.

The Due Process Clause does not “[r]equir[e] [j]udicial [d]etermination [o]f” respondent’s claim, Brief for Petitioners in Calcano–Martinez v. INS, O.T.2000, No. 00–1011, p. 34. Respondent has no legal entitlement to suspension of deportation, no matter how appealing his case. “[T]he Attorney General's suspension of deportation [is] “an act of grace” which is accorded pursuant to her ‘unfettered discretion,’ Jay v. Boyd, 351 U.S. 345, 354, 76 S.Ct. 919, 100 L.Ed. 1242 (1956) ...., and [can be likened, as Judge Learned Hand observed,] to “a judge's power to suspend the execution of a sentence, or the President's to pardon a convict,” 351 U.S., at 354, n. 16, 76 S.Ct. 919 ....” INS v. Yueh–Shaio Yang, 519 U.S. 26, 30, 117 S.Ct. 350, 136 L.Ed.2d 288 (1996). The furthest our cases have gone in imposing due process requirements upon analogous exercises of Executive discretion is the following. (1) We have required “minimal procedural safeguards” for death-penalty clemency proceedings, to prevent them from becoming so capricious as to involve “a state official flipp[ing] a coin to determine whether to grant clemency,” Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 289, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (O’CONNOR, J., concurring in part and concurring in judgment). Even assuming that this holding is not part of our “death-is-different” jurisprudence, Shafer v. South Carolina, 532 U.S. 36, 55, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001) (SCALIA, J., dissenting) (citation omitted), respondent here is not complaining about the absence of procedural safeguards; he disagrees with the Attorney General's judgment on a point of law. (2) We have recognized the existence of a due process liberty interest when *346 a State's statutory parole procedures prescribe that a prisoner “shall” be paroled if certain conditions are satisfied, see Board of Pardons v. Allen, 482 U.S. 369, 370–371, 381, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987); Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 12, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). There is no such statutory entitlement to suspension of deportation, no matter what the facts. Moreover, in neither Woodard, nor Allen, nor Greenholtz did we intimate that the Due Process Clause conferred jurisdiction of its own force, without benefit of statutory authorization. All three cases were brought under 42 U.S.C. § 1983.

Article III, § 1’s investment of the “judicial Power of the United States” in the federal courts does not prevent Congress from committing the adjudication of respondent's legal claim wholly to “non-Article III federal adjudicative bodies,” Brief for Petitioners in Calcano–Martinez v. INS,
O.T.2000, No. 00–1011, at 38. The notion that Article III requires every Executive determination, on a question of law or of fact, to be subject to judicial review has no support in our jurisprudence. Were it correct, the doctrine of sovereign immunity would not exist, and the APA’s general permission of suits challenging administrative action, see 5 U.S.C. § 702, would have been superfluous. Of its own force, Article III does no more than commit to the courts matters that are “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,” Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (REHNQUIST, J., concurring in judgment)—which (as I have discussed earlier) did not include supervision of discretionary Executive action.

** * * **

The Court has created a version of IIRIRA that is not only unrecognizable to its framers (or to anyone who can read) but gives the statutory scheme precisely the opposite of its intended effect, affording criminal aliens more opportunities for delay-inducing judicial review than others have, or even than criminal aliens had prior to the enactment of this legislation. Because § 2241’s exclusion of judicial review is unmistakably clear, and unquestionably constitutional, both this Court and the courts below were without power to entertain respondent’s claims. I would set aside the judgment of the court below and remand with instructions to have the District Court dismiss for want of jurisdiction. I respectfully dissent from the judgment of the Court.

I.N.S. v. St. Cyr

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Supreme Court of the United States

KANSAS, Petitioner,
v.

Leroy HENDRICKS.

Leroy HENDRICKS, Petitioner,
v.

KANSAS.

Nos. 95-1649, 95-9075.


Defendant convicted of indecent liberties with child appealed from an order of the District Court, Sedgwick County, Gregory L. Waller, J., committing him to custody of Secretary of Social and Rehabilitation Services based on jury finding that he was sexually violent predator under Kansas Sexually Violent Predator Act. The Kansas Supreme Court, 259 Kan. 246, 912 P.2d 129, reversed. Certiorari was granted. The Supreme Court, Justice Thomas, held that: (1) Act's definition of “mental abnormality” satisfied substantive due process requirements for civil commitment, and (2) Act did not establish “criminal” proceedings, and involuntary confinement pursuant to Act was not punitive, thus precluding finding of any double jeopardy or ex post facto violation.

Reversed.

Justice Kennedy filed concurring opinion.

Justice Breyer filed dissenting opinion in which Justices Stevens and Souter joined, and Justice Ginsburg joined in part.

West Headnotes

[1] Constitutional Law 92 4344

92 Constitutions Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)15 Mental Health

92k4341 Sexually Dangerous Persons; Sex Offenders

92k4344 k. Commitment and Confine-

Most Cited Cases

(Formerly 92k255(5))

Mental Health 257A 433(2)

257A Mental Health

257AIV Disabilities and Privileges of Mentally Dis-

257AIV(E) Crimes

257Ak433 Constitutional and Statutory Provi-

257Ak433(2) k. Sex Offenders. Most Cited Cases

(Formerly 257Ak441.1)

Kansas Sexually Violent Predator Act's definition of “mental abnormality” as congenital or acquired condition affecting emotional or volitional capacity which predisposes person to commit sexually violent offenses satisfied substantive due process requirements for civil commitment, despite claim that finding of “mental illness” was prerequisite for civil commitment; Act required evidence of past sexually violent behavior and present mental condition creating likelihood of such conduct in future if person is not incapacitated. U.S.C.A. Const.Amend. 14; K.S.A. 59-29a02(b).

[2] Constitutional Law 92 4041

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)1 In General

92k4041 k. Restraint, Commitment, and Detention. Most Cited Cases

(Formerly 92k255(1))

Although freedom from physical restraint has always been at core of liberty protected by due process clause from arbitrary governmental action, that liberty interest is not absolute. U.S.C.A. Const.Amend. 14.
**Constitutional Law 92**

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)15 Mental Health

92k4337 k. Commitment and Proceedings

Therefor. Most Cited Cases

(Formerly 92k255(5))


**Constitutional Law 92**

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)15 Mental Health

92k4341 Sexually Dangerous Persons; Sex Offenders

92k4344 k. Commitment and Confine-ment. Most Cited Cases

(Formerly 92k255(5))

Disagreements among psychiatric professionals as to whether pedophilia, or paraphilias in general, are “mental illnesses” do not tie State’s hands in setting bounds of its civil commitment laws under substantive due process analysis. U.S.C.A. Const.Amend. 14.

**Constitutional Law 92**

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2499 Particular Issues and Applications

92k2516 Health

92k2516(1) k. In General. Most Cited Cases

(Formerly 92k70.1(7.1))

When legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.

**Constitutional Law 92**

92 XXIII Ex Post Facto Prohibitions

92XXIII(B) Particular Issues and Applications

92k2819 Sex Offenders

92k2822 k. Involuntary Commitment. Most Cited Cases

(Formerly 92k203)

**Double Jeopardy 135H**

135H Double Jeopardy

135HII Proceedings, Offenses, Punishments, and Persons Involved or Affected

135Hk23 k. Civil or Criminal Nature. Most Cited Cases

**Mental Health 257A**

257A Mental Health

257AIV Disabilities and Privileges of Mentally Dis-ordered Persons

257AIV(E) Crimes

257Ak433 Constitutional and Statutory Provi-sions

257Ak433(2) k. Sex Offenders. Most Cited Cases

(Formerly 257Ak441.1)

Kansas Sexually Violent Predator Act did not establish “criminal” proceedings, and involuntary confinement pursuant to Act was not punitive, thus precluding finding of any double jeopardy or ex post facto violation; Kansas described Act as creating “civil” commitment procedure, commitment under Act did not implicate retribution or deterrence, Act required no finding of scienter, immediate release was permitted upon showing that confined person was no longer dangerous or mentally impaired, use of procedural safeguards tradition-ally followed in criminal trials did not render proceedings criminal, and treatment, if possible, was at least ancillary goal of Act. U.S.C.A. Const. Art. 1, § 10, cl. 1; Amend. 5; K.S.A. 59-29a03(a), 59-29a07, 59-29a08.

**Action 13**

13 Action
13II Nature and Form
13k18 k. Civil or Criminal. Most Cited Cases
Categorization of particular proceeding as “civil” or "criminal” is first of all question of statutory construction; court must initially ascertain whether legislature meant statute to establish civil proceedings, and if so, court ordinarily defers to legislature’s stated intent.

[8] Action 13 ↩18

13 Action
13II Nature and Form
13k18 k. Civil or Criminal. Most Cited Cases
Although “civil” label is not always dispositive in determining whether proceeding is “civil” or “criminal,” court will reject legislature's manifest intent only where party challenging statute provides clearest proof that statutory scheme is so punitive either in purpose or effect as to negate State's intention to deem it civil.

[9] Action 13 ↩18

 Existence of scienter requirement is customarily important element in distinguishing “criminal” from “civil” statutes.

[10] Mental Health 257A  ↩437
257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak436 Custody and Confinement
257Ak437 k. Duration of Confinement.
Most Cited Cases

Sentencing and Punishment 350H  ↩1
350H Sentencing and Punishment
350HI Punishment in General
350HI(A) In General
350Hk1 k. In General. Most Cited Cases
(Formerly 110k1205)

Mere fact that person is detained does not inexorably lead to conclusion that government has imposed “punishment”; state may take measures to restrict freedom of the dangerously mentally ill, which is a legitimate, nonpunitive governmental objective.


135H Double Jeopardy
135HII Proceedings, Offenses, Punishments, and Persons Involved or Affected
135Hk23 k. Civil or Criminal Nature. Most Cited Cases
For double jeopardy purposes, if individual otherwise meets requirements for involuntary civil commitment, state is under no obligation to release that individual simply because detention would follow period of incarceration. U.S.C.A. Const.Amend. 5.

[12] Double Jeopardy 135H  ↩134

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk132 Identity of Offenses; Same Offense
135Hk134 k. Several Offenses in One Act; Separate Statutory Offenses and Legislative Intent. Most Cited Cases

Double Jeopardy 135H  ↩135

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk132 Identity of Offenses; Same Offense
135Hk135 k. Proof of Fact Not Required for Other Offense. Most Cited Cases
Blockburger test for determining whether there are two offenses or only one where same act or transaction violates two distinct statutory provisions does not apply outside of successive prosecution context. U.S.C.A. Const.Amend. 5.

[13] Constitutional Law 92  ↩2822

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
For purposes of ex post facto analysis, Kansas' Sexually Violent Predator Act does not have retroactive effect, but rather, permits involuntary confinement based on determination that person currently both suffers from mental abnormality or personality disorder and is likely to pose future danger to public; to extent that past behavior is taken into account, it is used solely for evidentiary purposes. U.S.C.A. Const. Art. 1, § 10, cl. 1; K.S.A. 59-29a01 et seq.

KS Syllabus

The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Kansas' Sexually Violent Predator Act establishes procedures for the civil commitment of persons who, due to a “mental abnormality” or a “personality disorder,” are likely to engage in “predatory acts of sexual violence.” Kansas filed a petition under the Act in state court to commit respondent (and cross-petitioner) Hendricks, who had a long history of sexually molesting children and was scheduled for release from prison. The court reserved ruling on Hendricks' challenge to the Act's constitutionality, but granted his request for a jury trial. After Hendricks testified that he agreed with the state physician's diagnosis that he suffers from pedophilia and is not cured and that he continues to harbor sexual desires for children that he cannot control when he gets “stressed out,” the jury determined that he was a sexually violent predator. Finding that pedophilia qualifies as a mental abnormality under the Act, the court ordered him committed. On appeal, the State Supreme Court invalidated the Act on the ground that the precommitment condition of a “mental abnormality” did not satisfy what it perceived to be the “substantive” due process requirement that involuntary civil commitment must be predicated on a “mental illness” finding. It did not address Hendricks' ex post facto and double jeopardy claims.

Held:

1. The Act's definition of “mental abnormality” satisfies “substantive” due process requirements. An individual's constitutionally protected liberty interest in avoiding physical restraint may be overridden even in the civil context. Jacobson v. Massachusetts, 197 U.S. 11, 26, 25 S.Ct. 358, 361, 49 L.Ed. 643. This Court has consistently upheld involuntary commitment statutes that detain people who are unable to control their behavior and thereby pose a danger to the public health and safety, provided the confinement takes place pursuant to proper procedures and evidentiary standards. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 1785-1786, 118 L.Ed.2d 437. The Act unambiguously requires a precommitment finding of dangerousness either to one's self or to others, and links that finding to a determination that the person suffers from a “mental abnormality” or “personality disorder.” Generally, this Court has sustained a commitment statute if it couples proof of dangerousness with proof of some additional factor, such as a “mental illness” or “mental abnormality,” see, e.g., Heller v. Doe, 509 U.S. 312, 314-315, 113 S.Ct. 2637, 2639-2640, 125 L.Ed.2d 257, for these additional requirements serve to limit confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Act sets forth comparable criteria with its precommitment requirement of “mental abnormality” or

**2074 Syllabus FN*  **
“personality disorder.” Contrary to Hendricks' argument, this Court has never required States to adopt any particular nomenclature in drafting civil commitment statutes and leaves to the States the task of defining terms of a medical nature that have legal significance. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694. The legislature is therefore not required to use the specific term “mental illness” and is free to adopt any similar term. Pp. 2079-2081.

2. The Act does not violate the Constitution's double jeopardy prohibition or its ban on ex post facto lawmaking. Pp. 2081-2086.

   (a) The Act does not establish criminal proceedings, and involuntary confinement under it is not punishment. The categorization of a particular proceeding as civil or criminal is a question of statutory construction. *Allen v. Illinois*, 478 U.S. 364, 368, 106 S.Ct. 2988, 2991-2992, 92 L.Ed.2d 296. Nothing on the face of the Act suggests that the Kansas Legislature sought to create anything other than a civil commitment scheme. That manifest intent will be rejected only if Hendricks provides the clearest proof that the scheme is so punitive in purpose or effect as to negate Kansas' intention to deem it civil. *United States v. Ward*, 448 U.S. 242, 248-249, 100 S.Ct. 2636, 2641-2642, 65 L.Ed.2d 742. He has failed to satisfy this heavy burden. Commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. Its purpose is not retributive: It does not affix culpability for prior criminal conduct, but uses such conduct solely for evidentiary purposes; it does not make criminal conviction a prerequisite for commitment; and it lacks a scienter requirement, an important element in distinguishing criminal and civil statutes. Nor can the Act be said to act as a deterrent, since persons with a mental abnormality or personality disorder are unlikely to be deterred by the threat of confinement. The conditions surrounding confinement—essentially the same as conditions for any civilly committed patient—do not suggest a punitive purpose. Although the commitment scheme here involves an affirmative restraint, such restraint of the dangerously mentally ill has been historically regarded as a legitimate nonpunitive objective. Cf. *United States v. Salerno*, 481 U.S. 739, 747, 107 S.Ct. 2095, 2101-2102, 95 L.Ed.2d 697. The confinement's potentially indefinite duration is linked, not to any punitive objective, but to the purpose of holding a person until his mental abnormality no longer causes him to be a threat to others. He is thus permitted immediate release upon a showing that he is no longer dangerous, and the longest *348* he can be detained pursuant to a single judicial proceeding is one year. The State's use of procedural safeguards applicable in criminal trials does not itself turn the proceedings into criminal prosecutions. *Allen, supra*, at 372, 106 S.Ct., at 2993-2994. Finally, the Act is not necessarily punitive if it fails to offer treatment where treatment for a condition is not possible, or if treatment, though possible, is merely an ancillary, rather than an overriding, state concern. The conclusion that the Act is nonpunitive removes an essential prerequisite for both Hendricks' double jeopardy and ex post facto claims. Pp. 2081-2085.

   (b) Hendricks' confinement does not amount to a second prosecution and punishment for the offense for which he was convicted. Because the Act is civil in nature, its *2076* commitment proceedings do not constitute a second prosecution. Cf. *Jones, supra*. As this commitment is not tantamount to punishment, the detention does not violate the Double Jeopardy Clause, even though it follows a prison term. *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620. Hendricks' argument that, even if the Act survives the “multiple punishments” test, it fails the “same elements” test of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306, is rejected, since that test does not apply outside of the successive prosecution context. Pp. 2085-2086.

   (c) Hendricks' ex post facto claim is similarly flawed. The *Ex Post Facto* Clause pertains exclusively to penal statutes. *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588. Since the Act is not punishment, its application does not raise ex post facto concerns. Moreover, the Act clearly does not have retroactive ef-
fect. It does not criminalize conduct legal before its enactment or deprive Hendricks of any defense that was available to him at the time of his crimes. P. 2086.


THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, post, p. 2087. BREYER, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, and in which GINSBURG, J., joined as to Parts II and III, post, p. 2087.

Carla J. Stovall, Topeka, KS, for petitioner in No. 95-1649.

Thomas J. Weilert, Wichita, KS, for petitioner in No. 95-9075.


Justice THOMAS delivered the opinion of the Court.

In 1994, Kansas enacted the Sexually Violent Predator Act, which establishes procedures for the civil commitment of persons who, due to a “mental abnormality” or a “personality disorder,” are likely to engage in “predatory acts of sexual violence.” Kan. Stat. Ann. § 59-29a01 et seq. (1994). The State invoked the Act for the first time to commit Leroy Hendricks, an inmate who had a long history of sexually molesting children, and who was scheduled for release from prison shortly after the Act became law. Hendricks challenged his commitment on, inter alia, “substantive” due process, double jeopardy, and ex post facto grounds. The Kansas Supreme Court invalidated the Act, holding that its pre-commitment condition of a “mental abnormality” did not satisfy what the court perceived to be the “substantive” due process requirement that involuntary civil commitment must be predicated on a finding of “mental illness.” In re Hendricks, 259 Kan. 246, 261, 912 P.2d 129, 138 (1996). The State of Kansas petitioned for certiorari. Hendricks subsequently filed a cross-petition in which he reasserted his federal double jeopardy and ex post facto claims. We granted certiorari on both the petition and the cross-petition, 518 U.S. 1004, 116 S.Ct. 2522, 135 L.Ed.2d 1047 (1996), and now reverse the judgment below.

The Kansas Legislature enacted the Sexually Violent Predator Act (Act) in 1994 to grapple with the problem of managing repeat sexual offenders. **FN1** Although Kansas already*351 had a statute addressing the involuntary commitment of those defined as “mentally ill,” the legislature determined that existing civil commitment procedures were inadequate to confront the risks presented by “sexually violent predators.” In the Act’s preamble, the legislature explained:

*350* Justice THOMAS delivered the opinion of the Court. **FN1** Subsequent to Hendricks’ commitment, the Kansas Legislature amended the Act in ways not relevant to this action. See, e.g., Kan. Stat. Ann. § 59-29a03 (Supp.1996) (changing notification period from 60 to 90 days); § 59-29a04 (requiring state attorney general to initiate commitment proceedings).

“[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute].... In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators’ likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure ... is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are
very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute].” Kan. Stat. Ann. § 59-29a01 (1994).

As a result, the legislature found it necessary to establish “a civil commitment procedure for the long-term care and *352 treatment of the sexually violent predator.” Ibid. The Act defined a “sexually violent predator” as:

“any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” § 59-29a02(a).

A “mental abnormality” was defined, in turn, as a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.” § 59-29a02(b).

As originally structured, the Act's civil commitment procedures pertained to: (1) a presently confined person who, like Hendricks, “has been convicted of a sexually violent offense” and is scheduled for release; (2) a person who has been “charged with a sexually violent offense” but has been found incompetent to stand trial; (3) a person who has been found “not guilty by reason of insanity of a sexually violent offense”; and (4) a person found “not guilty” of a sexually violent offense because of a mental disease or defect. § 59-29a03(a), § 22-3221 (1995).

The initial version of the Act, as applied to a currently confined person such as Hendricks, was designed to initiate a specific series of procedures. The custodial agency was required to notify the local prosecutor 60 days before the anticipated release of a person who might have met the Act's criteria. § 59-29a03. The prosecutor was then obligated, within 45 days, to decide whether to file a petition in state court seeking the person's involuntary commitment. § 59-29a04. If such a petition were filed, the court was to determine whether “probable cause” existed to support a finding that the person was a “sexually violent predator” and thus eligible for civil commitment. Upon such a determination, transfer of the individual to a secure facility for professional evaluation would occur. § 59-29a05. After that evaluation, *353 a trial would be held to determine beyond a reasonable doubt whether the individual was a sexually violent predator. If that determination were made, the person would then be transferred to the custody of the Secretary of Social and Rehabilitation Services (Secretary) for “control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large.” § 59-29a07(a).

In addition to placing the burden of proof upon the State, the Act afforded the individual a number of other procedural safeguards. In the case of an indigent person, the State was required to provide, at public expense, the assistance of counsel and an examination by mental health care professionals. § 59-29a06. **2078 The individual also received the right to present and cross-examine witnesses, and the opportunity to review documentary evidence presented by the State. § 59-29a07.

Once an individual was confined, the Act required that “[t]he involuntary detention or commitment ... shall conform to constitutional requirements for care and treatment.” § 59-29a09. Confined persons were afforded three different avenues of review: First, the committing court was obligated to conduct an annual review to determine whether continued detention was warranted. § 59-29a10. Second, the Secretary was permitted, at any time, to decide that the confined individual's condition had so changed that release was appropriate, and could then authorize the person to petition for release. § 59-29a10. Finally, even without the Secretary's permission, the confined person could at any time file a release petition. § 59-29a11. If the court found that the State could no longer satisfy its burden under the initial commitment standard, the individual would be freed from confinement.

B

In 1984, Hendricks was convicted of taking
“indecent liberties” with two 13-year-old boys. After serving nearly 10 years of his sentence, he was slated for release to a halfway *354 house. Shortly before his scheduled release, however, the State filed a petition in state court seeking Hendricks' civil confinement as a sexually violent predator. On August 19, 1994, Hendricks appeared before the court with counsel and moved to dismiss the petition on the grounds that the Act violated various federal constitutional provisions. Although the court reserved ruling on the Act's constitutionality, it concluded that there was probable cause to support a finding that Hendricks was a sexually violent predator, and therefore ordered that he be evaluated at the Larned State Security Hospital.

Hendricks subsequently requested a jury trial to determine whether he qualified as a sexually violent predator. During that trial, Hendricks' own testimony revealed a chilling history of repeated child sexual molestation and abuse, beginning in 1955 when he exposed his genitals to two young girls. At that time, he pleaded guilty to indecent exposure. Then, in 1957, he was convicted of lewdness involving a young girl and received a brief jail sentence. In 1960, he molested two young boys while he worked for a carnival. After serving two years in prison for that offense, he was paroled, only to be rearrested for molesting a 7-year-old girl. Attempts were made to treat him for his sexual deviance, and in 1965 he was considered “safe to be at large,” and was discharged from a state psychiatric hospital. App. 139-144.

Shortly thereafter, however, Hendricks sexually assaulted another young boy and girl—he performed oral sex on the 8-year-old girl and fondled the 11-year-old boy. He was again imprisoned in 1967, but refused to participate in a sex offender treatment program, and thus remained incarcerated until his parole in 1972. Diagnosed as a pedophile, Hendricks entered into, but then abandoned, a treatment program. He testified that despite having received professional help for his pedophilia, he continued to harbor sexual desires for children. Indeed, soon after his 1972 parole, Hendricks began to abuse his own stepdaughter and stepson. He forced the children to engage in sexual activity with him *355 over a period of approximately four years. Then, as noted above, Hendricks was convicted of “taking indecent liberties” with two adolescent boys after he attempted to fondle them. As a result of that conviction, he was once again imprisoned, and was serving that sentence when he reached his conditional release date in September 1994.

Hendricks admitted that he had repeatedly abused children whenever he was not confined. He explained that when he “get[s] stressed out,” he “can’t control the urge” to molest children. Id., at 172. Although Hendricks recognized that his behavior harms children, and he hoped he would not sexually molest children again, he stated that the only sure way he could keep from sexually abusing children in the future was “to die.” Id., at 190. Hendricks readily agreed with the state physician's diagnosis that he suffers **2079 from pedophilia and that he is not cured of the condition; indeed, he told the physician that “treatment is bull----.” Id., at 153, 190.

FN2. In addition to Hendricks' own testimony, the jury heard from Hendricks' stepdaughter and stepson, who recounted the events surrounding their repeated sexual abuse at Hendricks' hands. App. 194-212. One of the girls to whom Hendricks exposed himself in 1955 testified as well. Id., at 191-194. The State also presented testimony from Lester Lee, a licensed clinical social worker who specialized in treating male sexual offenders, and Dr. Charles Befort, the chief psychologist at Larned State Hospital. Lee testified that Hendricks had a diagnosis of personality trait disturbance, passive-aggressive personality, and pedophilia. Id., at 219-220. Dr. Befort testified that Hendricks suffered from pedophilia and is likely to commit sexual offenses against children in the future if not confined. Id., at 247-248. He further opined that pedophilia qualifies as a “mental abnormality” within the Act's definition of that term. Id., at 263-264. Finally, Hendricks offered testimony from Dr. William S. Logan, a forensic psychiatrist, who...
stated that it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender. *Id.*, at 328-331.

The jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator. The trial court subsequently determined, as a matter of state law, that pedophilia qualifies as a “mental abnormality” as defined by *356 the Act, and thus ordered Hendricks committed to the Secretary's custody.

Hendricks appealed, claiming, among other things, that application of the Act to him violated the Federal Constitution's Due Process, Double Jeopardy, and *Ex Post Facto* Clauses. The Kansas Supreme Court accepted Hendricks' due process claim. *Id.*, at 261, 912 P.2d, at 138. The court declared that in order to commit a person involuntarily in a civil proceeding, a State is required by “substantive” due process to prove by clear and convincing evidence that the person is both (1) mentally ill, and (2) a danger to himself or to others. *Id.*, at 259, 912 P.2d, at 137. The court then determined that the Act's definition of “mental abnormality” did not satisfy what it perceived to be this Court's “mental illness” requirement in the civil commitment context. As a result, the court held that “the Act violates Hendricks' substantive due process rights.” *Id.*, at 261, 912 P.2d, at 138.

The majority did not address Hendricks' *ex post facto* or double jeopardy claims. The dissent, however, considered each of Hendricks' constitutional arguments and rejected them. *Id.*, at 264-294, 912 P.2d, at 140-156 (Larson, J., dissenting).

II

A

[1][2] Kansas argues that the Act's definition of “mental abnormality” satisfies “substantive” due process requirements. We agree. Although freedom from physical restraint “has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,” *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437 (1992), that liberty interest is not absolute. The Court has recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context:

“[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not *357 import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.” *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 25 S.Ct. 358, 361, 49 L.Ed. 643 (1905).

Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. See, e.g., 1788 N.Y. Laws, ch. 31 (Feb. 9, 1788) (permitting confinement of the “furiously mad”); see also A. Deutsch, The Mentally Ill in America (1949) (tracing history of civil commitment in the 18th and 19th centuries); G. Grob, Mental Institutions in America: Social Policy to 1875 (1973) (discussing colonial *2080 and early American civil commitment statutes). We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. See *Foucha, supra*, at 80, 112 S.Ct., at 1785-1786; *Addington v. Texas*, 441 U.S. 418, 426-427, 99 S.Ct. 1804, 1809-1810, 60 L.Ed.2d 323 (1979). It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty. Cf. *id.*, at 426, 99 S.Ct., at 1809-1810.

The challenged Act unambiguously requires a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement. Commitment proceedings can be initiated only when a person “has been convicted of or charged with a sexually violent offense,” and “suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” Kan. Stat. Ann. § 59-29a02(a) (1994). The statute thus requires proof of more than a mere predisposition to viol-
ence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated.*358 As we have recognized, “[p]revious instances of violent behavior are an important indicator of future violent tendencies.” *Heller v. Doe, 509 U.S. 312, 323, 113 S.Ct. 2637, 2644, 125 L.Ed.2d 257 (1993); see also *Schall v. Martin, 467 U.S. 253, 278, 104 S.Ct. 2403, 2417, 81 L.Ed.2d 207 (1984) (explaining that “from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct”).

[3] A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a “mental illness” or “mental abnormality.” See, e.g., *Heller, supra, at 314-315, 113 S.Ct., at 2639-2640 (Kentucky statute permitting commitment of “mentally retarded” or “mentally ill” and dangerous individual); *Allen v. Illinois, 478 U.S. 364, 366, 106 S.Ct. 2988, 2990-2991, 92 L.Ed.2d 296 (1986) (Illinois statute permitting commitment of “mentally ill” and dangerous individual); *Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty., 309 U.S. 270, 271-272, 60 S.Ct. 523, 524-525, 84 L.Ed. 744 (1940) (Minnesota statute permitting commitment of dangerous individual with “psychopathic personality”). These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a “mental abnormality” or “personality disorder” that makes it difficult, if not impossible, for the person to control his dangerous behavior. *Kan. Stat. Ann. § 59-29a02(b) (1994). The precommitment requirement of a “mental abnormality” or “personality disorder” is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.

Hendricks nonetheless argues that our earlier cases dictate a finding of “mental illness” as a prerequisite for civil commitment, citing *Foucha and *Addington. He then asserts*359 that a “mental abnormality” is not equivalent to a “mental illness” because it is a term coined by the Kansas Legislature, rather than by the psychiatric community. Contrary to Hendricks’ assertion, the term “mental illness” is devoid of any talismanic significance. Not only do “psychiatrists disagree widely and frequently on what constitutes mental illness,” *Ake v. Oklahoma, 470 U.S. 68, 81, 105 S.Ct. 1087, 1095, 84 L.Ed.2d 53 (1985), but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement. See, e.g., *Addington, supra, at 425-426, 99 S.Ct., at 1808-1810 (using the terms “emotionally disturbed” and “mentally ill”); *Jackson v. Indiana, 406 U.S. 715, 732, 737, 92 S.Ct. 1845, 1855, 1857-1858, 32 L.Ed.2d 435 (1972) (using the terms “incompetency” and “insanity”); cf. *Foucha, 504 U.S., at 88, 112 S.Ct., at 1789-1790 (O’CONNOR,**2081 J., concurring in part and concurring in judgment) (acknowledging State’s authority to commit a person when there is “some medical justification for doing so”).

Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Cf. *Jones v. United States, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694 (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of “insanity” and “competency,” for example, vary substantially from their psychiatric counterparts. See, e.g., Gerard, The Usefulness of the Medical Model to the Legal System, 39 Rutgers L.Rev. 377, 391-394 (1987) (discussing differing purposes of legal system and the medical profession in recognizing mental illness). Legal definitions, however, which must “take into account such issues as individual responsibility ... and competency,” need not mirror those advanced by the medical

*360 To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria. The mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder. See, e.g., id., at 524-525, 527-528; 1 American Psychiatric Association, Treatments of Psychiatric Disorders 617-633 (1989); Abel & Rouleau, Male Sex Offenders, in Handbook of Outpatient Treatment of Adults 271 (M. Thase, B. Edelstein, & M. Hersen eds. 1990).FN3 Hendricks even conceded that, when he becomes "stressed out," he cannot "control the urge" to molest children. App. 172. This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. Hendricks' diagnosis as a pedophile, which qualifies as a "mental abnormality" under the Act, thus plainly suffices for due process purposes.

FN3. We recognize, of course, that psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as "mental illnesses." Compare Brief for American Psychiatric Association as Amicus Curiae 26 with Brief for Menninger Foundation et al. as Amici Curiae 22-25. These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. Cf. Jones v. United States, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694 (1983). As we have explained regarding congressional enactments, when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." Id., at 370, 103 S.Ct., at 3053 (internal quotation marks and citation omitted).

B

[6] We granted Hendricks' cross-petition to determine whether the Act violates the Constitution's double jeopardy *361 prohibition or its ban on ex post facto lawmaking. The thrust of Hendricks' argument is that the Act establishes criminal proceedings; hence confinement under it necessarily constitutes punishment. He contends that where, as here, newly enacted "punishment" is predicated upon past conduct for which he has already been convicted and forced to serve a prison sentence, the Constitution's Double Jeopardy and Ex Post Facto Clauses are violated. We are unpersuaded by Hendricks' argument that Kansas has established criminal proceedings.

[7] The categorization of a particular proceeding as civil or criminal "is first of all a question of statutory construction." Allen, 478 U.S., at 368, 106 S.Ct., at 2992. We must **2082 initially ascertain whether the legislature meant the statute to establish "civil" proceedings. If so, we ordinarily defer to the legislature's stated intent. Here, Kansas' objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, instead of the criminal code, Kan. Stat. Ann., Article 29 (1994) ("Care and Treatment for Mentally Ill Persons"), as well as its description of the Act as creating a "civil commitment procedure," § 59-29a01 (emphasis added). Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.

[8] Although we recognize that a "civil label is not always dispositive," Allen, supra, at 369, 106 S.Ct., at 2992, we will reject the legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil," United States v. Ward, 448
U.S. 242, 248-249, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980). In those limited circumstances, we will consider the statute to have established criminal proceedings for constitutional purposes. Hendricks, however, has failed to satisfy this heavy burden.

As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal *362 punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness. We have previously concluded that an Illinois statute was nonpunitive even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal conduct was "received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior." *Allen, supra, at 371, 106 S.Ct., at 2993. In addition, the Kansas Act does not make a criminal conviction a prerequisite for commitment—persons absolved of criminal responsibility may nonetheless be subject to commitment under the Act. See Kan. Stat. Ann. § 59-29a03(a) (1994). An absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed. Thus, the fact that the Act may be "tied to criminal activity" is "insufficient to render the statute punitive." *United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

Moreover, unlike a criminal statute, no finding of scienter is required to commit an individual who is found to be a sexually violent predator; instead, the commitment determination is made based on a "mental abnormality" or "personality disorder" rather than on one's criminal intent. The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes. See *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S.Ct. 554, 567-568, 9 L.Ed.2d 644 (1963). The absence of such a requirement here is evidence that commitment under the statute is not intended to be retributive.

Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of *363 confinement. And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. App. 50-56, 59-60. Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being "punished."

[10] **2083 Although the civil commitment scheme at issue here does involve an affirmative restraint, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded. Cf. *id., at 747, 107 S.Ct., at 2101-2102. The Court has, in fact, cited the confinement of "mentally unstable individuals who present a danger to the public" as one classic example of nonpunitive detention. *Id., at 748-749, 107 S.Ct., at 2102-2103. If detention for the purpose of protecting the community from harm *necessarily constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.

Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others. Cf. *Jones,
463 U.S., at 368, 103 S.Ct., at 3051-3052 (noting with approval that "because it is impossible to predict how long it will take for any given individual to recover [from insanity] *364 or indeed whether he will ever recover-Congress has chosen ... to leave the length of commitment indeterminate, subject to periodic review of the patients' suitability for release"). If, at any time, the confined person is adjudged "safe to be at large," he is statutorily entitled to immediate release. Kan. Stat. Ann. § 59-29a07 (1994).

Furthermore, commitment under the Act is only potentially indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. § 59-29a08. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement. Ibid. This requirement again demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.

Hendricks next contends that the State's use of procedural safeguards traditionally found in criminal trials makes the proceedings here criminal rather than civil. In *Allen*, we confronted a similar argument. There, the petitioner "place[d] great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials" to argue that the proceedings were civil in name only. 478 U.S., at 371, 106 S.Ct., at 2993. We rejected that argument, however, explaining that the State's decision "to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions." *Id.*, at 372, 106 S.Ct., at 2993. The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not *365 transform a civil commitment proceeding into a criminal prosecution.

Finally, Hendricks argues that the Act is necessarily punitive because it fails to offer any legitimate "treatment." Without such treatment, Hendricks asserts, confinement under the Act amounts to little more than disguised punishment. Hendricks' argument assumes that treatment for his condition is available, but that the State has failed (or refused) to provide it. The Kansas Supreme Court, however, apparently rejected this assumption, explaining:

"It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes **2084 that sexually violent predators are not amenable to treatment under [the existing Kansas involuntary commitment statute]. If there is nothing to treat under [that statute], then there is no mental illness. In that light, the provisions of the Act for treatment appear somewhat disingenuous." 259 Kan., at 258, 912 P.2d, at 136.

It is possible to read this passage as a determination that Hendricks' condition was *untreatable* under the existing Kansas civil commitment statute, and thus the Act's sole purpose was incapacitation. Absent a treatable mental illness, the Kansas court concluded, Hendricks could not be detained against his will.

Accepting the Kansas court's apparent determination that treatment is not possible for this category of individuals does not obligate us to adopt its legal conclusions. We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation *366 may be a legitimate end of the civil law. See *Allen, supra*, at 373, 106 S.Ct., at 2994; *Salerno*, 481 U.S., at 748-749, 107 S.Ct., at 2102-2103. Accordingly, the Kansas court's determination that the Act's "overriding concern" was the continued "segregation of sexually violent offenders" is consistent with our conclusion that the Act establishes civil proceedings, 259 Kan., at 258, 912 P.2d, at 136, especially when that concern is coupled with the State's ancillary goal of providing treatment to those offenders, if such is possible. While we have upheld state civil com-
mitment statutes that aim both to incapacitate and to treat, see Allen, supra, we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. A State could hardly be seen as furthering a “punitive” purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Accord, Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186 U.S. 380, 22 S.Ct. 811, 46 L.Ed. 1209 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases). Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions. Cf. Greenwood v. United States, 350 U.S. 366, 375, 76 S.Ct. 410, 415, 100 L.Ed. 412 (1956) (“The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner”); O’Connor v. Donaldson, 422 U.S. 563, 584, 95 S.Ct. 2486, 2498, 45 L.Ed.2d 396 (1975) (Burger, C.J., concurring) (“[I]t remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of ‘cure’ are generally low”).

Alternatively, the Kansas Supreme Court’s opinion can be read to conclude that Hendricks’ condition is treatable, but *367 that treatment was not the State’s “overriding concern,” and that no treatment was being provided (at least at the time Hendricks was committed). 259 Kan., at 258, 912 P.2d, at 136. See also ibid. (“It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment”). Even if we accept this determination that the provision of treatment was not the Kansas Legislature’s “overriding” or “primary” purpose in passing the Act, this does not rule out the possibility that an ancillary purpose of the Act was to provide treatment, and it does not require us to conclude that the Act is punitive. In-deed, critical language in the Act itself demonstrates that the Secretary, under whose custody sexually violent predators are committed, has an obligation to provide treatment to individuals like Hendricks. § 59-29a07(a) (“If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe to be *2085 at large” (emphasis added)). Other of the Act’s sections echo this obligation to provide treatment for committed persons. See, e.g., § 59-29a01 (establishing civil commitment procedure “for the long-term care and treatment of the sexually violent predator”); § 5-29a09 (requiring the confinement to “conform to constitutional requirements for care and treatment”). Thus, as in Allen, “the State has a statutory obligation to provide ‘care and treatment for [persons adjudged sexually dangerous] designed to effect recovery,’ ” 478 U.S., at 369, 106 S.Ct., at 2992 (quoting Ill.Rev.Stat., ch. 38, ¶ 105-8 (1985)), and we may therefore conclude that “the State has ... provided for the treatment of those it commits,” 478 U.S., at 370, 106 S.Ct., at 2992.

Although the treatment program initially offered Hendricks may have seemed somewhat meager, it must be remembered that he was the first person committed under the *368 Act. That the State did not have all of its treatment procedures in place is thus not surprising. What is significant, however, is that Hendricks was placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals. FN4 And, before this Court, Kansas declared “[a]bsolutely” that persons committed under the Act are now receiving in the neighborhood of “31- 1/2 hours of treatment per week.” Tr. of Oral Arg. 14-15, 16. FN5

(observing that the State “has considerable discretion in determining the nature and scope of its responsibilities”). In *Allen v. Illinois*, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986), for example, we concluded that “the State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.” *Id.*, at 373, 106 S.Ct., at 2994 (emphasis deleted). By this measure, Kansas has doubtless satisfied its obligation to provide available treatment.

FN5. Indeed, we have been informed that in an August 28, 1995, hearing on Hendricks’ petition for state habeas corpus relief, the trial court, over admittedly conflicting testimony, ruled: “[T]he allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment.” App. 453-454. Thus, to the extent that treatment is available for Hendricks’ condition, the State now appears to be providing it. By furnishing such treatment, the Kansas Legislature has indicated that treatment, if possible, is at least an ancillary goal of the Act, which easily satisfies any test for determining that the Act is not punitive.

Where the State has “disavowed any punitive intent”; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing *369* that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks’ double jeopardy and *ex post facto* claims.

1

The Double Jeopardy Clause provides: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” Although generally understood to preclude a second prosecution for the same offense, the Court has also interpreted this prohibition to prevent the State from “punishing twice, or attempting a second time to punish criminally, for the same offense.” *Witte v. United States*, 515 U.S. 389, 396, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351 (1995) (emphasis and internal quotation marks omitted). Hendricks argues that, as applied to him, the Act violates double jeopardy principles because his confinement under the Act, imposed after a conviction and a term of incarceration, amounted to both a **2086** second prosecution and a second punishment for the same offense. We disagree.

[11] Because we have determined that the Kansas Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution. Cf. *Jones v. United States*, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983) (permitting involuntary civil commitment after verdict of not guilty by reason of insanity). Moreover, as commitment under the Act is not tantamount to “punishment,” Hendricks’ involuntary detention does not violate the Double Jeopardy Clause, even though that confinement may follow a prison term. Indeed, in *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966), we expressly recognized that civil commitment could follow the expiration of a prison term without offending double jeopardy principles. We reasoned that “there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal *370* term from all other civil commitments.” *Id.*, at 111-112, 86 S.Ct., at 763. If an individual otherwise meets the requirements for involuntary civil commitment, the State is under no obligation to release that individual simply because the detention would follow a period of incarceration.

[12] Hendricks also argues that even if the Act survives the “multiple punishments” test, it nevertheless
fails the “same elements” test of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under Blockburger, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Id., at 304, 52 S.Ct., at 182. The Blockburger test, however, simply does not apply outside of the successive prosecution context. A proceeding under the Act does not define an “offense,” the elements of which can be compared to the elements of an offense for which the person may previously have been convicted. Nor does the Act make the commission of a specified “offense” the basis for invoking the commitment proceedings. Instead, it uses a prior conviction (or previously charged conduct) for evidentiary purposes to determine whether a person suffers from a “mental abnormality” or “personality disorder” and also poses a threat to the public. Accordingly, we are unpersuaded by Hendricks’ novel application of the Blockburger test and conclude that the Act does not violate the Double Jeopardy Clause.

[13] Hendricks’ ex post facto claim is similarly flawed. The Ex Post Facto Clause, which “forbids the application of any new punitive measure to a crime already consummated,” has been interpreted to pertain exclusively to penal statutes. California Dept. of Corrections v. Morales, 514 U.S. 499, 505, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588 (1995) (quoting Lindsey v. Washington, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937)). As we have previously determined, the Act does not impose punishment; thus, its application does not raise *371 ex post facto concerns. Moreover, the Act clearly does not have retroactive effect. Rather, the Act permits involuntary confinement based upon a determination that the person currently both suffers from a “mental abnormality” or “personality disorder” and is likely to pose a future danger to the public. To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes. Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act does not violate the Ex Post Facto Clause.

III

We hold that the Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible ex post facto lawmaking. Accordingly, the judgment of the Kansas Supreme Court is reversed.

It is so ordered.

**2087 Justice KENNEDY, concurring.

I join the opinion of the Court in full and add these additional comments.

Though other issues were argued to us, as the action has matured it turns on whether the Kansas statute is an ex post facto law. A law enacted after commission of the offense and which punishes the offense by extending the term of confinement is a textbook example of an ex post facto law. If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish. The Court’s opinion gives a full and complete explanation why an ex post facto challenge based on this contention cannot succeed in the action before us. All this, however, concerns Hendricks alone. My brief, further comment is to caution against dangers inherent*372 when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application.

It seems the dissent, too, would validate the Kansas statute as to persons who committed the crime after its enactment, and it might even validate the statute as to Hendricks, assuming a reasonable level of treatment. As all Members of the Court seem to agree, then, the power of the State to confine persons who, by reason of a mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established. Addington v. Texas, 441 U.S. 418, 426-427, 99 S.Ct. 1804, 1809-1810, 60 L.Ed.2d 323 (1979). Confinement of such individuals is permitted even if it is
pursuant to a statute enacted after the crime has been committed and the offender has begun serving, or has all but completed serving, a penal sentence, provided there is no object or purpose to punish. See *Baxstrom v. Herold*, 383 U.S. 107, 111-112, 86 S.Ct. 760, 762-763, 15 L.Ed.2d 620 (1966). The Kansas law, with its attendant protections, including yearly review and review at any time at the instance of the person confined, is within this pattern and tradition of civil confinement. In this action, the mental abnormality-pedophilia-is at least described in the DSM-IV. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 524-525, 527-528 (4th ed. 1994).

Notwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life. At this stage of medical knowledge, although future treatments cannot be predicted, psychiatrists or other professionals engaged in treating pedophilia may be reluctant to find measurable success in treatment even after a long period and may be unable to predict that no serious danger will come from release of the detainee.

A common response to this may be, “A life term is exactly what the sentence should have been anyway,” or, in the words of a Kansas task force member, “SO BE IT.” Testimony of Jim Blaufuss, App. 503. The point, however, is not how long Hendricks and others like him should serve a criminal sentence. With his criminal record, after all, a life term may well have been the only sentence appropriate to protect society and vindicate the wrong. The concern instead is whether it is the criminal system or the civil system which should make the decision in the first place. If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function. These concerns persist whether the civil confinement statute is put on the books before or after the offense. We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.

On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

Justice BREYER, with whom Justice STEVENS and Justice SOUTER join, and with whom Justice GINSBURG joins as to Parts II and III, dissenting.

I agree with the majority that the Kansas Sexually Violent Predator Act’s “definition of ‘mental abnormality’” satisfies the “substantive” requirements of the Due Process Clause. *Ante*, at 2079. Kansas, however, concedes that Hendricks' condition is treatable; yet the Act did not provide Hendricks (or others like him) with any treatment until after his release date from prison and only inadequate treatment thereafter. These, and certain other, special features of the Act convince me that it was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him. The *Ex Post Facto* Clause therefore prohibits the Act's application to Hendricks, who committed his crimes prior to its enactment.

I begin with the area of agreement. This Court has held that the civil commitment of a “mentally ill” and “dangerous” person does not automatically violate the Due Process Clause provided that the commitment takes place pursuant to proper procedures and evidentiary standards. See *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 1785-1786, 118 L.Ed.2d 437 (1992); *Addington v. Texas*, 441 U.S. 418, 426-427, 99 S.Ct. 1804, 1809-1810, 60 L.Ed.2d 323 (1979). The Kansas Supreme Court, however, held that the Due Process Clause forbids application of the Act to Hendricks for “substantive” reasons, i.e., irrespective of the procedures or evidentiary standards used. The court reasoned that Kansas had not satisfied the “mentally ill” requirement of the Due Process Clause because Hendricks was not “mentally ill.” *In re Hendricks*, 259 Kan. 246, 260-261, 912 P.2d 129, 137-138 (1996). Moreover, Kansas had not satisfied what the court believed was an additional “substantive due process” requirement,
namely, the provision of treatment. *Id., at 257-258, 912 P.2d, at 136.* I shall consider each of these matters briefly.

A

In my view, the Due Process Clause permits Kansas to classify Hendricks as a mentally ill and dangerous person for civil commitment purposes. *Allen v. Illinois,* 478 U.S. 364, 370-371, 373-375, 106 S.Ct. 2988, 2992-2993, 2994-2995, 92 L.Ed.2d 296 (1986). I agree with the majority that the Constitution gives States a degree of leeway in making this kind of determination. *Ante,* at 2081; *Foucha, supra,* at 87, 112 S.Ct., at 1789 (O'CONNOR, J., concurring in part and concurring in judgment); *Jones v. United States,* 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694 (1983). But, because I do not subscribe to all of its reasoning, I shall set forth three sets of circumstances that, taken together, convince me that Kansas has acted within the limits that the Due Process Clause substantially sets.

*375* First, the psychiatric profession itself classifies the kind of problem from which Hendricks suffers as a serious mental disorder. *E.g.,* American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders 524-525, 527-528 (4th ed. 1994) (describing range of paraphilias and discussing how stress aggravates pedophilic behavior); Abel & Rouleau, Male Sex Offenders, in Handbook of Outpatient Treatment of Adults 271 (M. Thase, B. Edelstein, & M. Hersen eds.1990). I concede that professionals also debate whether or not this disorder should be called a mental “illness.” See R. Slovenko, Psychiatry and Criminal Culpability 57 (1995) (citing testimony that paraphilias are not mental illnesses); Schopp & Sturgis, Sexual Predators and Legal Mental Illness for Civil Commitment, 13 Behav. Sci. & The Law 437, 451-452 (1995) (same). Compare Brief for American Psychiatric Association as Amicus Curiae 26 (mental illness requirement not satisfied) with Brief for Menninger Clinic et al. as Amici Curiae 22-25 (requirement is satisfied). But the very presence and vigor of this debate is important. The Constitution permits a State to follow one reasonable professional view, while rejecting another. See *Addington v. Texas, supra,* at 431, 99 S.Ct., at 1812. The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds. See *Jones, supra,* at 365, n. 13, 103 S.Ct., at 3050, n. 13.

Second, Hendricks' abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, *2089* serious, and highly unusual inability to control his actions. (For example, Hendricks testified that, when he gets “stressed out,” he cannot “control the urge” to molest children, see *Ante,* at 2078.) The law traditionally has considered this kind of abnormality akin to insanity for purposes of confinement. See, *e.g.,* Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty., 309 U.S. 270, 274, 60 S.Ct. 252, 525-526, 84 L.Ed. 744 (1940) (upholding against a due process challenge the civil confinement of *376* a dangerous person where the danger flowed from an “utter lack of power to control ... sexual impulses” ) (quoting State ex rel. Pearson v. Probate Court of Ramsey Cty., 205 Minn. 545, 555, 287 N.W. 297, 302 (1939)); 1788 N.Y. Laws, ch. 31 (permitting confinement of those who are “furiously mad”);* In re Oakes,* 8 Law Rep. 122, 125 (Mass.1845) (Shaw, C. J.); A. Deutsch, The Mentally Ill in America 419-420 (1949) (tracing history of commitment of furiously mad people in 18th and 19th centuries); Dershowitz, The Origins of Preventative Confinement in Anglo-American Law-Part II: The American Experience, 43 U. Cin. L.Rev. 781 (1974). Indeed, the notion of an “irresistible impulse” often has helped to shape criminal law's insanity defense and to inform the related recommendations of legal experts as they seek to translate the insights of mental health professionals into workable legal rules. See also American Law Institute, Model Penal Code § 4.01 (insanity defense, in part, rests on inability “to conform ... conduct to the requirements of law”); A. Goldstein, The Insanity Defense 67-79 (1967) (describing “irresistible impulse” test).

Third, Hendricks' mental abnormality also makes him dangerous. Hendricks “has been convicted of ... a sexually violent offense,” and a jury found that he “suffers from a mental abnormality ... which makes”
him “likely to engage” in similar “acts of sexual violence” in the future. Kan. Stat. Ann. §§ 59-29a02, 59-29a03 (1994). The evidence at trial favored the State. Dr. Befort, for example, explained why Hendricks was likely to commit further acts of sexual violence if released. See, e.g., App. 248-254. And Hendricks' own testimony about what happens when he gets “stressed out” confirmed Dr. Befort's diagnosis.

Because (1) many mental health professionals consider pedophilia a serious mental disorder; and (2) Hendricks suffers from a classic case of irresistible impulse, namely, he is so afflicted with pedophilia that he cannot “control the urge” to molest children; and (3) his pedophilia presents a serious *377 danger to those children, I believe that Kansas can classify Hendricks as “mentally ill” and “dangerous” as this Court used those terms in *Foucha.*

The Kansas Supreme Court's contrary conclusion rested primarily upon that court's view that Hendricks would not qualify for civil commitment under Kansas' own state civil commitment statute. The issue before us, however, is one of constitutional interpretation. The Constitution does not require Kansas to write all of its civil commitment rules in a single statute or forbid it to write two separate statutes each covering somewhat different classes of committable individuals. Moreover, Hendricks apparently falls outside the scope of the Kansas general civil commitment statute because that statute permits confinement only of those who “lack[ ] capacity to make an informed decision concerning treatment.” Kan. Stat. Ann. § 59-2902(h) (1994). The statute does not tell us why it imposes this requirement. Capacity to make an informed decision about treatment is not always or obviously incompatible with severe mental illness. Neither Hendricks nor his *amicus* point to a uniform body of professional opinion that says as much, and we have not found any. See, e.g., American Psychiatric Assn., Guidelines for Legislation on the Psychiatric Hospitalization of Adults, 140 Am. J. Psychiatry 672, 673 (1983); Stromberg & Stone, A Model State Law on Civil Commitment of the Mentally Ill, 20 Harv. J. Legis. 275, 301-302 (1983); DeLand & Borenstein, Medicine Court, II, *Rivers in Practice, 147 Am. J. Psychiatry* 38 (1990). Consequently, the boundaries of the Federal Constitution and those of Kansas' general civil commitment statute are not congruent.

**2090 B**

The Kansas Supreme Court also held that the Due Process Clause requires a State to provide treatment to those whom it civilly confines (as “mentally ill” and “dangerous”). It found that Kansas did not provide Hendricks with significant *378 treatment. And it concluded that Hendricks' confinement violated the Due Process Clause for this reason as well.

This case does not require us to consider whether the Due Process Clause always requires treatment—whether, for example, it would forbid civil confinement of an *untreatable* mentally ill, dangerous person. To the contrary, Kansas argues that pedophilia is an “abnormality” or “illness” that can be treated. See Tr. of Oral Arg. 12 (Kansas Attorney General, in response to the question “you're claiming that there is some treatability ...?” answering “[a]bsolutely”); Brief for Petitioner 42-47. Two groups of mental health professionals agree. Brief for Association for the Treatment of Sexual Abusers as *Amicus Curiae* 11-12 (stating that “sex offenders can be treated” and that “increasing evidence” shows that “state-of-the-art treatment programs ... significantly reduce recidivism”); Brief for Menninger Foundation et al. as *Amici Curiae* 28. Indeed, no one argues the contrary. Hence the legal question before us is whether the Clause forbids Hendricks' confinement unless Kansas provides him with treatment that it *concedes* is available.

Nor does anyone argue that Kansas somehow could have violated the Due Process Clause's treatment concerns had it provided Hendricks with the treatment that is potentially available (and I do not see how any such argument could succeed). Rather, the basic substantive due process treatment question is whether that Clause requires Kansas to provide treatment that it concedes is potentially available to a person whom it concedes is treatable. This same question is at the heart of my discussion of whether Hendricks' confinement violates the Constitution's *Ex Post Facto* Clause. See *infra,* at 2092-2098. For that reason, I shall not consider the sub-
substantive due process treatment question separately, but instead shall simply turn to the Ex Post Facto Clause discussion. As Justice KENNEDY points out, ante, at 2087, some of the matters there discussed may later prove relevant to substantive due process analysis.

*379 II

Kansas' 1994 Act violates the Federal Constitution's prohibition of "any ... ex post facto Law" if it "inflicts" upon Hendricks "a greater punishment" than did the law "annexed to" his "crime[s]" when he "committed" those crimes in 1984. Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798) (opinion of Chase, J.); U.S. Const., Art. I, § 10. The majority agrees that the Clause "forbids the application of any new punitive measure to a crime already consummated." California Dept. of Corrections v. Morales, 514 U.S. 499, 505, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588 (1995) (citation omitted; emphasis added). Ante, at 2086. But it finds the Act is not "punitive." With respect to that basic question, I disagree with the majority.

Certain resemblances between the Act's "civil commitment" and traditional criminal punishments are obvious. Like criminal imprisonment, the Act's civil commitment amounts to "secure" confinement, Kan. Stat. Ann. § 59-29a07(a) (1994), and "incarceration against one's will," In re Gault, 387 U.S. 1, 50, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527 (1967). See Testimony of Terry Davis, SRS Director of Quality Assurance, App. 52-54, 78-81 (confinement takes place in the psychiatric wing of a prison hospital where those whom the Act confines and ordinary prisoners are treated alike). Cf. Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 298, 109 S.Ct. 2909, 2932, 106 L.Ed.2d 219 (1989) (O'CONNOR, J., concurring in part and dissenting in part). In addition, a basic objective of the Act is incapacitation, which, as Blackstone said in describing an objective of criminal law, is to "depriv[e] the party injuring of the power to do future mischief." 4 W. Blackstone, Commentaries *11-*12 (incapacitation is one important purpose of criminal punishment); see also Foucha, 504 U.S., at 99, 112 S.Ct., at 1795 (KENNEDY, J., dissenting) ("Incapacitation for the protection of society is not an unusual ground **2091 for incarceration"); United States v. Brown, 381 U.S. 437, 458, 85 S.Ct. 1707, 1720, 14 L.Ed.2d 484 (1965) ("Punishment serves several purposes: retributive, rehabilitative, deterrent-and preventative. One of the reasons society imprisons those convicted *380 of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment"); 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, p. 32 (1986); 18 U.S.C. § 3553(a); United States Sentencing Guidelines, Guidelines Manual, ch. 1, pt. A (Nov.1995).


And the Act imposes that confinement through the use of persons (county prosecutors, procedural guarantees (trial by jury, assistance of counsel, psychiatric evaluations), and standards ("beyond a reasonable doubt") traditionally associated with the criminal law. Kan. Stat. Ann. §§ 59-29a06, 59-29a07 (1994).

These obvious resemblances by themselves, however, are not legally sufficient to transform what the Act calls "civil commitment" into a criminal punishment. Civil commitment of dangerous, mentally ill individuals by its very nature involves confinement and incapacitation. Yet "civil commitment," from a constitutional perspective, nonetheless remains civil. Allen v. Illinois, 478 U.S., at 369-370, 106 S.Ct., at 2992-2993. Nor does the fact that criminal behavior triggers the Act make the critical difference. The Act's insistence upon a prior crime, by screening out those whose past behavior does not concretely demonstrate the existence of a mental problem or potential future danger, may serve an important noncriminal evidentiary purpose. Neither is the presence of criminal law-type procedures determinative.
Those procedures can serve an important purpose that in this context one might consider noncriminal, namely, helping to prevent judgmental mistakes that would wrongly deprive a person of important liberty. *Id.* at 371-372, 106 S.Ct., at 2993-2994.

If these obvious similarities cannot by themselves prove that Kansas’ “civil commitment” statute is criminal, neither can the word “civil” written into the statute, § 59-29a01, by itself prove the contrary. This Court has said that only the “clearest proof” could establish that a law the legislature called “civil” was, in reality, a “punitive” measure. *United States v. Ward*, 448 U.S. 242, 248-249, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980). But the Court has also reiterated that a “civil label is not always dispositive,” *Allen v. Illinois*, supra, at 369, 106 S.Ct., at 2992; it has said that in close cases the label is “not of paramount importance,” *Kurth Ranch*, supra, at 777, 114 S.Ct., at 1945 (citation omitted); and it has looked behind a “civil” label fairly often, e.g., *United States v. Halper*, 490 U.S. 435, 447, 109 S.Ct. 1892, 1901, 104 L.Ed.2d 487 (1989).

In this circumstance, with important features of the Act pointing in opposite directions, I would place particular importance upon those features that would likely distinguish between a basically punitive and a basically nonpunitive purpose. *United States v. Ursery*, 518 U.S. 267, 278, 116 S.Ct. 2135, 2142, 135 L.Ed.2d 549 (1996) (asking whether a statutory scheme was so punitive “‘either in purpose or effect’” to negate the legislature’s “‘intention to establish a civil remedial mechanism’” (citations omitted)). And I note that the Court, in an earlier civil commitment case, *Allen v. Illinois*, 478 U.S., at 369, 106 S.Ct., at 2992, looked primarily to the law’s concern for treatment as an important distinguishing feature. I do not believe that *Allen* means that a particular law’s lack of concern for treatment, by itself, is enough to make an incapacitative law punitive. But, for reasons I will point out, when a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive.

In *Allen*, the Court considered whether, for Fifth Amendment purposes, proceedings under an Illinois statute were *civil* or “criminal.” The Illinois statute, rather like the Kansas statute here, authorized the confinement of persons who were sexually dangerous, who had committed at least one prior sexual assault, and who suffered from a “mental disorder.” *Id.* at 366, n. 1, 106 S.Ct., at 2988, n. 1. The *Allen* Court, looking behind the statute’s “civil commitment” label, found the statute civil-in important part because the State had “provided for the treatment of those it commits.” *Id.*, at 370, 106 S.Ct., at 2992 (also referring to facts that the State had “disavowed any interest in punishment” and that it had “established a system under which committed persons may be released after the briefest time in confinement”).

In reaching this conclusion, the Court noted that the State Supreme Court had found the proceedings “essentially criminal” because the statute’s aim was to provide “treatment, not punishment.” *Id.*, at 367, 106 S.Ct., at 2991 (quoting *People v. Allen*, 107 Ill.2d 91, 105-106, 89 Ill.Dec. 847, 851-852, 481 N.E.2d 690, 694-695 (1985)). It observed that the State had “a statutory obligation to provide ‘care and treatment ... designed to effect recovery’” in a “facility set aside to provide psychiatric care.” 478 U.S., at 369, 106 S.Ct., at 2992 (quoting Ill.Rev.Stat., ch. 38, ¶ 105-8 (1985)). And it referred to the State’s purpose as one of “treating rather than punishing sexually dangerous persons.” 478 U.S., at 373, 106 S.Ct., at 2994; see also *ibid.* (“Had petitioner shown, for example, that the confinement ... imposes ... a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case”).

The *Allen* Court’s focus upon treatment, as a kind of touchstone helping to distinguish civil from punitive purposes, is not surprising, for one would expect a nonpunitive statutory scheme to confine, not simply in order to protect, but also in order to cure. That is to say, one would expect a nonpunitively motivated legislature that confines because of a dangerous mental abnormality to seek to help the individual himself overcome that abnormality (at least insofar as professional treatment
for the abnormality exists and is *383 potentially helpful, as Kansas, supported by some groups of mental health professionals, argues is the case here, see supra, at 2090). Conversely, a statutory scheme that provides confinement that does not reasonably fit a practically available, medically oriented treatment objective, more likely reflects a primarily punitive legislative purpose.

Several important treatment-related factors-factors of a kind that led the five-Member Allen majority to conclude that the Illinois Legislature's purpose was primarily civil, not punitive-in this action suggest precisely the opposite. First, the State Supreme Court here, unlike the state court in Allen, has held that treatment is not a significant objective of the Act. The Kansas court wrote that the Act's purpose is "segregation of sexually violent offenders," with "treatment" a matter that was "incidental at best." 259 Kan., at 258, 912 P.2d, at 136.

By way of contrast, in Allen the Illinois court had written that "treatment, not punishment," was "the aim of the statute." Allen, supra, at 367, 106 S.Ct., at 2991 (quoting People v. Allen, supra, at 99-101, 89 Ill.Dec. at 851-852, 481 N.E.2d, at 694-695).


The record provides support for the Kansas court's conclusion. The court found that, as of the time of Hendricks' commitment, the State had not funded treatment, it had not entered into treatment contracts, and it had little, if any, qualified treatment staff. See 259 Kan., at 249, 258, 912 P.2d, at 131, 136; Testimony of Dr. Charles Befort, App. 255 (acknowledging that he has no specialized training); Testimony of John House, SRS Attorney, id., at 367 (no contract has been signed by bidders); Testimony of John House, SRS Attorney, id., at 369 (no one hired to operate sexually violent predator (SVP) program or to serve as clinical director, psychiatrist, or psychologist). Indeed, were we to follow the majority's invitation to look beyond the record in this case, an invitation with which we disagree, see infra, at 2085, it would reveal that Hendricks, according to the commitment program's own director, was receiving "essentially no treatment." Dr. Charles Befort in State Habeas Corpus Proceeding, App. 393; 259 Kan., at 249, 258, 912 P.2d, at 131, 136. See also App. 421 ("[T]he treatment that is prescribed by statute" is "still not available"); id., at 420-421 (the "needed treatment" "hasn't been delivered yet" and "Hendricks has wasted ten months" in "terms of treatment effects"); id., at 391-392 (Dr. Befort admitting that he is not qualified to be SVP program director).

It is therefore not surprising that some of the Act's official supporters had seen in it an opportunity permanently to confine dangerous sex offenders, e.g., id., at
468 (statement of Attorney General Robert Stephan); *id.*, at 475-476, 478 (statement of Special Assistant to the Attorney General *Carla Stovall*). Others thought that effective treatment did not exist, *id.*, at 503 (statement of Jim Blaufuss) (“Because there is no effective treatment for sex offenders, this Bill may mean a life sentence for a felon that is considered a risk to women and children. SO BE IT!”)-a view, by the way, that the State of Kansas, supported by groups of informed mental health professionals, here strongly denies. See *supra*, at 2090.

The Kansas court acknowledged the existence of “provisions of the Act for treatment” (although it called them “somewhat disingenuous”). 259 Kan., at 258, 912 P.2d, at 136. Cf. Kan. Stat. Ann. § 59-29a01 (1994) (legislative findings that “prognosis for rehabilita[tion] ... in a prison setting is poor, ... treatment needs ... long term” and “commitment procedure for ... long term care and treatment ... necessary”); § 59-29a09 (“commitment ... shall conform to constitutional requirements for care and treatment”). Nor did the court deny that Kansas could later increase the amount of treatment it provided. But the Kansas Supreme Court could, and did, use the Act's language, history, and initial implementation to help it characterize the Act's primary purposes.

Second, the Kansas statute, insofar as it applies to previously convicted offenders such as Hendricks, commits, confines, and treats those offenders *after* they have served virtually their entire criminal sentence. That time-related circumstance seems deliberate. The Act explicitly defers diagnosis, evaluation, and commitment proceedings until a few weeks prior to the “anticipated release” of a previously convicted offender from prison. Kan. Stat. Ann. § 59-29a03(a)(1) (1994). But why, one might ask, does the Act not commit and require treatment of sex offenders sooner, *id.*, say, soon after they begin to serve their sentences?

An Act that simply seeks confinement, of course, would not need to begin civil commitment proceedings sooner. Such an Act would have to begin proceedings only when an *offender's* prison term ends, threatening his release from the confinement that imprisonment assures. But it is difficult to see why rational legislators who seek treatment would write the Act in this way—providing treatment years after the criminal act that indicated its necessity. See, *e.g.*, Wettstein, A *Psychiatric Perspective on Washington's Sexually Violent Predators Statute, 15 U. Puget Sound L.Rev. 597, 617 (1992) (stating that treatment delay leads to “loss of memory” and makes it “more difficult for the offender” to “accept responsibility,” and that time in prison leads to attitude hardening that “engender[s] a distorted view of the precipitating offense”). And it is particularly difficult to see why legislators who specifically wrote into the statute a finding that “prognosis for rehabilitating ... in a prison setting is poor” would leave an offender in that setting for months or years before beginning treatment. This is to say, the timing provisions of the statute confirm the Kansas Supreme Court's view that treatment was not a particularly important legislative objective.

I recognize one possible counterargument. A State, wanting both to punish Hendricks (say, for deterrence purposes) and also to treat him, might argue that it should be permitted to postpone treatment until after punishment in order to make certain that the punishment in fact occurs. But any such reasoning is out of place here. Much of the treatment that Kansas offered here (called “ward milieu” and “group therapy”) can be given at the same time as, and in the same place where, Hendricks serves his punishment. See, *e.g.*, Testimony of Leroy Hendricks, App. 142-143, 150, 154, 179-181 (stating that Washington and Kansas had both provided group therapy to Hendricks, and that he had both taken and refused such treatment at various points); Testimony of Terry Davis, SRS Director of Quality Assurance, *id.*, at 78-81 (pointing out that treatment under the Act takes place in surroundings very similar to those in which prisoners receive treatment); Testimony of John House, SRS Attorney, *id.*, at 375-376. See also Task Force on Community Protection, Final Report to Booth Gardner, Governor State of Washington II-2 (1989) (findings of task force that developed the Washington State Act, which served as a model for Kansas' Act, stating that “[s]ex offenders can be treated during incarceration”). The evidence adduced at the state habeas proceeding, were we to assume it properly be-
before the Court, see infra, at 20-21, supports this conclusion as well. See Testimony of Dr. Befort at State Habeas Proceeding, App. 399, 406-408 (describing treatment as ward milieu and group therapy); id., at 416-417 (stating that Kansas offers similar treatment, on a voluntary basis, to prisoners). Hence, assuming, arguendo, that it would be otherwise permissible, Kansas need not postpone treatment in order to make certain that sex offenders serve their full terms of imprisonment, i.e., to make certain that they receive the entire punishment that Kansas criminal law provides. To the contrary, the statement in the Act itself, that the Act aims to respond to special “long term” “treatment needs,” suggests that treatment should begin during imprisonment. It also suggests that, were those long-term treatment needs (rather than further punishment) Kansas’ primary aim, the State would require that treatment begin soon after conviction, not 10 or more years later. See also Vt. Stat. Ann., Tit. 18, § 2815 (1959) (providing for treatment of sexual psychopaths first, and punishment afterwards).

Third, the statute, at least as of the time Kansas applied it to Hendricks, did not require the committing authority to consider the possibility of using less restrictive alternatives, such as postrelease supervision, halfway houses, or other methods that amici supporting Kansas here have mentioned. Brief for Menninger Foundation et al. as Amici Curiae 28; Brief for Association for the Treatment of Sexual Abusers as Amicus Curiae 11-12. The laws of many other States require such consideration. See Appendix, infra.

**2095 **388 This Court has said that a failure to consider, or to use, “alternative and less harsh methods” to achieve a nonpunitive objective can help to show that legislature’s “purpose ... was to punish.” Bell v. Wolfish, 441 U.S. 520, 539, n. 20, 99 S.Ct. 1861, 1874, n. 20, 60 L.Ed.2d 447 (1979). And one can draw a similar conclusion here. Legislation that seeks to help the individual offender as well as to protect the public would avoid significantly greater restriction of an individual’s liberty than public safety requires. See Keilitz, Conn, & Gianpetero, Least Restrictive Treatment of Involuntary Patients: Translating Concepts into Practice, 29 St. Louis U.L.J. 691, 693 (1985) (describing “least restrictive alternative[e]” provisions in the ordinary civil commitment laws of almost all States); Lyon, Levine, & Zusman, Patients’ Bill of Rights: A Survey of State Statutes, 6 Mental Disability L. Rep. 178, 181-183 (1982) (same). Legislation that seeks almost exclusively to incapacitate the individual through confinement, however, would not necessarily concern itself with potentially less restrictive forms of incapacitation. I would reemphasize that this is not a case in which the State claims there is no treatment potentially available. Rather, Kansas, and supporting amici, argue that pedophilia is treatable. See supra, at 2090.

Fourth, the laws of other States confirm, through comparison, that Kansas’ “civil commitment” objectives do not require the statutory features that indicate a punitive purpose. I have found 17 States with laws that seek to protect the public from mentally abnormal, sexually dangerous individuals through civil commitment or other mandatory treatment programs. Ten of those statutes, unlike the Kansas statute, begin treatment of an offender soon after he has been apprehended and charged with a serious sex offense. Only seven, like Kansas, delay “civil” commitment (and treatment) until the offender has served his criminal sentence (and this figure includes the Acts of Minnesota and New Jersey, both of which generally do not delay treatment). Of these seven, however, six (unlike Kansas) require consideration of less restrictive*389 alternatives. See Ariz.Rev.Stat.Ann. §§ 13-4601, 4606 B (Supp.1996-1997); Cal. Welf. & Inst.Code Ann. §§ 6607, 6608 (West Supp.1997); Minn.Stat. § 253B.09 (1996); N.J. Stat. Ann. § 30:4-27.11d (West 1997); Wash. Rev.Code Ann. § 71.09.090 (Supp.1996-1997); Wis. Stat. § 980.06(2)(b) (Supp.1993-1994). Only one State other than Kansas, namely Iowa, both delays civil commitment (and consequent treatment) and does not explicitly consider less restrictive alternatives. But the law of that State applies prospectively only, thereby avoiding ex post facto problems. See Iowa Code Ann. § 709C.12 (Supp.1997) (Iowa SVP Act only “applies to persons convicted of a sexually violent offense on or after July 1, 1997”); see also Appendix, infra. Thus the practical experience of other States, as revealed by their statutes, confirms what
the Kansas Supreme Court's finding, the timing of the civil commitment proceeding, and the failure to consider less restrictive alternatives, themselves suggest, namely, that for *Ex Post Facto* Clause purposes, the purpose of the Kansas Act (as applied to previously convicted offenders) has a punitive, rather than a purely civil, purpose.

Kansas points to several cases as support for a contrary conclusion. It points to *Allen*—which is, as we have seen, a case in which the Court concluded that Illinois' "civil commitment" proceedings were not criminal. I have explained in detail, however, how the statute here differs from that in *Allen*, and why *Allen*'s reasoning leads to a different conclusion in this litigation. See supra, at 2091-2095.

Kansas also points to *Addington v. Texas*, where the Court held that the Constitution does not require application of criminal law's "beyond a reasonable doubt" standard in a civil commitment proceeding. 441 U.S., at 428, 99 S.Ct., at 1810. If some criminal law guarantees such as "reasonable doubt" did not apply in *Addington*, should other guarantees, such as the prohibition against *ex post facto* laws, apply here? The answer to this question, of course, lies in the particular statute at issue in *Addington*—a Texas statute that, this Court observed, *390* did "not exercis[e]" state power "in a punitive sense." *Ibid.* That statute did not add criminal commitment's confinement to imprisonment; rather **2096** civil commitment was, at most, a substitute for criminal punishment. See Tex.Rev.Civ. Stat. Ann. § 5547-41 (Vernon 1958) (petition must state "proposed patient is not

ment that must constitutionally accompany commit-

ment pursuant to the Statute. The failure of the Stat-

tute to provide for examination or treatment prior to

the completion of the punishment phase strongly sug-

gests that treatment is of secondary, rather than

primary, concern." 259 Kan., at 258, 912 P.2d, at

136 (quoting *Young v. Weston*, 898 F.Supp. 744, 753

(W.D.Wash.1995)).

The majority suggests that this is the very case I say it is not, namely, a case of a mentally ill person who is *untreatable*. *Ante*, at 2084. And it quotes a long excerpt from the Kansas Supreme Court's opinion in support. That court, however, did not find that Hendricks was *untreatable*; it found that he was untreated—quite a different matter. Had the Kansas Supreme Court thought that Hendricks, or others*391* like him, are untreatable, it could not have written the words that follow that excerpt, adopting by reference the words of another court opinion:

"'The statute forecloses the possibility that offenders will be evaluated and treated until after they have been punished.... Setting aside the question of whether a prison term exacerbates or minimizes the mental condition of a sex offender, it plainly delays the treatment that must constitutionally accompany commitment pursuant to the Statute. The failure of the Statute to provide for examination or treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary, concern.' " 259 Kan., at 258, 912 P.2d, at 136 (quoting *Young v. Weston*, 898 F.Supp. 744, 753

(W.D.Wash.1995)).

This quotation, and the rest of the opinion, make clear that the court is finding it objectionable that the statute, among other things, has not provided adequate treatment to one who, all parties here concede, *can* be treated.
The majority suggests in the alternative that recent evidence shows that Kansas is now providing treatment. *Ante*, at 2084-2085. That evidence comes from two sources: First, a statement by the Kansas Attorney General at oral argument that those committed under the Act are now receiving treatment, *ante*, at 2085; and second, in a footnote, a Kansas trial judge's statement, in a state habeas proceeding nearly one year after Hendricks was committed, that Kansas is providing treatment. *Ante*, at 2085, n. 5. I do not see how either of these statements can be used to justify the validity of the Act's application to Hendricks at the time he filed suit.

We are reviewing the Kansas Supreme Court's determination of Hendricks' case. Neither the majority nor the lengthy dissent in that court referred to the two facts that the majority now seizes upon, and for good reason. That court denied a motion to take judicial notice of the state *392 habeas* proceeding, see Order of Kansas Supreme Court, No. 94-73039, Mar. 1, 1996. The proceeding is thus not part of the record, and cannot properly be considered by this Court. And the Kansas Supreme Court obviously had no chance to consider Kansas' new claim made at oral argument before this Court. There is simply no evidence in the record before this Court that comes even close to resembling **2097** the assertion Kansas made at oral argument. It is the record, not the parties' view of it, that must control our decision. See *Russell v. Southard*, 12 How. 139, 158-159, 13 L.Ed. 927 (1851); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-158, n. 16, 90 S.Ct. 1598, 1608, n. 16, 26 L.Ed.2d 142 (1970); *Hopt v. Utah*, 114 U.S. 488, 491-492, 5 S.Ct. 972, 973, 29 L.Ed. 183 (1885); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 486, n. 3, 106 S.Ct. 748, 751, n. 3, 88 L.Ed.2d 846 (1986); *New Haven Inclusion Cases*, 399 U.S. 392, 450, n. 66, 90 S.Ct. 2054, 2088, n. 66, 26 L.Ed.2d 691 (1970); R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 555-556, 594 (7th ed. 1993); Fed. Rule Evid. 201(b).

The prohibition on facts found outside the record is designed to ensure the reliability of the evidence before the Court. For purposes of my argument in this dissent, however, the material that the majority wishes to consider, when read in its entirety, shows that Kansas was *not* providing treatment to Hendricks. At best, the testimony at the state hearing contained general and vague references that treatment was about to be provided, but it contains *no statement* that Hendricks *himself* was receiving treatment. And it provides the majority with no support at all in respect to that key fact. Indeed, it demonstrates the contrary conclusion. For example, the program's director, Dr. Befort, testified that he would have to tell the court at Hendricks' next annual review, in October 1995, that Hendricks "has had no opportunity for meaningful treatment." App. 400. He also stated that SVP's were receiving "essentially no treatment" and that the program does not "have adequate staffing." *Id.*, at 393, 394. And Dr. Befort's last words made clear that Hendricks has "wasted ten months ... in terms of treatment *393* effects" and that, as far as treatment goes, "[t]oday, it's still not available." *Id.*, at 420-421. Nor does the assertion made by the Kansas Attorney General at oral argument help the majority. She never stated that *Hendricks*, as opposed to other SVP's, was receiving this treatment. And we can find no support for her statement in the record.

We have found no other evidence in the record to support the conclusion that Kansas was in fact providing the treatment that all parties agree that it could provide. Thus, even had the Kansas Supreme Court considered the majority's new evidence-which it did not-it is not likely to have changed its characterization of the Act's treatment provisions as "somewhat disingenuous." 259 Kan., at 258, 912 P.2d, at 136.

Regardless, the Kansas Supreme Court did so characterize the Act's treatment provisions and did find that treatment was "at best" an "incidental" objective. Thus, the circumstances here are different from *Allen*, where the Illinois Supreme Court explicitly found that the statute's aim was to provide treatment, not punishment. See *supra*, at 2092-2093. There is no evidence in the record that contradicts the finding of the Kansas court. Thus, *Allen* 's approach-its reliance on the state court-if followed here would mean the Act as applied to Leroy Hendricks (as opposed to others who may have received
treatment or who were sentenced after the effective date of the Act) is punitive.

Finally, Kansas points to United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), a case in which this Court held preventive detention of a dangerous accused person pending trial constitutionally permissible. Salerno, however, involved the brief detention of that person, after a finding of “probable cause” that he had committed a crime that would justify further imprisonment, and only pending a speedy judicial determination of guilt or innocence. This Court, in Foucha, emphasized the fact that the confinement at issue in Salerno was “strictly limited in duration.” 504 U.S., at 82, 112 S.Ct., at 1787. It described *394 that “prertrial detention of arrestees” as “one of those carefully limited exceptions permitted by the Due Process Clause.” Id., at 83, 112 S.Ct., at 1787. And it held that Salerno did not authorize the indefinite detention, on grounds of dangerousness, of “insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.” 504 U.S., at 83, 112 S.Ct., at 1787. Whatever Salerno’s “due process” implications **2098 may be, it does not focus upon, nor control, the question at issue here, the question of “punishment” for purposes of the Ex Post Facto Clause.

One other case warrants mention. In Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), this Court listed seven factors that helped it determine whether a particular statute was primarily punitive for purposes of applying the Fifth and Sixth Amendments. Those factors include whether a sanction involves an affirmative restraint, how history has regarded it, whether it applies to behavior already a crime, the need for a finding of scienter, its relationship to a traditional aim of punishment, the presence of a nonpunitive alternative purpose, and whether it is excessive in relation to any nonpunitive alternative purpose. Id., at 169, 83 S.Ct., at 568. This Court has said that these seven factors are “neither exhaustive nor dispositive,” and nonetheless “helpful.” Ward, 448 U.S., at 249, 100 S.Ct., at 2641-2642. Paraphrasing them here, I believe the Act before us involves an affirmative restraint historically regarded as punishment; imposed upon behavior already a crime after a finding of scienter; which restraint, namely, confinement, serves a traditional aim of punishment, does not primarily serve an alternative purpose (such as treatment), and is excessive in relation to any alternative purpose assigned. 372 U.S., at 168-169, 83 S.Ct., at 567-568.

This is not to say that each of the factors the Court mentioned in Mendoza-Martinez on balance argues here in favor of a constitutional characterization as “punishment.” It is not to say that I have found “a single ‘formula’ for identifying those legislative changes that have a sufficient effect on *395 substantive crimes or punishments to fall within the constitutional prohibition,” Morales, 514 U.S., at 509, 115 S.Ct., at 1603; see also Halper, 490 U.S., at 447, 109 S.Ct., at 1901; id., at 453, 109 S.Ct., at 1904 (KENNEDY, J., concurring). We have not previously done so, and I do not do so here. Rather, I have pointed to those features of the Act itself, in the context of this litigation, that lead me to conclude, in light of our precedent, that the added confinement the Act imposes upon Hendricks is basically punitive. This analysis, rooted in the facts surrounding Kansas' failure to treat Hendricks, cannot answer the question whether the Kansas Act, as it now stands, and in light of its current implementation, is punitive toward people other than he. And I do not attempt to do so here.

III

To find that the confinement the Act imposes upon Hendricks is “punishment” is to find a violation of the Ex Post Facto Clause. Kansas does not deny that the 1994 Act changed the legal consequences that attached to Hendricks' earlier crimes, and in a way that significantly “disadvantage[d] the offender,” Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). See Brief for Respondent State of Kansas 37-39.

To find a violation of that Clause here, however, is not to hold that the Clause prevents Kansas, or other States, from enacting dangerous sexual offender statutes. A statute that operates prospectively, for example, does not offend the Ex Post Facto Clause. Weaver, 450 U.S., at 29, 101 S.Ct., at 964-965. Neither does it offend
the Ex Post Facto Clause for a State to sentence offenders to the fully authorized sentence, to seek consecutive, rather than concurrent, sentences, or to invoke recidivism statutes to lengthen imprisonment. Moreover, a statute that operates retroactively, like Kansas' statute, nonetheless does not offend the Clause if the confinement that it imposes is not punishment-if, that is to say, the legislature does not simply add a later criminal punishment to an earlier one. Ibid.

*396 The statutory provisions before us do amount to punishment primarily because, as I have said, the legislature did not tailor the statute to fit the nonpunitive civil aim of treatment, which it concedes exists in Hendricks' case. The Clause in these circumstances does not stand as an obstacle to achieving important protections for the public's safety; rather it provides an assurance that, where so significant a restriction of an individual's basic freedoms is at issue, a State cannot cut corners. Rather, the legislature must hew to the Constitution's liberty-protecting line. See The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton).

I therefore would affirm the judgment below.

**2099 *397 APPENDIX TO OPINION OF BREYER, J.

SELECTED SEXUAL OFFENSE COMMITMENT STATUTES

(Kansas is the only State that answers “yes” to all three categories)

<table>
<thead>
<tr>
<th>State</th>
<th>Delays</th>
<th>Treatment</th>
<th>Less Restrictive Alternatives</th>
<th>Applies to Pre-Act Crimes</th>
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<td></td>
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<tr>
<td>Iowa Code Ann. ch. 709C (Supp.1996)</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>N.J. Stat. Ann. § 30:4-82.4 et seq. (West 1997)</td>
<td>Sometimes</td>
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<tr>
<td>Ore. Rev. Stat. § 426.510 et seq.</td>
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<td>Yes</td>
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<tr>
<td>Tenn. Code Ann. § 33-6-301 et seq.</td>
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<td>Wis. Stat. § 980.01 et seq. (Supp. 1993-1994)</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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(* = designation that the statute does not specify)
Proceeding predicated upon denial by registrar of application of plaintiff for registration as a voter. The Superior Court, Northampton County, North Carolina, entered judgment adverse to plaintiff, and, preserving her federal question, plaintiff appealed. The Supreme Court of North Carolina, 248 N.C. 102, 102 S.E.2d 853, affirmed and plaintiff appealed. The Supreme Court, Mr. Justice Douglas, held that requirement of North Carolina statute and Constitution that a person as a prerequisite to registration as a voter be able to read and write any section of the Constitution of North Carolina in the English language, with such requirement applicable to members of all races, did not conflict with either the Fourteenth, Fifteenth or Seventeenth Amendments to the federal Constitution, and such requirements could not be condemned as unconstitutional on their face as a device unrelated to desire of the state to raise the standards for people of all races who cast the ballot.

Affirmed.

West Headnotes

[1] Federal Courts 170B 511.1

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk511 Scope and Extent of Review
170Bk511.1 k. In General. Most Cited

Cases
(Formerly 170Bk511, 106k399(1))
Where issue of discrimination in the actual operation of the ballot laws of North Carolina was not framed in issues presented for state court litigation over denial by registrar of application of registration of plaintiff as a voter because of her refusal to take a literacy test, question of such discrimination through granting of voting privileges to certain persons under a grandfather clause of the North Carolina Constitution, would not be discussed by the Supreme Court. Const.N.C. art. 6, § 4; G.S.N.C. §§ 163-28 to 163-28.3.

[2] Elections 144 18

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k18 k. Power to Prescribe Qualifications.
Most Cited Cases

The states have broad powers to determine the conditions under which the right of suffrage may be exercised, in the absence of discrimination condemned by the Constitution.

[3] Elections 144 10

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k18 k. Power to Prescribe Qualifications.
Most Cited Cases

While the right of suffrage is established and guaranteed by the federal Constitution, it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. U.S.C.A.Const. art. 1, s 2.

[4] United States 393 10

393 United States
393I Government in General
393k7 Congress

393k10 k. Apportionment of Representatives. Most Cited Cases

While the Fourteenth Amendment which provides for apportionment of representatives among the states according to their respective numbers counting the whole number of persons in each state, except Indians not taxed, speaks of the “right to vote,” the right protected refers to the right to vote as established by the laws and Constitution of the state. U.S.C.A.Const. Amend. 14, § 2.

[5] Elections 144 ☐ 18

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k18 k. Power to Prescribe Qualifications. Most Cited Cases

Residence requirements, age, and a previous criminal record are examples indicating factors which a state may take into consideration in determining qualification of voters.

[6] Elections 144 ☐ 18

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k18 k. Power to Prescribe Qualifications. Most Cited Cases

A literacy requirement may be set up as a prerequisite by a state to eligibility for voting without violation of the federal Constitution. U.S.C.A.Const. Amends. 14, 15, 17.

[7] Constitutional Law 92 ☐ 1482

92 Constitutional Law

92XXVI Political Rights and Discrimination

92k1482 k. Fifteenth Amendment. Most Cited Cases

(Formerly 144k12)

Elections 144 ☐ 12(5)

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k12 Denial or Abridgment on Account of Race

144k12(2) Discriminatory Practices Proscribed

144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases

(Formerly 144k12)

A literacy test as a prerequisite to eligibility for voting, even though fair on its face, may be employed to perpetuate discrimination which the Fifteenth Amendment was designed to uproot, and, also, a literacy test may be unconstitutional on its face where the legislative setting of the provision and the discretion vested in the registrar of voting make it clear that the requirement is merely a device to make racial discrimination easy. U.S.C.A.Const. Amend. 15.

[8] Constitutional Law 92 ☐ 3284

92 Constitutional Law

92XXVI Equal Protection

92XXVI(B) Particular Classes

92XXVI(B)8 Race, National Origin, or Ethnicity

92k3283 Elections, Voting, and Political Rights

92k3284 k. In General. Most Cited Cases

(Formerly 92k215.3, 92k215)

Elections 144 ☐ 12(5)

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k12 Denial or Abridgment on Account of Race

144k12(2) Discriminatory Practices Proscribed

144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases

(Formerly 144k12)

Requirement of North Carolina statute and
Constitution that a person as a prerequisite to registration as a voter “be able to read and write any section of the Constitution of North Carolina in the English language” with such requirement applicable to members of all races, did not conflict with either the Fourteenth, Fifteenth or Seventeenth Amendments to the federal Constitution, and such requirements could not be condemned as unconstitutional on their face as a device unrelated to desire of the state to raise the standards for people of all races who cast the ballot. U.S.C.A.Const. Amends. 14, 15, 17; 28 U.S.C.A. § 1257(2); Const. N.C. art. 6, § 4; G.S.N.C. §§ 163-28 to 163-28.3.

Mr. Samuel S. Mitchell, Raleigh, N.C., for appellant.

Mr. I. Beverly Lake, Raleigh, N.C., for appellee.

Mr. Justice DOUGLAS delivered the opinion of the Court.

This controversy started in a Federal District Court. Appellant, a Negro citizen of North Carolina, sued to have the literacy test for voters prescribed by that State declared unconstitutional and void. A three-judge court was convened. That court noted that the literacy test was part of a provision of the North Carolina Constitution that also included a grandfather clause. It said that the grandfather clause plainly would be unconstitutional under *46 Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340. It noted, however, that the North Carolina statute which enforced the registration requirements contained in the State Constitution had been superseded by a 1957 Act and that the 1957 Act does not contain the grandfather clause or any reference to it. But being uncertain as to the significance of the 1957 Act and deeming it wise to have all administrative remedies under that Act exhausted before the federal court acted, it stayed its action, retaining jurisdiction for a reasonable time to enable appellant to exhaust her administrative remedies and obtain from the state courts an interpretation of the statute in light of the State Constitution. Lassiter v. Taylor, D.C., 152 F.Supp. 295.

Thereupon the instant case was commenced. It started as an administrative proceeding. Appellant applied for registration as a voter. Her registration was denied by the registrar because she refused to submit to a literacy test as required by the North Carolina statute. *47 She appealed to the County Board of Elections. On the de novo hearing before that Board appellant again refused to take the literacy test and she was again denied registration for that reason. She appealed to the Superior Court which sustained the Board against the claim that the requirement of the literacy test violated the Fourteenth, Fifteenth, and Seventeenth Amendments of the Federal Constitution. Preserving her federal question, she appealed to the North Carolina Supreme Court which affirmed the lower court. 248 N.C. 102, 102 S.E.2d 853.

The case came here by appeal, 28 U.S.C. s 1257(2), 28 U.S.C.A. s 1257(2), and we noted probable jurisdiction. 358 U.S. 916, 79 S.Ct. 294, 3 L.Ed.2d 236.

FN1. This Act, passed in 1957, provides in s 163-28 as follows:

‘Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section.’


The literacy test is a part of s 4 of Art. VI of the North Carolina Constitution. That test is contained in the first sentence of s 4. The second sentence contains a so-called grandfather clause. The entire s 4 reads as follows:

‘Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no
male person who was, on January 1, 1867, or at any
time prior thereto, entitled to vote under the laws of
any state in the United states wherein he then
resided, and no lineal descendant of any such **988
person, shall be denied the right to register and vote
at any election in this State by reason of his failure
to possess the educational qualifications herein pre-
scribed: Provided, he shall have registered in ac-
cordance with the terms of this section prior to
December 1, 1908. The General Assembly shall
provide for the registration of all persons, entitled
to vote without the educational qualifications herein
prescribed, and shall, on or before November 1,
1908, provide for the making of a permanent record
of such registration, and all persons so registered
shall forever thereafter have the right to vote in all
elections by the people in this State, unless disqual-
ified under section 2 of this article.'

Originally Art. VI contained in s 5 the follow-
ing provision:

‘That this amendment to the Constitution is
presented and adopted as one indivisible plan for
the regulation of the suffrage, with the intent and
purpose to so connect the different parts, and to
make them so dependent upon each other, that the
whole shall stand or fall together.’

*48 But the North Carolina Supreme Court in
the instant case held that a 1945 amendment to Article VI freed it of the indivisibility clause. That
amendment rephrased s 1 of Art. VI to read as fol-
lows:

‘Every person born in the United States, and
every person who has been naturalized, twenty-one
years of age, and possessing the qualifications set
out in this Article, shall be entitled to vote.’

That court said that ‘one of those qualifications'
was the literacy test contained in s 4 of Art. VI; and
that the 1945 amendment ‘had the effect of incor-
porating and adopting anew the provisions as to the
qualifications required o a voter as set out in Article VI, freed of the indivisibility clause of the 1902
amendment. And the way was made clear for the
General Assembly to act.’ 248 N.C. at page 112,
102 S.E.2d at page 860.

In 1957 the Legislature rewrote General Stat-
utes s 163-28 as we have noted. FN2 Prior to that
1957 amendment s 163-28 perpetuated the grand-
father clause contained in s 4 of Art. VI of the Con-
stitution and s 163-32 established a procedure for
registration to effectuate it. FN3 But *49 the 1957
amendment contained a provision that ‘All laws
and clauses of laws in conflict with this Act are
hereby repealed.’ FN4 The federal three-judge court
ruled that this 1957 amendment eliminated the
grandfather clause from the statute. 152 F.Supp. at
page 296.

FN2. Note 1, supra.

FN3. Section 163-32 provided:

‘Every person claiming the benefit of sec-
tion four of article six of the Constitution of
North Carolina, as ratified at the general
election on the second day of August, one
thousand nine hundred, and who shall be
entitled to register upon the permanent re-
cord for registration provided for under
said section four, shall prior to December
first, one thousand nine hundred and eight,
apply or registration to the officer charged
with the registration of voters as prescribed
by law in each regular election to be held
in the State for members of the General
Assembly, and such persons shall take and
subscribe before such officer an oath in the
following form, viz.:

‘I am a citizen of the United States and of
the State of North Carolina; I am -- years
of age. I was, on the first day of January,
A.D. one thousand eight hundred and
sixty-seven, or prior to said date, entitled
to vote under the constitution and laws of
the state of _ _ in which I then resided
(or, I am a lineal descendant of _ _, who
was, on January one, one thousand eight hundred and sixty-seven, or prior to that date, entitled to vote under the constitution and laws of the state of _ _, wherein he then resided.’


**989 The Attorney General of North Carolina, in an amicus brief, agrees that the grandfather clause contained in Art. VI is in conflict with the Fifteenth Amendment. Appellee maintains that the North Carolina Supreme Court ruled that the invalidity of that part of Art. VI does not impair the remainder of Art. VI since the 1945 amendment to Art. VI freed it of its indivisibility clause. Under that view Art. VI would impose the same literacy test as that imposed by the 1957 statute and neither would be linked with the grandfather clause which, though present in print, is separable from the rest and void. We so read the opinion of the North Carolina Supreme Court.

[1] Appellant argues that that is not the end of the problem presented by the grandfather clause. There is a provision in the General Statutes for permanent registration in some counties. FN5 Appellant points out that *50 although the cut-off date in the grandfather clause was December 1, 1908, those who registered before then might still be voting. If they were allowed to vote without taking a literacy test and if appellant were denied the right to vote unless she passed it, members of the white race would receive preferential privileges of the ballot contrary to the command of the Fifteenth Amendment. That would be analogous to the problem posed in the classic case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, where an ordinance unimpeachable on its face was applied in such a way as to violate the guarantee of equal protection contained in the Fourteenth Amendment. But this issue of discrimination in the actual operation of the ballot laws of North Carolina has not been framed in the issues presented for the state court litigation. Cf. Williams v. State of Mississippi, 170 U.S. 213, 225, 18 S.Ct. 583, 588, 42 L.Ed. 1012. So we do not reach it. But we mention it in passing so that it may be clear that nothing we say or do here will prejudice appellant in tendering that issue in the federal proceedings which await the termination of this state court litigation.

FN5. Section 163-31.2 provides:

‘In counties having one or more municipalities with a population in excess of 10,000 and in which a modern looseleaf and visible registration system has been established as permitted by G.S. 163-43, with a full time registration as authorized by G.S. 163-31, such registration shall be a permanent public record of registration and qualification to vote, and the same shall not thereafter be cancelled and a new registration ordered, either by precinct or countywide, unless such registration has been lost or destroyed by theft, fire or other hazard.’

We come then to the question whether a State may consistently with the Fourteenth and Seventeenth Amendments apply a literacy test to all voters irrespective of race or color. The Court in Guinn v. United States, supra, 238 U.S. 366, 35 S.Ct. 931, disposed of the question in a few words, ‘No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen its establishment was but the exercise by the state of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted.’

[2][3][4] The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, Pope v. Williams, 193 U.S. 621, 633, 24 S.Ct. 573, 576, 48 L.Ed. 817; Mason v. State of Missouri, 179 U.S. 328, 335, 21 S.Ct. 125, 128, 45 L.Ed. 214, absent of course the discrimination which the Constitution condemns.*51 Article I, s 2 of the Constitution in its provision for the election of members of the House of Representatives and the Seventeenth
Amendment in its provision for the election of Senators provide that officials will be chosen ‘by the People.’ Each provision goes on to state that ‘the Electors in each State shall the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.’ So while the right of suffrage is established and guaranteed by the Constitution (Ex parte Yarbrough, 110 U.S. 651, 663-665, 4 S.Ct. 152, 158, 159, 28 L.Ed. 274; Smith v. Allwright, 321 U.S. 649, 661-662, 64 S.Ct. 757, 763-764, 88 L.Ed. 987) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed. See United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368. While s 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of ‘the right to vote,’ the right protected ‘refers to the right to vote as established by the laws and constitution of the state.’ McPherson v. Blacker, 146 U.S. 1, 39, 13 S.Ct. 3, 12, 36 L.Ed. 869.

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (Davis v. Beason, 133 U.S. 333, 345-347, 10 S.Ct. 299, 301-302, 33 L.Ed. 637) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. Cf. Franklin v. Harper, 205 Ga. 779, 55 S.E.2d 221, appeal dismissed 339 U.S. 946, 70 S.Ct. 804, 94 L.Ed. 1361. It was said last century in Massachusetts that a literacy test was designed to insure an ‘independent and intelligent’ exercise of the right of suffrage. Stone v. Smith, 159 Mass. 413-414, 34 N.E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.


Two States require that the voter be able to read and write English. N.Y. Election Law s 150; Ore.Rev.Stat. s 247.131. Wyoming (Wyo.Comp.Stat.Ann. s 31-113) and Connecticut (Conn.Gen.Stat. s 9-12) require that the voter read a constitutional provision in English, while Virginia (Va.Code s 24-68) requires that the voting
application be written in the applicant's hand before the registrar and without aid, suggestion or memoranda. Washington (Wash.Rev.Code s 29.07.070) has the requirement that the voter be able to read and speak the English language.

Georgia requires that the voter read intelligibly and write legibly a section of the State or Federal Constitution. If he is physically unable to do so, he may qualify if he can give a reasonable interpretation of a section read to him. An alternative means of qualifying is provided: if one has good character and understands the duties and obligations of citizenship under a republican government, and he can answer correctly 20 of 30 questions listed in the statute (e.g., How does the Constitution of Georgia provide that a county site may be changed?, what is treason against the State of Georgia?, who are the solicitor general and the judge of the State Judicial Circuit in which you live?) he is eligible to vote. Ga.Code Ann. ss 34-117, 34-120.

In Louisiana one qualifies if he can read and write English or his mother tongue, is of good character, and understands the duties and obligations of citizenship under a republican form of government. If he cannot read and write, he can qualify if he can give a reasonable interpretation of a section of the State or Federal Constitution when read to him, and if he is attached to the principles of the Federal and State Constitutions. LSA-R.S., Tit. 18, s 31.

In Mississippi the applicant must be able to read and write a section of the State Constitution and give a reasonable interpretation of it. He must also demonstrate to the registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government. Miss.Code Ann. s 3213.

[7][8] Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face. In Davis v. Schnell, D.C., 81 F.Supp. 872, 873, affirmed 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093, the test was the citizen's ability to 'understand and explain' an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy. We cannot make the same inference here. The present requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay snares for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot.

Affirmed.

U.S. 1959.

Lassiter v. Northampton County Bd. of Elections
360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072

END OF DOCUMENT
Supreme Court of the United States
State of MINNESOTA, Petitioner,
v. CLOVER LEAF CREAMERY COMPANY et al.
No. 79-1171.
Argued Nov. 3, 1980.
Decided Jan. 21, 1981.
Rehearing Denied March 23, 1981.
See 450 U.S. 1027, 101 S.Ct. 1735.

Milk sellers and others brought action challenging constitutionality of Minnesota statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons. The District Court, Ramsey County, David E. Marsden, J., held the statute unconstitutional. The Minnesota Supreme Court affirmed, 289 N.W.2d 79. Certiorari was granted. The Supreme Court, Justice Brennan, held that: (1) principal purposes of the statute are to promote conservation and ease solid waste disposal problems and not to isolate from interstate competition interests of certain segments of local dairy and pulpwood industries; (2) the ban for a rational relation to legitimate state purposes of promoting resource conservation, easing solid waste disposal and conserving energy; (3) fact that the legislature decided to ban the most recent entry in the field of nonreturnables and in effect, “grandfathered” paperboard containers at least temporarily did not make the ban on plastic containers arbitrary or irrational; (4) statute did not discriminate against interstate commerce; and (5) incidental burden imposed on interstate commerce was not clearly excessive in relation to the putative local benefits and no approach with a lesser impact on interstate activities was available.

Judgment of Minnesota Supreme Court reversed.

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

Justice Powell filed an opinion concurring in part and dissenting in part.

Justice Stevens filed a dissenting opinion.

West Headnotes

[1] Constitutional Law 92

2486

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2486 k. In General. Most Cited Cases
(Formerly 92k70.1(1))

Constitutional Law 92

3006

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)2 Relationship to Similar Provisions
92k3006 k. Federal/State Cognates. Most Cited Cases
(Formerly 92k70.3(4))

A state court reviewing a challenge to a state statute on equal protection grounds is bound by the limits applicable to federal courts and may not independently reach conclusions contrary to those of the legislature concerning legislative facts bearing on the wisdom or utility of the legislation, although a state may apply a more stringent standard of review as a matter of state law under a state equivalent of the federal equal protection or due process clauses. M.S.A.Const. Art. 1, § 7; U.S.C.A.Const. Amends. 5, 14.


2330
As a matter of federal constitutional law, states are free to allocate the lawmaking function to whatever branch of state government they may choose. U.S.C.A.Const. Amend. 14.

[3] Courts 106 \(\approx 97(3)\)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(3) k. Validity of State Statutes Under Federal Constitution. Most Cited Cases
When a state court reviews legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than that imposed by the United States Supreme Court. M.S.A.Const. Art. 1, § 7; U.S.C.A.Const. Amend. 14.

Federal Courts 170B \(\approx 505\)

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk411 k. Constitutional and Civil Rights in General; Waiver. Most Cited Cases

Purposes stated by Minnesota legislature for ban on retail sale of milk in plastic nonreturnable, nonrefillable containers, i.e., promoting resource conservation, easing solid waste disposal problems and conserving energy, are legitimate state purposes and, hence, issue on equal protection challenge to legislative classification between plastic and nonplastic nonreturnable milk containers was whether the classification was rationally related to achievement of the statutory purposes. M.S.A. §§ 116F.01, 116F.21, 116F.22; U.S.C.A.Const. Amend. 14.

[5] Constitutional Law 92 \(\approx 3700\)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)12 Trade or Business
92k3681 Licenses and Regulation
92k3700 k. Restaurants; Food and Drink. Most Cited Cases
(Formerly 92k240(4))

92 Constitutional Law

92k3681 Licenses and Regulation
92k3700 k. Restaurants; Food and Drink. Most Cited Cases
(Formerly 92k240(4))
92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)6 Levels of Scrutiny

92k3052 Rational Basis Standard; Reasonableness

92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases (Formerly 92k213.1(1))

In equal protection analysis, the Supreme Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces it to conclude that they could not have been a goal of the legislation. U.S.C.A.Const. Amend. 14.

[7] Constitutional Law 92 92

92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)12 Trade or Business

92k3681 Licenses and Regulation

92k3700 k. Restaurants; Food and Drink. Most Cited Cases (Formerly 92k240(4))

Food 178 (1.8(2))

178 Food

178k1 Power to Make Regulations

178k1.8 Milk Products and Substitutes

178k1.8(2) k. State Power. Most Cited Cases (Formerly 92k240(4))

Review of legislative history of Minnesota statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers supported state court's conclusion that principal purpose of the act, attacked as violating equal protection because it permitted retail sales in other nonreturnable, nonrefillable containers such as paperboard milk cartons, here the stated purposes of promoting conservation and easing solid waste disposal problems and that actual purpose was not to isolate from interstate competition certain segments of the local dairy and pulpwood industries. M.S.A. §§ 116F.01, 116F.21, 116F.22; U.S.C.A.Const. Amend. 14.

[8] Constitutional Law 92 92

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)5 Scope of Doctrine in General

92k3038 Discrimination and Classification

92k3043 k. Statutes and Other Written Regulations and Rules. Most Cited Cases (Formerly 92k213.1(1))

Supreme Court will not invalidate a state statute under the equal protection clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry. U.S.C.A.Const. Amend. 14.

[9] Constitutional Law 92 92

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)6 Levels of Scrutiny

92k3052 Rational Basis Standard; Reasonableness

92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases (Formerly 92k213.1(2))

To satisfy the rational relation equal protection test, states are not required to convince courts of the correctness of their legislative judgments but, rather, those challenging such judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker. U.S.C.A.Const. Amend. 14.

[10] Constitutional Law 92 92

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases (Formerly 92k213.1(2))

Parties challenging legislation under equal protection clause may introduce evidence supporting their claim that it is irrational but they cannot prevail so long as it is evident from all considerations presented to the legislature and those of which a court may take judicial notice, that the question is at least debatable. U.S.C.A.Const. Amend. 14.

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases (Formerly 92k213.1(2))

Where there is evidence before a legislature reasonably supporting a classification attacked as without a rational basis, litigants may not procure invalidation under the equal protection clause merely by tendering evidence in court that the legislature was mistaken. U.S.C.A.Const. Amend. 14.

[12] Constitutional Law 92 ☞3053
92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3053 k. In General. Most Cited Cases (Formerly 92k213.1(2))

Under the rational basis equal protection test a court is not to weigh conflicting evidence as to whether an act will succeed in effectuating the legislature's stated goals. U.S.C.A.Const. Amend. 14.

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)12 Trade or Business
92k3681 Licenses and Regulation
92k3700 k. Restaurants; Food and Drink. Most Cited Cases (Formerly 92k240(4))

Food 178 ☞1.1
178 Food
178k1 Power to Make Regulations
178k1.1 k. In General. Most Cited Cases (Formerly 178k1)

Claim that ban on plastic nonreturnable milk containers would reduce economic dislocation foreseen from the movement toward the greater use of environmentally superior containers, a stated pur-
pose for Minnesota legislature's ban on plastic non-returnable milk containers, was a valid justification for the ban and would further state statutory purposes, including promoting resource conservation, as plastic nonreturnables had only recently been introduced on a wide scale in the state and while legislature was considering the act many state dairies were preparing to invest large amounts of capital in plastic container production. M.S.A. §§ 116F.01, 116F.21, 116F.22; U.S.C.A.Const. Amend. 14.

[15] Food 178 \( \text{\textcopyright}1.1 \)

178 Food

178k1 Power to Make Regulations

178k1.1 k. In General. Most Cited Cases
(Formerly 178k1)

Fact that, in effect, Minnesota legislature “grandfathered” paperboard containers, at least temporarily, did not make legislature's ban on use of plastic nonreturnable, nonrefillable milk containers arbitrary or irrational; state legislature could reasonably conclude that nonreturnable, nonrefillable containers imposed environmental hazards and by banning the most recent entry while permitting paperboard containers the state could prevent the industry from becoming reliant on the new container while avoiding severe economic dissolution as few dairies were presently able to package their products in refillable bottles or plastic pouches. M.S.A. § 116F.22; U.S.C.A.Const. Amend. 14.

[16] Constitutional Law 92 \( \text{\textcopyright}2486 \)

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2485 Inquiry Into Legislative Judgment

92k2486 k. In General. Most Cited Cases
(Formerly 92k70.1(1))

Constitutional Law 92 \( \text{\textcopyright}2489 \)

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2485 Inquiry Into Legislative Judgment

92k2489 k. Wisdom. Most Cited Cases
(Formerly 92k70.3(4))

Constitutional Law 92 \( \text{\textcopyright}2494 \)

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2485 Inquiry Into Legislative Judgment

92k2494 k. Expediency. Most Cited Cases
(Formerly 92k70.3(4))

It is up to legislatures, not courts, to decide on the wisdom and utility of legislation.

[17] Food 178 \( \text{\textcopyright}2 \)

178 Food

178k2 k. Statutory and Municipal Regulations in General. Most Cited Cases
(Formerly 92k70.1(4))

Constitutional Law 92 \( \text{\textcopyright}2500 \)

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2499 Particular Issues and Applications

92k2500 k. In General. Most Cited Cases
(Formerly 92k70.1(4))

Since in view of evidence before Minnesota legislature in enacting ban on retail sale of milk in plastic nonreturnable, nonrefillable containers it was at least debatable whether the ban would help
serve energy, one of the stated purposes of the legis-
lation, the state court erred in substituting its
judgment for that of the legislature by finding that
production of plastic nonrefillable containers re-
quired less energy than production of paper con-
tainers and invalidating the act on equal protection
grounds, although the state court might have been
correct in its statement that the act was not a sens-
able means of conserving energy. M.S.A. §§
Amend. 14.

[18] Constitutional Law 92(fetch=2500)

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2500 k. In General. Most Cited
Cases
(Formerly 92k70.1(4))

Food 178(fetch=1.8(2))

178 Food
178k1 Power to Make Regulations
178k1.8 Milk Products and Substitutes
178k1.8(2) k. State Power. Most Cited
Cases
(Formerly 92k70.1(4))

In applying the rational basis test on equal protection challenge to Minnesota statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers, the state supreme court erred in finding, contrary to the legislature's finding based on a reputable study, that plastic milk jugs take up less space in landfills and present fewer solid waste disposal problems than the present paperboard containers, with one of the stated purposes of the act being easing of solid waste disposal. M.S.A. §§
Amend. 14.

[19] Constitutional Law 92(fetch=3700)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)12 Trade or Business
92k3681 Licenses and Regulation
92k3700 k. Restaurants; Food and
Drink. Most Cited Cases
(Formerly 92k240(4))

Food 178(fetch=1.1)

178 Food
178k1 Power to Make Regulations
178k1.1 k. In General. Most Cited Cases
(Formerly 178k1)

Minnesota statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sales in other nonreturnable, nonrefillable containers such as paperboard cartons, bore a rational relation to stated objectives of promoting resource conservation, easing solid waste disposal problems and conserving energy and, hence, passed muster under the equal protection rationality test. M.S.A. §§
Amend. 14.

[20] Constitutional Law 92(fetch=4283)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4283 k. Food and Beverages;
Restaurants. Most Cited Cases
(Formerly 92k296(1))

Food 178(fetch=1.1)

178 Food
178k1 Power to Make Regulations
178k1.1 k. In General. Most Cited Cases
(Formerly 178k1)
Minnesota statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers but permitting such sale in other nonreturnable, nonrefillable containers such as paperboard cartons, does not violate substantive due process. M.S.A. §§ 116F.01, 116F.21, 116F.22; U.S.C.A. Const. Amend. 14.

[21] Federal Courts 170B ≈ 511.1

170B Federal Courts

170BVII Supreme Court

170BVII(E) Review of Decisions of State Courts

170Bk511 Scope and Extent of Review

170Bk511.1 k. In General. Most Cited Cases

(Formerly 170Bk511)

Although in invalidating, on equal protection grounds, Minnesota statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers the Minnesota Supreme Court did not reach commerce clause issue, as had the trial court, the United States Supreme Court, on certiorari, would decide the issue as the parties and amici had fully briefed and argued the commerce clause question and in view of the obvious factual connection between rationality and analysis under equal protection clause and the balancing of interest test under the commerce clause. M.S.A. §§ 116F.01, 116F.21, 116F.22; U.S.C.A.Const. Art. 1, §§, cl. 3; Amend. 14; 28 U.S.C.A. § 1257(3).

[22] Commerce 83 ≈ 52.10

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(A) In General

83k52.10 k. Environmental Protection Regulations. Most Cited Cases

When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, states are limited by the commerce clause. U.S.C.A.Const. Art. 1, § 8, cl. 3.

[23] Commerce 83 ≈ 52.10

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(A) In General

83k52.10 k. Environmental Protection Regulations. Most Cited Cases

If a state law purporting to promote environmental purposes is in reality simply economic protectionism, a virtual per se rule of invalidity under the commerce clause is applied. U.S.C.A.Const. Art. 1, § 8, cl. 3.

[24] Commerce 83 ≈ 54.1

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(A) In General

83k54 Preferences and Discriminations

83k54.1 k. In General. Most Cited Cases

A court may find that a state law constitutes economic protectionism, for commerce clause purposes, on proof either of discriminatory effect or discriminatory purpose. U.S.C.A.Const. Art. 1, § 8, cl. 3.

[25] Commerce 83 ≈ 52.10

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(A) In General

83k54 Preferences and Discriminations

83k54.1 k. In General. Most Cited Cases
Cases
(Formerly 83k54)
Legislative history of Minnesota statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers but permitting such sale on other nonreturnable, nonrefillable containers such as paperboard cartons failed to establish that actual purpose of the act was to promote economic interest of certain segments of the local dairy and pulpwood industry at expense of economic interest of the segments of the dairy industry and the plastics industry and, thus, statute would not be invalidated under commerce clause as having a discriminatory purpose. M.S.A. §§ 116F.01, 116F.21, 116F.22; U.S.C.A.Const. Art. 1, § 8, cl. 3.

[26] Commerce 83 ⇨ 13.5

83 Commerce
83I Power to Regulate in General
83k11 Powers Remaining in States, and Limitations Thereon
83k13.5 k. Local Matters Affecting Commerce. Most Cited Cases
Even if a statute regulates evenhandedly and imposes only incidental burdens on interstate commerce, it must be struck down under the commerce clause if the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. U.S.C.A.Const. Art. 1, § 8, cl. 3.

[27] Commerce 83 ⇨ 13.5

83 Commerce
83I Power to Regulate in General
83k11 Powers Remaining in States, and Limitations Thereon
83k13.5 k. Local Matters Affecting Commerce. Most Cited Cases
Extent of the burden on interstate commerce that will be tolerated under the commerce clause depends on nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities. U.S.C.A.Const. Art. 1, § 8, cl. 3.

[28] Commerce 83 ⇨ 52.10

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(A) In General
83k52.10 k. Environmental Protection Regulations. Most Cited Cases

[29] Commerce 83 ⇨ 52.10

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(A) In General
83k54 Preferences and Discriminations
83k54.1 k. In General. Most Cited Cases
Minnesota statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers did not effect “simple protectionism” in violation of the commerce clause but regulated evenhandedly by prohibiting all milk retail sellers from selling their products in the banned containers without regard to whether the milk, the containers or the sellers were from outside the state and, hence, absent discrimination between interstate and intrastate commerce the controlling question was whether the incidental burden imposed on interstate commerce was clearly excessive in relation to the putative local benefits. M.S.A. §§ 116F.01, 116F.21, 116F.22; U.S.C.A.Const. Art. 1, § 8, cl. 3.
al benefits as milk products would continue to move freely across Minnesota border, inconvenience of having to conform to different packaging requirements in Minnesota and surrounding states would be slight and even granting that out-of-state plastics industry was burdened relatively more heavily than Minnesota pulpwood industry, such was not clearly excessive in light of substantial state interests in promoting conservation of energy and other natural resources and easing solid waste disposal problems and no approach with a lesser impact on interstate activities was available. M.S.A. §§ 116F.01, 116F.21, 116F.22; U.S.C.A.Const. Art. 1, § 8, cl. 3.

[30] Commerce 83 §54.1

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(A) In General

83k54 Preferences and Discriminations

83k54.1 k. In General. Most Cited Cases

(Formerly 83k54)

A nondiscriminatory regulation serving substantial state purposes is not invalid under commerce clause simply because it causes some business to shift from predominantly out-of-state industry to a predominantly in-state industry and it is only if the burden on interstate commerce clearly outweighs the state's legitimate purpose that the regulation violates the commerce clause. U.S.C.A.Const. Art. 1, § 8, cl. 3.

**719 Syllabus FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*456 For the stated purposes of promoting resource conservation, easing solid waste disposal problems, and conserving energy, the Minnesota Legislature enacted a statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard cartons. Respondents filed suit in Minnesota District Court, seeking to enjoin enforcement of the statute on constitutional grounds. The District Court held that the statute violated, inter alia, the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause. Finding that “the evidence conclusively demonstrate[d] that the discrimination against plastic nonrefillables [was] not rationally related to the Act's objectives,” the Minnesota Supreme Court affirmed on the equal protection ground without reaching the Commerce Clause issue.

Held:

1. The ban on plastic nonreturnable milk containers bears a rational relation to the State's objectives and must be sustained under the Equal Protection Clause. Pp. 722-727.

(a) The Equal Protection Clause does not deny Minnesota the authority to ban one type of milk container conceded to cause environmental problems, merely because another already established type is permitted to continue in use. Whether in fact the statute will promote more environmentally desirable milk packaging is not the question. The Equal Protection Clause is satisfied if the Minnesota Legislature could rationally have decided that its ban on plastic milk jugs might foster greater use of environmentally desirable alternatives. Pp. 724-725.

(b) The fact that the state legislature, having concluded that nonreturnable, nonrefillable milk containers pose environmental hazards, decided to ban the most recent entry in the field, and thus, in effect, “grandfathered” paperboard containers, at least temporarily, does not make the ban on plastic containers arbitrary or irrational. Cf. New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d
Where the evidence as to whether the statute would help to conserve energy was “at least debatable,” the Minnesota Supreme Court erred in substituting its judgment for that of the legislature by finding, contrary to the legislature, that the production of plastic nonrefillable *457 containers required less energy than production of paper containers. P. 726.

Similarly, the Minnesota Supreme Court erred in finding, contrary to the legislature’s finding based on a reputable study, that plastic milk jugs take up less space in landfills and present fewer solid waste disposal problems than do paperboard containers. Pp. 726-727.

The statute does not violate the Commerce Clause as constituting an unreasonable burden on interstate commerce. Pp. 727-729.

The incidental burden imposed on interstate commerce by the statute is not excessive in relation to the putative local benefits. Milk products may continue to move freely across the Minnesota border, and since most dairies package their products in more than one type of container, the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight. Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, this burden is not “clearly excessive” in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems. These local benefits amply support Minnesota’s decision under the Commerce Clause. Pp. 728-729.

FN1. Respondents, plaintiffs below, are a Minnesota dairy that owns equipment for producing plastic nonreturnable milk jugs, a Minnesota dairy that leases such equipment, a non-Minnesota company that manufactures such equipment, a Minnesota company that produces plastic nonreturnable milk jugs, a non-Minnesota dairy that sells milk products in Minnesota in plastic nonreturnable milk jugs, a Minnesota milk retailer, a non-Minnesota manufacturer of polyethylene resin that sells such resin in many States, including Minnesota, and a plastics industry trade association.

The purpose of the Minnesota statute is set out as § 1:

“The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, pro-
motors energy waste, and depletes natural resources. The legislature therefore, in *459 furtherance of the policies stated in Minnesota Statutes, Section 116F.01, [FN2] determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.” 1977 Minn.Laws, ch. 268, § 1, codified as Minn.Stat. § 116F.21 (1978).

FN2. Minnesota Stat. § 116F.01 (1978) provides in relevant part:

“Statement of policy. The legislature seeks to encourage both the reduction of the amount and type of material entering the solid waste stream and the reuse and recycling of materials. Solid waste represents discarded materials and energy resources, and it also represents an economic burden to the people of the state. The recycling of solid waste materials is one alternative for the conservation of material and energy resources, but it is also in the public interest to reduce the amount of materials requiring recycling or disposal.”

Section 2 of the Act forbids the retail sale of milk and fluid milk products, other than sour cream, cottage cheese, and yogurt, in nonreturnable, nonrefillable rigid or semi-rigid containers composed at least 50% of plastic. [FN3]

FN3. Minnesota is apparently the first State so to regulate milk containers. 289 N.W.2d 79, 81, n. 6 (1979).

The Act was introduced with the support of the state Pollution Control Agency, Department of Natural Resources, Department of Agriculture, Consumer Services Division, and Energy Agency, and debated vigorously in both houses of the state legislature. Proponents of the legislation argued that it would promote resource conservation, ease solid waste disposal problems, and conserve energy. Relying on the results of studies and other information, they stressed the need to *460 stop introduction of the plastic nonreturnable container before it became entrenched in the market. Opponents of the Act, also presenting empirical evidence, argued that the Act would not promote the goals asserted by the proponents, but would merely increase costs of retail milk products and prolong the use of ecologically undesirable paperboard milk cartons.


FN5. The principal empirical study cited in legislative debate, see, e. g., Transcript of the Full Senate Floor Discussion on H.F. 45, p. 12 (May 20, 1977), reprinted as Plaintiffs' Exhibit J (statement of Sen. Luther), is Midwest Research Institute, Resource and Environmental Profile Analysis of Five Milk Container Systems, admitted into evidence as Plaintiffs' Exhibit I.

**722 After the Act was passed, respondents filed suit in Minnesota District Court, seeking to enjoin its enforcement. The court conducted extensive evidentiary hearings into the Act's probable consequences, and found the evidence “in sharp conflict.” App. A-25. Nevertheless, finding itself “as factfinder ... obliged to weigh and evaluate this evidence,” ibid., the court resolved the evidentiary conflicts in favor of respondents, and concluded that the Act “will not succeed in effecting the Legislature's published policy goals....” Id., at A-21. The court further found that, contrary to the statement of purpose in § 1, the “actual basis” for the Act “was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics
industry.” Id., at A-19. The court therefore declared the Act “null, void, and unenforceable” and enjoined its enforcement, basing the judgment on substantive due process under the Fourteenth Amendment to the United States Constitution and Art. 1, § 7, of the Minnesota Constitution; equal protection under the Fourteenth Amendment; and prohibition of unreasonable burdens on interstate commerce under Art. I, § 8, of the United States Constitution. App. A-23.

The State appealed to the Supreme Court of Minnesota, which affirmed the District Court on the federal equal protection and due process grounds, without reaching the Commerce Clause or state-law issues. 289 N.W.2d 79 (1979). Unlike the District Court, the State Supreme Court found that the purpose of the Act was “to promote the state interests *461 of encouraging the reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream,” and acknowledged the legitimacy of this purpose. Id., at 82. Nevertheless, relying on the District Court’s findings of fact, the full record, and an independent review of documentary sources, the State Supreme Court held that “the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act’s objectives.” Ibid. We granted certiorari, 445 U.S. 949, 100 S.Ct. 1596, 63 L.Ed.2d 784, and now reverse.

II

[1][2][3][4][5][6][7][8] The parties agree that the standard of review applicable to this case under the Equal Protection Clause is the familiar “rational basis” test. See Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171 (1979); New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976). FN6 Moreover, they agree that the purposes**723 of the Act *462 cited by the legislature—promoting resource conservation, easing solid waste disposal problems, and conserving energy—are legitimate state purposes. Thus, the controversy in this *463 case centers on the narrow issue whether the legislative classification between plastic and nonplastic nonreturnable milk containers is rationally related to achievement of the statutory purposes.

FN6 Justice STEVENS’ dissenting opinion argues that the Minnesota Supreme Court when reviewing a challenge to a Minnesota statute on equal protection grounds is not bound by the limits applicable to federal courts, but may independently reach conclusions contrary to those of the legislature concerning legislative facts bearing on the wisdom or utility of the legislation. This argument, though novel, is without merit. A state court may, of course, apply a more stringent standard of review as a matter of state law under the State’s equivalent to the Equal Protection or Due Process Clauses. E. g., Baker v. City of Fairbanks, 471 P.2d 386, 387, 401-402 (Alaska 1970); Serrano v. Priest, 18 Cal.3d 728, 764-765, 135 Cal.Rptr. 345, 557 P.2d 929, 950-951 (1976), cert. denied, 432 U.S. 907, 97 S.Ct. 2951, 53 L.Ed.2d 1079 (1977); State v. Kaluna, 55 Haw. 361, 368-369, 520 P.2d 51, 58-59 (1974); see Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977). And as the dissent correctly notes, post, at 732-733, the States are free to allocate the lawmaking function to whatever branch of state government they may choose. Uphaus v. Wyman, 360 U.S. 72, 77, 79 S.Ct. 1040, 1044, 3 L.Ed.2d 1090 (1959); Sweezy v. New Hampshire, 354 U.S. 234, 256-257, 77 S.Ct. 1203, 1214-1215, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring in result); Dreyer v. Illinois, 187 U.S. 71, 83-84, 23 S.Ct. 78, 32, 47 L.Ed. 79 (1902). But when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed. Oregon v. Hass, 420 U.S.
714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975).

The standard of review under equal protection rationality analysis-without regard to which branch of the state government has made the legislative judgment—is governed by federal constitutional law, and a state court's application of that standard is fully reviewable in this Court on writ of certiorari. 28 U.S.C. § 1257(3). Justice STEVENS concedes the flaw in his argument when he admits that “a state court's decision invalidating state legislation on federal constitutional grounds may be reversed by this Court if the state court misinterpreted the relevant federal constitutional standard.” Post, at 737. And contrary to his argument that today's judgment finds “no precedent in this Court's decisions,” post, at 733, we have frequently reversed State Supreme Court decisions invalidating state statutes or local ordinances on the basis of equal protection analysis more stringent than that sanctioned by this Court. E. g., Idaho Dept. of Employment v. Smith, 434 U.S. 100, 98 S.Ct. 327, 54 L.Ed.2d 324 (1977); Arlington County Board v. Richards, 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977); Richardson v. Ramirez, 418 U.S. 24, 96 S.Ct. 2655, 41 L.Ed.2d 551 (1974); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973). See also North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc., 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973); Dean v. Gadsen Times Publishing Corp., 412 U.S. 543, 93 S.Ct. 2264, 37 L.Ed.2d 137 (1973); McDaniel v.Barresi, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 282 (1971). Never have we suggested that our review of the judgments in such cases differs in any relevant respect because they were reached by state courts rather than federal courts.

Indeed Justice STEVENS has changed his own view. Previously he has stated that state-court decisions under the Fourteenth Amendment granting litigants “more protection than the Federal Constitution requires,” are in error. Idaho Dept. of Employment v. Smith, supra, 434 U.S. at 104, 98 S.Ct. at 329 (STEVENS, J., dissenting in part). This is in agreement with the conclusion of one commentator:

“In reviewing state court resolutions of federal constitutional issues, the Supreme Court has not differentiated between those decisions which sustain and those which reject claims of federal constitutional right. In both instances, once having granted review, the Court has simply determined whether the state court's federal constitutional decision is ‘correct,’ meaning, in this context, whether it is the decision that the Supreme Court would independently reach.” Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv.L.Rev. 1212, 1243 (1978) (footnote omitted).

Thus, Justice STEVENS' argument in the dissenting opinion that today's treatment of the instant case is extraordinary and unprecedented, see post, at 733, and n. 7, is simply wrong.

FN7. Respondents, citing the District Court's Finding of Fact No. 12, App. A-19, also assert that the actual purpose for the Act was illegitimate: to “isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries.” Brief for Respondents 23. We accept the contrary holding of the Min-
nnesota Supreme Court that the articulated purpose of the Act is its actual purpose. See 289 N.W.2d, at 82. In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they “could not have been a goal of the legislation.” See Weinberger v. Wiesenfeld, 420 U.S. 636, 648, n. 16, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975). Here, a review of the legislative history supports the Minnesota Supreme Court’s conclusion that the principal purposes of the Act were to promote conservation and ease solid waste disposal problems. The contrary evidence cited by respondents, see Brief for Respondents 29-31, is easily understood, in context, as economic defense of an Act genuinely proposed for environmental reasons. We will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry.

A

Respondents apparently have not challenged the theoretical connection between a ban on plastic nonreturnables and the purposes articulated by the legislature; instead, they have argued that there is no empirical connection between the two. They produced impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers will be to deplete natural resources, exacerbate solid waste disposal problems, and waste energy, because consumers unable to purchase milk in plastic *464 containers will turn to paperboard milk cartons, allegedly a more environmentally harmful product.

**724 [9] But States are not required to convince the courts of the correctness of their legislative judgments. Rather, “those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.” Vance v. Bradley, 440 U.S., at 111, 99 S.Ct., at 950. See also Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425, 72 S.Ct. 405, 408, 96 L.Ed. 469 (1952); Henderson Co. v. Thompson, 300 U.S. 258, 264-265, 57 S.Ct. 447, 450-451, 81 L.Ed. 632 (1937).

[10][11] Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), they cannot prevail so long as “it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.” Id., at 154, 58 S.Ct., at 784. Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.

FN8. We express no view whether the District Court could have dismissed this case on the pleadings or granted summary judgment for the State on the basis of the legislative history, without hearing respondents' evidence. See Vance v. Bradley, 440 U.S. 93, 109-112, 99 S.Ct. 939, 949, 951, 59 L.Ed.2d 171 (1979); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772 (1936).

[12] The District Court candidly admitted that the evidence was “in sharp conflict,” App. A-25, but resolved the conflict in favor of respondents and struck down the statute. The Supreme Court of Minnesota, however, did not reverse on the basis of this patent violation of the principles governing rationality analysis under the Equal Protection Clause. Rather, the court analyzed the statute afresh under the Equal Protection Clause, and reached the
conclusion that the statute is *465 constitutionally invalid. The State contends that in this analysis the court impermissibly substituted its judgment for that of the legislature. We turn now to that argument.

B

The State identifies four reasons why the classification between plastic and nonplastic nonreturnables is rationally related to the articulated statutory purposes. If any one of the four substantiates the State’s claim, we must reverse the Minnesota Supreme Court and sustain the Act.

First, the State argues that elimination of the popular plastic milk jug will encourage the use of environmentally superior containers. There is no serious doubt that the plastic containers consume energy resources and require solid waste disposal, nor that refillable bottles and plastic pouches are environmentally superior. Citing evidence that the plastic jug is the most popular, and the gallon paperboard carton the most cumbersome and least well regarded package in the industry, the State argues that the ban on plastic nonreturnables will buy time during which environmentally preferable alternatives may be further developed and promoted.

As Senator Spear argued during the Senate debate:

“This bill is designed to prevent the beginning of another system of non-returnables that is going to be very, very difficult [to stop] once it begins. It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another non-returnable system with all the investment and all of the vested interest that is going to involve to begin.” Transcript of the Full Senate Floor Discussion on H.F. 45, p. 6 (May 20, 1977), reprinted as Plaintiffs’ Exhibit J.

**725 Accord, id., at 1-2 (statement of Sen. Luther).

*466 The Minnesota Supreme Court dismissed this asserted state interest as “speculative and illusory.” 289 N.W.2d, at 86. The court expressed doubt that the Minnesota Legislature or Pollution Control Agency would take any further steps to promote environmentally sound milk packaging, and stated that there is no evidence that paperboard cartons will cease to be used in Minnesota. Ibid.

[13] We find the State’s approach fully supportable under our precedents. This Court has made clear that a legislature need not “strike at all evils at the same time or in the same way,” Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 610, 55 S.Ct. 570, 571, 79 L.Ed. 1086 (1935), and that a legislature “may implement [its] program step by step, ... adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.” New Orleans v. Dukes, 427 U.S., at 303, 96 S.Ct., at 2516. See also Katzenbach v. Morgan, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d 828 (1966); Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110, 69 S.Ct. 463, 465, 93 L.Ed. 533 (1949). The Equal Protection Clause does not deny the State of Minnesota the authority to ban one type of milk container conceded to cause environmental problems, merely because another type, already established in the market, is permitted to continue in use. Whether in fact the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature could rationally have decided that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.

[14][15] Second, the State argues that its ban on plastic nonreturnable milk containers will reduce the economic dislocation foreseen from the movement toward greater use of environmentally superior containers. The State notes that plastic nonre-
turnables have only recently been introduced on a wide scale in Minnesota, and that, at the time the legislature was *467 considering the Act, many Minnesota dairies were preparing to invest large amounts of capital in plastic container production. As Representative Munger, chief sponsor of the bill in the House of Representatives, explained:

“Minnesota’s dairy market is on the verge of making a major change over from essentially a paperboard container system to a system of primarily single use, throwaway plastic bottles. The major dairies in our state have ordered the blow-mold equipment to manufacture in plant the non-returnable plastic milk bottle. Members of the House, I feel now is an ideal time for this legislation when only one dairy in our state is firmly established in manufacturing and marketing the throwaway plastic milk bottle.” Transcript of the Debate of the Minnesota House of Representatives on H.F. 45, p. 2 (Mar. 10, 1977), reprinted as Plaintiffs' Exhibit J.

See also Transcript of the Full Senate Floor Discussion on H.F. 45, p. 6 (May 20, 1977), reprinted as Plaintiffs' Exhibit J (statement of Sen. Milton); *id.,* at 9 (statement of Sen. Schaaf); *id.,* at 10-11 (statement of Sen. Perpich).

Moreover, the State explains, to ban both the plastic and the paperboard nonreturnable milk container at once would cause an enormous disruption in the milk industry because few dairies are now able to package their products in refillable bottles or plastic pouches. Thus, by banning the plastic container while continuing to permit the paperboard container, the State was able to prevent the industry from becoming reliant on the new container, while avoiding severe economic dislocation.

The Minnesota Supreme Court did not directly address this justification, but we find it supported by our precedents as well. **726 In New Orleans v. Dukes, supra, we upheld a city regulation banning pushcart food vendors, but exempting from the ban two vendors who had operated in the city for over eight years. Noting that the “city could reasonably decide *468 that newer businesses were less likely to have built up substantial reliance interests in continued operation,” we held that the city “could rationally choose initially to eliminate vendors of more recent vintage.” *Id.,* at 305, 96 S.Ct., at 2517. Accord, *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6, 91 S.Ct. 16, 17, 27 L.Ed.2d 4 (1970). This case is not significantly different. The state legislature concluded that nonreturnable, nonrefillable milk containers pose environmental hazards, and decided to ban the most recent entry into the field. The fact that the legislature in effect “grandfathered” paperboard containers, at least temporarily, does not make the Act’s ban on plastic nonreturnables arbitrary or irrational.

Third, the State argues that the Act will help to conserve energy. It points out that plastic milk jugs are made from plastic resin, an oil and natural gas derivative, whereas paperboard milk cartons are primarily composed of pulpwood, which is a renewable resource. This point was stressed by the Act’s proponents in the legislature. Senator Luther commented: “We have been through an energy crisis in Minnesota. We know what it is like to go without and what we are looking at here is a total blatant waste of petroleum and natural gas....” Transcript of the Full Senate Floor Discussion on H.F. 45, p. 12 (May 20, 1977), reprinted as Plaintiffs' Exhibit J. Representative Munger said in a similar vein:

“A sweep to the plastic throwaway bottle in the gallon size container alone would use enough additional natural gas and petroleum to heat 3,100 homes each year in Minnesota when compared to a refillable system and 1,400 compared to the present paperboard system. Plastic containers are made from a non-renewable resource while the paperboard is made from Minnesota’s forest products.” Transcript of the Debate of the Minnesota House of Representatives on H.F. 45, p. 2 (Mar. 10, 1977), reprinted as Plaintiffs' Exhibit J.

*469 The Minnesota Supreme Court held, in
effect, that the legislature misunderstood the facts. The court admitted that the results of a reliable study support the legislature's conclusion that less energy is consumed in the production of paperboard containers than in the production of plastic nonreturnables, but, after crediting the contrary testimony of respondents' expert witness and altering certain factual assumptions, the court concluded that "production of plastic nonreturnables requires less energy than production of paper containers." 289 N.W.2d, at 85.

FN9. See n. 5, supra.

FN10. The court adopted the higher of two possible measurements of energy consumption from paperboard production, apparently because the lower figure contemplated the use of waste products, such as sawdust, for energy production. In addition, the court substituted a lower measurement of the energy consumption from plastic nonreturnable production for that used in the study. 289 N.W.2d, at 84-85.

[16][17] The Minnesota Supreme Court may be correct that the Act is not a sensible means of conserving energy. But we reiterate that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." Ferguson v. Skrupa, 372 U.S. 726, 729, 83 S.Ct. 1028, 1030, 10 L.Ed.2d 93 (1963). Since in view of the evidence before the legislature, the question clearly is "at least debatable," United States v. Carolene Products Co., 304 U.S., at 154, 58 S.Ct., at 784, the Minnesota Supreme Court erred in substituting its judgment for that of the legislature.

[18] Fourth, the State argues that the Act will ease the State's solid waste disposal problem. Most solid consumer wastes in Minnesota are disposed of in landfills. A reputable study before the Minnesota Legislature**727 indicated that plastic milk jugs occupy a greater volume in landfills than other nonreturnable milk containers. This was one of the legislature's major concerns. For example, in introducing the bill to the House of Representatives, Representative Munger asked rhetorically,*470 "Why do we need this legislation?" Part of his answer to the query was that "the plastic non-refillable containers will increase the problems of solid waste in our state." Transcript of the Debate of the Minnesota House of Representatives on H.F. 45, p. 1 (Mar. 10, 1977), reprinted as Plaintiffs' Exhibit J.

FN11. This was the conclusion of the Midwest Research Institute study, see n. 5, supra. Brief for Petitioner 21.

The Minnesota Supreme Court found that plastic milk jugs in fact take up less space in landfills and present fewer solid waste disposal problems than do paperboard containers. 289 N.W.2d, at 82-85. But its ruling on this point must be rejected for the same reason we rejected its ruling concerning energy conservation: it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.

[19][20] We therefore conclude that the ban on plastic nonreturnable milk containers bears a rational relation to the State's objectives, and must be sustained under the Equal Protection Clause. FN12

FN12. The District Court also held that the Act violated substantive due process, and was apparently affirmed by the State Supreme Court on this ground. Conclusion of Law No. 1, App. A-23; 289 N.W.2d, at 87, n. 20. From our conclusion under equal protection, however, it follows a fortiori that the Act does not violate the Fourteenth Amendment's Due Process Clause. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-125, 98 S.Ct. 2207, 2213, 57 L.Ed.2d 91 (1978); Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963).

III

[21] The District Court also held that the Min-
Minnesota statute is unconstitutional under the Commerce Clause FN13 because it imposes an unreasonable burden on interstate commerce. FN14 We cannot agree.

FN13. “The Congress shall have Power ... To regulate Commerce ... among the several States....” U.S.Const., Art. I, § 8, cl. 3.

FN14. The Minnesota Supreme Court did not reach the Commerce Clause issue. 289 N.W.2d, at 87, n. 20. The parties and amici have fully briefed and argued the question, and because of the obvious factual connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause, we will reach and decide the question. See New York City Transit Authority v. Beazer, 440 U.S. 568, 583, n. 24, 99 S.Ct. 1355, 1364-1365, 59 L.Ed.2d 587 (1979).

*471 [22][23][24][25][26][27] When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause. See Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980); Hunt v. Washington Apple Advertising Comm’n, 432 U.S. 333, 350, 97 S.Ct. 2434, 2445, 53 L.Ed.2d 383 (1977); Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915 (1945). If a state law purporting to promote environmental purposes is in reality “simple economic protectionism,” we have applied a “virtually per se rule of invalidity.” Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). FN15 Even if a statute regulates “evenhandedly,” and imposes only “incidental” burdens on interstate commerce, the courts must nevertheless strike it down if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Moreover, the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” Ibid.

FN15. A court may find that a state law constitutes “economic protectionism” on proof either of discriminatory effect, see Philadelphia v. New Jersey, or of discriminatory purpose, see Hunt v. Washington Apple Advertising Comm’n, 432 U.S., at 352-353, 97 S.Ct., at 2446. Respondents advance a “discriminatory purpose” argument, relying on a finding by the District Court that the Act’s “actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.” App. A-19. We have already considered and rejected this argument in the equal protection context, see n. 7, supra, and do so in this context as well.

[28] Minnesota’s statute does not effect “simple protectionism,” but “regulates evenhandedly” by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, *472 or the sellers are from outside the State. This statute is therefore unlike statutes discriminating against interstate commerce, which we have consistently struck down. E. g., Lewis v. BT Investment Managers, Inc., supra (Florida statutory scheme prohibiting investment advisory services by bank holding companies with principal offices out of the State); Hughes v. Oklahoma, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (Oklahoma statute prohibiting the export of natural minnows from the State); Philadelphia v. New Jersey, supra (New Jersey statute prohibiting importation of solid and liquid wastes into the State); Hunt v. Washington Apple Advertising Comm’n, supra (North Carolina
statute imposing additional costs on Washington, but not on North Carolina, apple shippers).

[29] Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is “clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc., supra*, at 142, 90 S.Ct., at 847. We conclude that it is not.

The burden imposed on interstate commerce by the statute is relatively minor. Milk products may continue to move freely across the Minnesota border, and since most dairies package their products in more than one type of containers, *FN16* the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight. See *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 184, 56 S.Ct. 159, 162, 80 L.Ed. 138 (1935). Within Minnesota, business will presumably shift from manufacturers of plastic nonreturnable containers to producers of paperboard cartons, refillable bottles, *FN17* and plastic pouches, but there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms. Indeed, two of the three dairies, the sole milk retailer, and the sole milk container producer challenging the statute in this litigation are Minnesota firms.

*FN16.* Respondent Wells Dairy, an Iowa firm, sells 60% of its milk in plastic nonreturnable containers, and the remainder in other type of packages, including paperboard cartons. Tr. 419, 426, 439. The Chairman of the Board of respondent Marigold Foods, Inc., a Minnesota dairy, admitted at trial that his firm would continue to sell milk in plastic nonreturnable containers in other States, despite the passage of the Act. *Id.*, at 474.


Pulpwood producers are the only Minnesota industry likely to benefit significantly from the Act at the expense of out-of-state firms. Respondents point out that plastic resin, the raw material used for making plastic nonreturnable milk jugs, is produced entirely by non-Minnesota firms, while pulpwood, used for making paperboard, is a major Minnesota product. Nevertheless, it is clear that respondents exaggerate the degree of burden on out-of-state interests, both because plastics will continue to be used in the production of plastic pouches, plastic returnable bottles, and paperboard itself, and because out-of-state pulpwood producers will presumably absorb some of the business generated by the Act.

Even granting that the out-of-state plastics industry is burdened relatively more *FN729* than the Minnesota pulpwood industry, we find that this burden is not “clearly excessive” in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, which we have already reviewed in the context of equal protection analysis. See *supra*, at 724-727. We find these local benefits ample to support Minnesota’s decision under the Commerce Clause. Moreover, we find that no approach with “a lesser impact on interstate activities,” *Pike v. Bruce Church, Inc., supra*, at 142, 90 S.Ct., at 847, is available. Respondents have suggested several alternative statutory schemes, but these alternatives are either more burdensome on commerce than the Act (as, for example, banning all nonreturnables) or less likely to be effective (as, for example, *FN474* providing incentives for recycling). See Brief for Respondents 32-33.

we upheld a Maryland statute barring producers and refiners of petroleum products—all of which were out-of-state businesses—from retailing gasoline in the State. We stressed that the Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.” *Id.*, at 127-128, 98 S.Ct., at 2214-2215. A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause.

The judgment of the Minnesota Supreme Court is

Reversed.

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

Justice POWELL, concurring in part and dissenting in part.

The Minnesota statute at issue bans the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permits such sale in paperboard milk cartons. Respondents challenged the validity of the statute under both the Equal Protection and Commerce Clauses. The Minnesota District Court agreed with respondents on both grounds. The Supreme Court of Minnesota also agreed that the statute violated the Equal Protection Clause, but found it unnecessary to reach the Commerce Clause issue.

This Court today reverses the Supreme Court of Minnesota, finding no merit in either of the alleged grounds of invalidity. I concur in the view that the statute survives equal protection challenge, and therefore join the judgment of reversal on this *475* ground. I also agree with most of Parts I and II of the Court's opinion.

I would not, however, reach the Commerce Clause issue, but would remand it for consideration by the Supreme Court of Minnesota. The District Court expressly found:

“12. Despite the purported policy statement published by the legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.” App. to Pet. for Cert. A-24.

At a subsequent point in its opinion, and in even more explicit language, the District Court reiterated its finding that the purpose of the statute related to interstate commerce.

**FN1** These findings were highly relevant to the question whether the statute discriminated against interstate commerce. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2536, 57 L.Ed.2d 475 (1978) (“The crucial inquiry ... must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental”). Indeed, the trial court's findings normally would require us to conclude that the Minnesota Legislature was engaging in such discrimination, as they were not rejected by the Minnesota Supreme Court. That court simply invalidated the statute on equal protection grounds, and had no reason to consider the claim of discrimination against interstate commerce.

**FN1.** Finding 23 of the District Court was as follows:

“23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, *actual bases were to isolate from interstate competition* the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be promoted without the remedies prescribed in Chapter 268.” App.

*476 The Minnesota Supreme Court did accept the *avowed* legislative purpose of the statute. It stated: “The Act is intended to promote the policies stated in Minn.St. 116F.01; therefore it is intended to promote the state interests of encouraging the re-use and recycling of materials and reducing the amount and type of material entering the solid waste stream.” 289 N.W.2d 79, 82 (1979). The Court today reads this statement as an implied rejection of the trial court’s specific finding that the “actual [purpose] was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests” of the nonresident dairy and plastics industry. In my view, however, the Minnesota Supreme Court was merely assuming that the statute was intended to promote its stated purposes. It was entirely appropriate for that court to accept, for purposes of equal protection analysis, the purpose expressed in the statute. See ante, at 723, n. 7. When the court did so, however, there is no reason to conclude that it intended to express or imply any view on any issue it did not consider. In drawing its conclusions, the court included no discussion whatever of the Commerce Clause issue and, certainly, no rejection of the trial court’s express and repeated findings concerning the legislature’s actual purpose.

FN2. Commerce Clause analysis differs from analysis under the “rational basis” test. Under the Commerce Clause, a court is empowered to disregard a legislature's statement of purpose if it considers it a pretext. See Dean Milk Co. v. Madison, 340 U.S. 349, 354, 71 S.Ct. 295, 297, 95 L.Ed. 329 (1951) (“A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods”).

I conclude therefore that this Court has no basis for inferring a rejection of the quite specific fact-findings by the trial court. The Court’s decision today, holding that Chapter 268 does not violate the Commerce Clause, is flatly contrary *477 to the only relevant specific findings of fact. Although we are not barred from reaching the Commerce Clause issue, in doing so we also act without the benefit of a decision by the highest court of Minnesota on the question. In these circumstances, it is both unnecessary, and in my opinion inappropriate, for this Court to decide the Commerce Clause issue. See, e. g., FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 542, 80 S.Ct. 1267, 1270, 4 L.Ed.2d 1385 (1960); United States v. Ballard, 322 U.S. 78, 88, 64 S.Ct. 882, 887, 88 L.Ed. 1148 (1944). Because no reason has been offered for a departure from our customary restraint, I would remand the case with instructions to consider specifically whether the statute discriminated impermissibly against interstate commerce.

Justice STEVENS, dissenting.

While the Court in this case seems to do nothing more than apply well-established equal protection and Commerce Clause principles to a particular state statute, in reality its reversal of the Minnesota Supreme Court is based upon a newly discovered principle of federal constitutional law. According to this principle, which is applied but not explained by the majority, the Federal Constitution defines not only the relationship between Congress and the federal courts, but also the relationship between state legislatures and state courts. Because I can find no support for this novel constitutional doctrine in either the language of the Federal Constitution or the prior decisions of this Court, I respectfully dissent.

I

The keystone of the Court's equal protection analysis is its pronouncement that “it is not the function of the courts to substitute their evaluation
of legislative facts for that of the legislature.” *Ante*, at 727. FN1 If the pronouncement concerned the function of federal courts, it would be amply supported by reason and precedent. For federal tribunals are courts of limited jurisdiction, whose powers are confined by the Federal Constitution, by statute, and by the decisions of this Court. It is not surprising, therefore, that the Court’s pronouncement is supported by citation only to precedents dealing with the function that a federal court may properly perform when it is reviewing the constitutionality of a law enacted by Congress or by a state legislature.

FN2. The majority cites *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979); *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 72 S.Ct. 405, 96 L.Ed. 469 (1952); *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); and *Henderson Co. v. Thompson*, 300 U.S. 258, 57 S.Ct. 447, 81 L.Ed. 632 (1937), in support of its conclusion that it is not the function of the Minnesota courts to re-evaluate facts considered by the Minnesota Legislature. See *ante*, at 724, 726. However, even a cursory examination of these cases reveals that they provide no support for the Court's decision in this case.

In four of the cited cases, the Court reviewed the actions of lower federal, not state, courts. These cases thus shed no light upon the role a state court properly may play in reviewing actions of the state legislature. In *Vance v. Bradley* and *United States v. Carolene Products*, Federal District Courts had invalidated federal statutes on federal constitutional grounds. In both cases, this Court reversed because the District Courts had exceeded the scope of their powers by re-evaluating the factual bases for the congressional enactments. See *Vance, supra*, at 111-112, 99 S.Ct., at 950-951; *Carolene Products, supra*, at 152, 154, 58 S.Ct., at 784. In *Ferguson v. Skrupa*, a Federal District Court had invalidated a Kansas statute on federal constitutional grounds. This Court reversed, finding that the District Court had exceeded constitutional limitations by substituting its judgment for that of the Kansas Legislature. See 372 U.S., at 729-731, 83 S.Ct., at 1030-1031. The Court also indicated in *Ferguson* that its own power to supervise the actions of state legislatures is narrowly circumscribed. *Id.*, at 730-731, 83 S.Ct., at 1031. Finally, in *Henderson Co. v. Thompson*, a Federal District Court had sustained a Texas statute in the face of a constitutional challenge. In affirming that decision, the Court simply observed that “[t]he needs of conservation are to be determined by the Legislature.” 300 U.S., at 264, 57 S.Ct., at 450.

In only one of the cases cited by the majority did the Court review a state-court judgment. In *Day-Brite Lighting, Inc. v. Missouri*, a Missouri statute was challenged on due process, equal protection, and Contract Clause theories. The Missouri Supreme Court had upheld the statute, and this Court affirmed. In the course of its opinion, the Court stated that it was not free to re-evaluate the legislative judgment or act as “a superle-

cratur.” 342 U.S., at 423, 425, 72 S.Ct., at 408. The Court did not comment at all upon the extent of the Missouri Supreme Court's authority to supervise the activities of the Missouri Legislature. Nothing in the Day-Brite Lighting opinion can be construed as the source of the Court's newly found power to determine the States which law-making powers may be allocated to their courts and which to their legislatures.

*479 But what is the source—if indeed there be one—of this Court's power to make the majestic announcement that it is not the function of a state court to substitute its evaluation of legislative facts for that of a state legislature? I should have thought the allocation of functions within the structure of a state government would be a **732 matter for the State to determine. I know of nothing in the Federal Constitution that prohibits a State from giving law-making power to its courts. FN3  *480 Nor is there anything in the Federal Constitution that prevents a state court from reviewing factual determinations made by a state legislature or any other state agency. If a state statute expressly authorized a state tribunal to sit as a Council of Revision with full power to modify or to amend *481 the work product of its legislature, that statute would not violate any federal rule of which I am aware. The functions that a state court shall perform within the structure of state government are unquestionably matters of state law.

FN3. Responding to an argument that the lawmaking power of the Virginia Legislature had been improperly assigned to another arm of the State's government, Justice Cardozo, writing for the Court in Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612-613, 57 S.Ct. 549, 551, 81 L.Ed. 835 (1937), stated:

“The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution, Art. IV, § 4. Even if it were, the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the courts. Pacific States Telephone Co. v. Oregon, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377; Davis v. Hildebrant, 241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172; Ohio ex rel. Bryant v. Akron Park District, 281 U.S. 74, 79, 80, 50 S.Ct. 228, 230, 74 L.Ed. 710. Cases such as Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 741, 79 L.Ed. 446, and Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, cited by appellants, are quite beside the point. What was in controversy there was the distribution of power between President and Congress, or between Congress and administrative officers or commissions, a controversy affecting the structure of the national government as established by the provisions of the national constitution.

“So far as the objection to delegation is founded on the Constitution of Virginia, it is answered by a decision of the highest court of the state. In Reynolds v. Milk Commission, 163 Va. 957, 179 S.E. 507, the Supreme Court of Appeals passed upon the validity of the statute now in question.... A judgment by the highest court of a state as to the meaning and effect of its own constitution is de-

FN4. In *Ferguson v. Skrupa*, supra, the Court indicated that the Federal Constitution does prevent the federal courts from reviewing factual determinations made by a state legislature. In rejecting the substantive due process cases of an earlier era, the Court stated:

> “Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.” 372 U.S., at 729, 83 S.Ct., at 1030.

The Court went on to explain this constitutional limitation:

> “We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.... Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to ‘subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.’” *Id.*, at 730, 83 S.Ct., at 1031 (footnote omitted).

The Court's conclusion in *Ferguson* that the Constitution imposes limitations upon the power of the federal courts to review legislative judgments was clearly correct and was consistent with the structure of the Federal Constitution and “the system of government created” therein. The Constitution defines the relationship among the coordinate branches of the Federal Government and prescribes for each branch certain limited powers. The Federal Constitution, however, is silent with respect to the powers of the coordinate branches of state governments and the relationship among those branches.

One of the few propositions that this Court has respected with unqualified consistency—until today—is the rule that a federal court is bound to respect the interpretation of state law announced by the highest judicial tribunal in a State. FN5 In this *Ferguson* case, the Minnesota Supreme Court has held that the state trial court acted properly when it reviewed the factual basis for the state legislation, and implicitly the Minnesota Supreme Court also has held that its own review of the legislative record was proper. Moreover, it also has determined as a matter of state law how it properly should resolve conflicts in the evidence presented to the state legislature, as supplemented by the additional evidence presented to the trial court in this case. FN6 In my opinion, the factual conclusions drawn by the Minnesota courts concerning the deliberations of the Minnesota Legislature are entitled to just as much deference as if they had been drafted by the state legislature itself and incorporated in a preamble to the state statute. The State of Minnesota has told us in unambiguous language that this statute is not rationally related to any environmental objective; it seems to me to be a matter of indifference, for purposes of applying the federal Equal Protection Clause, whether that message to us from the State of Minnesota is conveyed by the State Supreme Court, or by the state legislature itself.

FN5. Although this proposition is so well established as to require no citation of authority, abundant authority is readily available. See, *e. g.*, *North Carolina v. Butler*, 256 U.S. 534, 543, 41 S.Ct. 544, 547, 65 L.Ed. 1074 (1921).
In its memorandum in this case, the state trial court initially observed that it was not free to “substitute its judgment for that of the legislature as to the wisdom or desirability of the act.” App. A-24. With respect to the facts considered by the legislature, however, the trial court found that “as fact-finder, [it was] obliged to weigh and evaluate this evidence, much of which was in sharp conflict.” *Id.*, at A-25.

In its opinion affirming the trial court's decision, the Minnesota Supreme Court took a similar view of the function to be performed by the Minnesota courts when reviewing Minnesota legislation:

“We are aware of the deference that is accorded to the legislature when the present type of statute is analyzed on equal protection grounds. Nevertheless, our inquiry into the constitutional propriety of the present classification separating paper containers from plastic nonrefillables is dependent upon facts. Based upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources, we believe the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives.” 289 N.W.2d 79, 82 (1979).

I find it extraordinary that this federal tribunal feels free to conduct its own *de novo* review of a state legislative record in search of a rational basis that the highest court of the State has expressly rejected. There is no precedent in this Court's decisions for such federal oversight of a State's lawmaking process. FN7 Of course, if a federal **734*** trial court had reviewed the *483*** factual basis for a state law, conflicts in the evidence would have to be resolved in favor of the State. FN8 But when a state court has conducted**735*** the review, it is not our business to disagree*484*** with the state tribunal's evaluation of the State's own lawmaking process. Even if the state court should tell us that a state statute has a meaning that we believe the state legislature plainly did not intend, we are not free to take our own view of the matter. FN9

FN7 In its footnote 6, *ante*, at 722-723, the Court takes issue with my suggestion that its action in this case is unprecedented by citing four cases in which the Court reversed State Supreme Court decisions invalidating provisions of state law on federal equal protection grounds. See *Idaho Dept. of Employment v. Smith*, 434 U.S. 100, 98 S.Ct. 327, 54 L.Ed.2d 324 (1977) (*per curiam*); *Arlington County Board v. Richards*, 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977) (*per curiam*); *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974); *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973). In each of those cases, however, this Court concluded that the state court had applied an...
incorrect legal standard; in none did this Court reassess the factual predicate for the state-court decision.

In *Idaho Dept. of Employment*, the Idaho Supreme Court had invalidated a statutory classification, not because it generally failed to further legitimate state goals, but rather because the court had found that the classification was imperfect since some members of the class denied unemployment benefits were in fact as available for full-time employment as members of the class entitled to benefits under the Idaho statute. See *Smith v. Department of Employment*, 98 Idaho 43, 43-44, 557 P.2d 637, 637-638 (1976), citing *Kerr v. Department of Employment*, 97 Idaho 385, 545 P.2d 473 (1976). This Court did not disagree with the Idaho court’s finding that the classification was imperfect, but merely held that this imperfection was legally insufficient to invalidate the statute under the Equal Protection Clause. 434 U.S., at 101-102, 98 S.Ct., at 328. In *Arlington County Board v. Richards*, the Virginia Supreme Court had recognized the rational-basis test as the appropriate equal protection standard, but then had proceeded to apply a more stringent standard to the municipal ordinance at issue. The court had expressly noted that the municipal ordinance “may relieve the [parking] problems” to which it was directed. However, the court concluded that the means employed by the county to deal with these problems—classification based upon residency-created an unconstitutional “invidious discrimination.” See *Arlington County Board v. Richards*, 217 Va. 645, 651, 231 S.E.2d 231, 235 (1977). This Court reversed, rejecting the conclusion that the ordinance’s residency classification resulted in an invidious discrimination. 434 U.S., at 7, 98 S.Ct., at 26. In *Richardson v. Ramirez*, a voting rights case, the California Supreme Court was reversed, not because it had re-examined the factual determinations of the California Legislature, but because this Court found that the statutory discrimination at issue was expressly authorized by § 2 of the Fourteenth Amendment. 418 U.S., at 41-56, 94 S.Ct., at 2665. Finally, in *Lake Shore Auto Parts v. Lehnhausen*, the Illinois Supreme Court had held, in essence, that a classification used in determining liability for a property tax must, as a constitutional matter, be based upon the nature of the property at issue, and not upon the corporate or noncorporate character of the property’s owner. See *Lake Shore Auto Parts v. Korzen*, 49 Ill.2d 137, 149-151, 273 N.E.2d 592, 598-599 (1971). This Court rejected this principle, finding it inconsistent with prior decisions clearly establishing that distinctions between individuals and corporations in tax legislation violated no constitutional rights. 410 U.S., at 359-365, 93 S.Ct., at 1003-1006.

As the majority observes, the Court in each of these cases reversed the state-court decisions because the state courts had applied an equal protection standard more stringent than that sanctioned by this Court. Quite frankly, in my opinion it would have been sound judicial policy in all four of those cases to allow the state courts to accord even greater protection within their respective jurisdictions than the Federal Constitution commands. See my dissent in *Idaho Dept. of Employment, supra*, at 104, 98 S.Ct., at 329. But what is especially relevant here is the fact that in none of those cases had the state courts found, after a full evid-
entiary hearing, that the factual predicate
for the state law at issue was simply not
true. The Minnesota courts in this case
made such a finding after the develop-
ment of an extensive record. The Min-
nesota courts then applied the correct
federal legal standard to the facts re-
vealed by this record and concluded that
the statutory classification was not ra-
onially related to a legitimate state pur-
pose. As I read the cases cited by the
majority, they are simply inapposite in
this case. My own research has un-
covered no instance in which the Court
has reversed the decision of the highest
court of a State, as it does in this case,
because the state court exceeded some
federal constitutional limitation upon its
power to review the factual determina-
tions of the state legislature. The Court
has never before, to my knowledge, un-
dertaken to define, as a matter of federal
law, the appropriate relationship
between a state court and a state legis-

FN8. In most of the cases in which the
Court has indicated that courts may not
substitute their judgment for that of the
legislature, the Court was reviewing
decisions of the lower federal courts. See, e. g., New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976) ( per curiam); Hughes v. Alexan-
retary of Agriculture v. Central Roig Re-
stances in which the Court was reviewing
state-court decisions, its statements with
respect to the limited role of the judiciary
in reviewing state legislation clearly con-
cerned its own authority to act as a
“superlegislature,” not the authority of a
state court to do so where permitted by
state law. See, e. g., Exxon Corp. v. Gov-
Works, 274 U.S. 325, 328, 47 S.Ct. 594, 594-595, 71 L.Ed. 1522 (1927); Cusack
Co. v. Chicago, 242 U.S. 526, 531, 37 S.Ct. 190, 192, 61 L.Ed. 472 (1917); Had-
acheck v. Los Angeles, 239 U.S. 394, 413-414, 36 S.Ct. 143, 146-147, 60 L.Ed. 348 (1915); Price v. Illinois, 238 U.S. 446, 452-453, 35 S.Ct. 892, 894-895, 59 L.Ed. 1400 (1915); Laurel Hill Cemetery v. San

FN9. This Court will defer to the interpretation of state law announced by the highest court of a State even where a more reasonable interpretation is apparent, see, e.g., O'Brien v. Skinner, 414 U.S. 524, 531, 94 S.Ct. 740, 743, 38 L.Ed. 2d 702 (1974), a contrary construction might save a state statute from constitutional invalidity, see, e.g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837, n. 9, 98 S.Ct. 1362, 1365, 56 L.Ed.2d 1 (1978), or it appears that the state court has attributed an unusually inflexible command to its legislature, see, e.g., Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688-689, 79 S.Ct. 1362, 1365, 3 L.Ed.2d 1512 (1959).

Once it is recognized that this Court may not review the question of state law presented by the Minnesota courts’ decision to re-evaluate the evidence presented to the legislature, the result we must reach in this case is apparent. Because the factual conclusions drawn by the Minnesota courts are clearly supported by the record, the only federal issue that this case presents is whether a discriminatory statute that is admittedly irrational violates the Equal Protection Clause of the Fourteenth Amendment. The Court implicitly acknowledges that the Minnesota Supreme Court applied the proper rule of federal law when it answered that question. FN11 Whatever we may think about the environmental consequences of this discriminatory law, it follows inexorably that it is our duty as federal judges to affirm the judgment of the Minnesota Supreme Court.

FN10. As the majority notes, the evidence considered by the Minnesota courts was conflicting, ante, at 722, 724, 726, and the respondents “produced impressive supporting evidence at trial” indicating that the decision of the Minnesota Legislature was factually unsound. Ante, at 723. In light of this record, this Court clearly cannot reverse the concurrent factual findings of two state courts.

Moreover, since there is no significant difference between plastic containers and paper containers in terms of environmental impact, and since no one contends that the Minnesota statute will reduce the consumption of dairy products, it is not difficult to understand the state judges’ skeptical scrutiny of a legislative ban on the use of one kind of container without imposing any present or future restriction whatsoever on the use of the other.

FN11. It is true that the Court carefully avoids an express acknowledgment that the Minnesota Supreme Court applied the correct legal standard. Not one word in the Court’s opinion, however, suggests that the Court has any disagreement with the state court’s understanding of the proper federal rule.

II

In light of my conclusion that the Minnesota Supreme Court’s equal protection decision must be affirmed, I need not address the Commerce Clause question resolved by the majority. Ante, at 727-729. Nonetheless, I believe that the majority’s treatment of that question compels two observations.

First, in my opinion the Court errs in undertaking to decide the Commerce Clause question at all. The state trial court addressed the question and found that the statute was designed by the Minnesota Legislature to promote the economic interests of the local dairy and pulpwood industries at the expense of competing economic groups. FN12 On appeal, the Minnesota Supreme Court expressly declined to consider this aspect of the trial court’s decision, and accordingly made no comment at all upon the merits of the Commerce Clause question. 289 N.W.2d 79, 87, n. 20 (1979).
Generally, when reviewing state-court decisions, this Court will not decide questions which the highest court of a State has properly declined to address. The majority offers no persuasive explanation for its unusual action in this case. In the absence of some substantial justification for this action, I would not deprive the Minnesota Supreme Court of the first opportunity to review this aspect of the decision of the Minnesota trial court.

FN12. The trial court made the following findings of fact:

“12. Despite the purported policy statement published by the Legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.

“23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be promoted without the remedies prescribed in Chapter 268.” App. A-19, A-22.

These findings were repeated in the memorandum filed by the trial court in this case:

“The relevant legislative history of Chapter 268 support [sic] a conclusion that the real basis for it was to serve certain economic interests (paper, pulpwood, and some dairies) at the expense of other competing economic groups (plastic and certain dairies) by prohibiting the plastic milk bottle.” Id., at A-24.

FN13. According to the majority, its decision to address the Commerce Clause question is justified “because of the obvious factual connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause.” Ante, at 727, n. 14. The majority cites New York City Transit Authority v. Beazer, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979), in support of this rationale. This justification is inadequate, in my opinion, for two reasons.

First, in light of the trial court's factual finding that the Minnesota Legislature enacted the statute for protectionist, rather than environmental, reasons, see n. 12, supra, the Equal Protection Clause and Commerce Clause inquiries are not necessarily as similar as the Court suggests. As the majority acknowledges, if a state law which purports to promote environmental goals is actually protectionist in design, a virtually automatic rule of invalidity, not a balancing-of-interests test, is applied. See ante, at 727-728. See also New Orleans v. Dukes, 427 U.S., at 304, n. 5, 96 S.Ct., at 2517.

Second, in Beazer the Court reviewed the decision of a lower federal court, not a state supreme court. While this Court, in its discretion, may elect to deprive lower federal courts of the opportunity to decide particular statutory questions, it seems to me that respect for the Minnesota Supreme Court as the highest court of a sovereign State dictates that we not casually divest it of authority to decide a constitutional question on which it properly declined to comment when this case was first before it. Such deference is especially appropriate here because the Court’s analysis of the Commerce Clause issue requires rejection of
the state trial court's findings of fact.

Second, the Court's Commerce Clause analysis suffers from the same flaw as its equal protection analysis. The Court rejects the findings of the Minnesota trial court, not because they are clearly erroneous, but because the Court is of the view that the Minnesota courts are not authorized to exercise such a broad power of review over the Minnesota Legislature. See ante, at 727-728, n. 15. After rejecting the trial court's findings, the Court goes on to find that any burden the Minnesota statute may impose upon interstate commerce is not excessive in light of the substantial state interests furthered by the statute. Ante, at 729. However, the Minnesota Supreme Court expressly found that the statute is not rationally related to the substantial state interests identified by the majority. FN14 Because I believe, as explained in Part I, supra, that the Court's intrusion upon the lawmaking process of the State of Minnesota is without constitutional sanction or precedential support it is clear to me that the findings of the Minnesota Supreme Court must be respected by this Court. Accordingly, the essential predicate for the majority's conclusion that the "local benefits**737 [are] ample to support Minnesota's decision under the Commerce Clause," ante, at 729, is absent.

FN14. As noted in Part I, supra, the Court rejects the Minnesota Supreme Court's findings, not because they are without support in the record-they clearly are adequately supported, see n. 10, supra-but because it feels that the Minnesota Supreme Court was without authority to do anything other than endorse the factual conclusions of the Minnesota Legislature.

III

The majority properly observes that a state court, when applying the provisions of the Federal Constitution may not *489 apply a constitutional standard more stringent than that announced in the relevant decisions of this Court. See ante, at 722-723, n. 6. It follows from this observation that a state court's decision invalidating state legislation on federal constitutional grounds may be reversed by this Court if the state court misinterpreted the relevant federal constitutional standard. In this case, however, the Minnesota Supreme Court applied the correct federal equal protection standard and properly declined to consider the Commerce Clause. The majority reverses this decision because it disagrees with the Minnesota courts' perception of their role in the State's lawmaking process, not because of any error in the application of federal law. In my opinion, this action is beyond the Court's authority. I therefore respectfully dissent.

Minnesota v. Clover Leaf Creamery Co.

END OF DOCUMENT
Supreme Court of the United States.

CHARLES E. MYERS and A. Claude Kalmey, Plffs. in Err.,
v.
JOHN B. ANDERSON.

No. 8.
CHARLES E. MYERS and A. Claude Kalmey, Plffs. in Err.,
v.
WILLIAM H. HOWARD.

No. 9.
CHARLES E. MYERS and A. Claude Kalmey, Plffs. in Err.,
v.
ROBERT BROWN.

No. 10.
Nos. 8, 9, and 10.
Argued November 11 and 12, 1913.
Decided June 21, 1915.

THREE WRITS of Error to the Circuit Court of the United States for the District of Maryland to review judgments awarding damages against state election officials for denying the right of suffrage to negro citizens. Affirmed.

The facts are stated in the opinion.

West Headnotes

Elections 144

144 Elections

144 I Right of Suffrage and Regulation Thereof in General

144 k11 Operation of Provisions of Constitution of United States. Most Cited Cases

The right to vote secured by U.S.C.A. Const.Amend. 15, against denial on account of race, color, or previous condition of servitude, extends to municipal corporations.

Elections 144 $12(2.1)

144 Elections

144 I Right of Suffrage and Regulation Thereof in General

144k12 Denial or Abridgment on Account of Race

144k12(2) Discriminatory Practices Proscribed

144k12(2.1) k. In General. Most Cited Cases

(Formerly 144k12(2), 144k12)

Conferring the right to register and vote at city election in Annapolis, as is done by Laws Md.1908, c. 525, on all citizens, who, prior to January 1, 1868, are entitled to vote in state, and to legal descendants of such persons, abridges the right to vote on account of race, color, or previous condition of servitude in violation of U.S.C.A. Const.Amend. 15.

Elections 144 $104

144 Elections

144 V Registration of Voters

144k99 Registration Officers

144k104 k. Liabilities. Most Cited Cases

State election officials, who, conforming to a state statute, deprive negro citizens of their right to vote secured by U.S.C.A. Const.Amend. 15, are liable to such citizens for resulting damages by Rev.St. § 1979, 42 U.S.C.A. § 1983.

Elections 144 $104

144 Elections

144 V Registration of Voters

144k99 Registration Officers

144k104 k. Liabilities. Most Cited Cases

The invalidity of provisions of Laws Md.1908,
c. 525, prescribing qualifications for voters at municipal elections not naturalized, does not relieve the election officers appointed under that statute from liability under Rev.St. § 1979, 42 U.S.C.A. § 1983, for denying right to vote at such election to negro citizens contrary to U.S.C.A. Const.Amend. 15.

Statutes 361 k64(4)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(4) k. Counties, Towns, and Municipalities. Most Cited Cases
Invalidity under U.S.C.A. Const. Amend. 15, or provision of Laws Md.1908, c. 525, conferring right to vote at municipal election in Annapolis on all citizens entitled to vote prior to January 1, 1868, renders invalid other qualifications.


*375 Mr. Chief Justice White delivered the opinion of the court:

These cases involve some questions which were not in the Guinn Case, No. 96, just decided [238 U. S. 347, 59 L. ed. 1340, 35 Sup. Ct. Rep. 926]. The *376 foundation question, however, is the same: that is, the operation and effect of the 15th Amendment.

Prior to the adoption of the 15th Amendment the privilege of suffrage was conferred by the Constitution of Maryland of 1867 upon 'every white male citizen,' but the 15th Amendment by its self-operative force obliterated the word 'white,' and caused the qualification therefore to be 'every male citizen,' and this came to be recognized by the court of appeals of the state of Maryland. Without recurring to the establishment of the city of Annapolis as a municipality in earlier days, or following the development of its government, it suffices to say that before 1877 the right to vote for the governing municipal body was vested in persons entitled to vote for members of the general assembly of Maryland, which standard, by the elimination of the word 'white' from the Constitution by the 15th **934 Amendment embraced 'every male citizen.'

In 1896 a general election law comprising many sections was enacted in Maryland. Laws of 1896, chap. 202, p. 327. It is sufficient to say that it provided for a board of supervisors of elections in each county to be appointed by the governor, and that this board was given the power to appoint two persons as registering officers and two as judges of election for each election precinct or ward in the county. Under this law each ward or voting precinct in Annapolis became entitled to two registering officers. While the law made these changes in the election machinery it did not change the qualification of voters.

In 1908 an act was passed 'to fix the qualifications of voters at municipal elections in the city of Annapolis and to provide for the registration of said voters.' Laws of 1908, chap. 525, p. 347. This law authorized the appointment of three persons as registers, instead of two, in each election ward or precinct in Annapolis, and provided for the mode in which they should perform their duties, and conferred the right of registration and consequently the *377 right to vote on all male citizens above the age of twenty-one years who had resided one year in the municipality and had not been convicted of crime, and who came within any one of the three following classes:

1. All taxpayers of the city of Annapolis assessed on the city books for at least $500. 2. And duly naturalized citizens. 2 1/2. And male children of naturalized citizens who have reached the age of twenty-one years. 3. All citizens who prior to January 1, 1868, were entitled to vote in the state of Maryland or any other state of the United States at
a state election, and the lawful male descendants of any person who prior to January 1, 1868, was entitled to vote in this state or in any other state of the United States at a state election, and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the city of Annapolis or qualified to vote at the municipal elections held therein, and any person so duly registered shall, while so registered, be qualified to vote at any municipal election held in said city; said registration shall in all other respects conform to the laws of the state of Maryland relating to and providing for registration in the state of Maryland.'

The three persons who are defendants in error in these cases applied in Annapolis to the board of registration to be registered as a prerequisite to the enjoyment of their right to vote at an election to be held in July, 1909, and they were denied the right by a vote of two out of the three members of the board. They consequently were unable to vote. Anderson, the defendant in error in No. 8, was a negro citizen who possessed all the qualifications required to vote exacted by the law in existence prior to the one we have just quoted, and who on January 1, 1868, the date fixed in the third class in the act in question, would have been entitled to vote in Maryland but for the fact that he was a negro, albeit he possessed none of the particular qualifications enumerated by the statute in question. Howard, the defendant in error in No. 9, was a negro citizen possessing all the qualifications to vote required before the passage of the act in question, whose grandfather resided in Maryland and would have been entitled to vote on January 1, 1868, but for the fact that he was a negro. Brown, the defendant in error in No. 10, also had all the qualifications to vote under the law previously existing, and his father was a negro residing in Maryland who would have been able to vote on the date named but for the fact that he was a negro. The three parties thereupon began these separate suits to recover damages against the two registering officers who had refused to register them on the ground that thereby they had been deprived of a right to vote secured by the 15th Amendment, and that there was liability for damages under § 1979, Rev. Stat., Comp. Stat. 1913, § 3932, which is as follows:

'Every person who under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

The complaints were demurred to and it would seem that every conceivable question of law susceptible of being raised was presented and considered, and the demurrers were overruled, the grounds for so doing being stated in one opinion common to the three cases (182 Fed. 223). The cases were then tried to the court without a jury, and to the judgments in favor of the plaintiffs which resulted these three separate writs of error were prosecuted.

The nonliability in any event of the election officers for their official conduct is seriously pressed in argument, and it is also urged that in any event there could not be liability under the 15th Amendment for having deprived of the right to vote at a municipal election. But we do not undertake to review the considerations pressed on these subjects because we think they are fully disposed of by the ruling this day made in the Guinn Case and by the very terms of § 2004, Rev. Stat., Comp. Stat. 1913, § 3966, when considered in the light of the inherently operative force of the 15th Amendment as stated in the case referred to.

This brings us to consider the statute in order to determine whether its standards for registering and voting are repugnant to the 15th Amendment. There are three general criteria. We test them by beginning at the third, as it is obviously the most comprehensive, and, as we shall ultimately see, the keystone of the arch upon which all the others rest. In
coming to do so it is at once manifest that, barring some negligible changes in phraseology, that standard is in all respects identical with the one just decided in the Guinn Case to be repugnant to the 15th Amendment, and we pass from its consideration and approach the first and a subdivision numbered 2 1/2. The first confers the rights to register and vote free from any distinction on account of race or color upon all taxpayers assessed for at least $500. We put all question of the constitutionality of this standard out of view as it contains no express discrimination repugnant to the 15th Amendment, and it is not susceptible of being assailed on account of an alleged wrongful motive on the part of the law-maker or the mere possibilities of its future operation in practice, and because, as there is a reason other than discrimination on account of race or color discernible upon which the standard may rest, there is no room for the conclusion that it must be assumed, because of the impossibility of finding any other reason for its enactment, to rest alone upon a purpose to violate the 15th Amendment. And as, in order to dispose of the case, as *380 we shall see, it is not necessary to examine the constitutionality of the other standards, that is, numbers 2 and 2 1/2 relating to naturalized citizens and their descendants, merely for the sake of argument we assume those two standards, without so deciding, to be also free from constitutional objection, and come to consider the case under that hypothesis.

The result, then, is this: that the third standard is void because it amounts to a mere denial of the operative effect of the 15th Amendment, and, based upon that conception, proceeds to re-create and re-establish a condition which the Amendment prohibits and the existence of which had been previously stricken down in consequence of the self-operative force of its prohibitions; and the other standards separately considered are valid or are assumed to be such and therefore are not violative of the 15th Amendment. On its face, therefore, this situation would establish that the request made by all the plaintiffs for registration was rightfully refused since, even if the void standard be put wholly out of view, none of the parties had the qualifications necessary to entitle them to register and vote under any of the others. This requires us therefore to determine whether the two first standards which we have held were valid or have assumed to be so must nevertheless be treated as nonexisting as the necessary result of the elimination of the third standard because of its repugnancy to the prohibition of the 15th Amendment. And by this we are brought therefore to determine the interrelation of the provisions and the dependency of the two first, including the substandard under the second, upon the third; in other words, to decide whether or not such a unity existed between the standards that the destruction of one necessarily leaves no possible reason for recognizing the continued existence and operative force of the others.

In the Guinn Case this subject was also passed upon and *381 it was held that albeit the decision of the question was, in the very nature of things, a state one, nevertheless, in the absence of controlling state rulings, it was our duty to pass upon the subject, and that in doing so the overthrow of an illegal standard would not give rise to the destruction of a legal one unless such result was compelled by one or both of the following conditions: (a) Where the provision as a whole plainly and expressly established the dependency of the one standard upon the other, and therefore rendered it necessary to conclude that both must disappear as the result of the destruction of either; and (b) where, even although there was no express ground for reaching the conclusion just stated, nevertheless that view might result from an overwhelming implication consequent upon the condition which would be created by holding that the disappearance of the one did not prevent the survival of the other; that is, a condition which would be so unusual, so extreme, so incongruous as to leave no possible ground for the conclusion that the death of the one had not also carried with it the cessation of the life of the other.

That both of these exceptions here obtain we
think is clear: First, because, looking at the context of the provision, we think that the obvious purpose was not to subject to the exactions of the first standard (the property qualification) any person who was included in the other standards; and second, because the result of holding that the other standards survived the striking down of the third would be to bring about such an abnormal result as would bring the case **936 within the second exception, since it would come to pass that every American-born citizen would be deprived of his right to vote unless he was able to comply with the property qualification, and all naturalized citizens and their descendants would be entitled to vote without being submitted to any property qualification whatever. If the clauses as to naturalization were *382 assumed to be invalid, the incongruous result just stated would, of course, not arise, but the legal situation would be unchanged, since that view would not weaken the conclusion as to the unity of the provisions of the statute, but, on the contrary, would fortify it.

But it is argued even although this result be conceded, there nevertheless was no right to recover, and there must be a reversal since, if the whole statute fell, all the clauses providing for suffrage fell, and no right to suffrage remained, and hence no deprivation or abridgment of the right to vote resulted. But this, in a changed form of statement, advances propositions which we have held to be unsound in the Guinn Case. The qualification of voters under the Constitution of Maryland existed and the statute which previously provided for the registration and election in Annapolis was unaffected by the void provisions of the statute which we are considering. The mere change in some respects of the administrative machinery by the new statute did not relieve the new officers of their duty, nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution of the United States and the statutes passed in pursuance thereof. The conclusive effect of this view will become apparent when it is considered that if the argument were accepted, it would follow that al-

though the 15th Amendment by its self-operative force, without any action of the state, changed the clause in the Constitution of the state of Maryland conferring suffrage upon ‘every white male citizen’ so as to cause it to read ‘every male citizen,’ nevertheless the Amendment was so supine, so devoid of effect, as to leave it open for the legislature to write back by statute the discriminating provision by a mere changed form of expression into the laws of the state, and for the state officers to make the result of such action successfully operative.

There is a contention pressed concerning the application*383 of the statute upon which the suits were based to the acts in question. But we think, in view of the nature and character of the acts, of the self-operative force of the 15th Amendment, and of the legislation of Congress on the subject, that there is no ground for such contention.

Affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of these cases.

U.S. 1915

Myers v. Anderson

238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349

END OF DOCUMENT
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

The CATHOLIC BISHOP OF CHICAGO et al.

No. 77-752.
Decided March 21, 1979.

The National Labor Relations Board concluded that schools operated by church had violated National Labor Relations Act by refusing to recognize or to bargain with unions representing lay faculty members at the schools. The Court of Appeals for the Seventh Circuit, 559 F.2d 1112, denied enforcement of Board's orders, and certiorari was granted.

The Supreme Court, Mr. Chief Justice Burger, held that in view of the fact that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the religion clauses of the First Amendment and in view of the absence of a clear expression of Congress' intent to bring teachers in a church-operated school until after 1974 amendment was enacted, nothing in history of amendment could be read as reflecting Congress' tacit approval of Board's exercise of jurisdiction over lay faculty members of church-operated school. National Labor Relations Act, § 19 as amended 29 U.S.C.A. § 169.

Affirmed.

Mr. Justice Brennan filed a dissenting opinion, in which Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun joined.

West Headnotes

[1] Labor and Employment 231H C—1666

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings

Cited Cases

(Formerly 232Ak51 Labor Relations)

Where 1974 amendment to National Labor Relations Act removed exemption of nonprofit hospitals but NLRB did not assert jurisdiction over teachers in a church-operated school until after 1974 amendment was enacted, nothing in history of amendment could be read as reflecting Congress' tacit approval of Board's exercise of jurisdiction over lay faculty members of church-operated school. National Labor Relations Act, § 19 as amended 29 U.S.C.A. § 169.


92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1362 Private Education
92k1368 Employees
92k1368(1) k. In general. Most

Cited Cases
(Formerly 92k84.5(12), 92k84)

Labor and Employment 231H C—1666

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)1 In General
231Hk1665 Jurisdiction in General
231Hk1666 k. In general. Most

Cited Cases
(Formerly 232Ak505.1, 232Ak505 Labor Relations)

In view of fact that National Labor Relations Board's exercise of jurisdiction over teachers in church-operated schools would implicate guarantees of the religion clauses of the First Amendment and in view of absence of clear expression of Con-

**1314 *490 Syllabus FN*  

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The National Labor Relations Board (NLRB) certified unions as bargaining agents for lay teachers in schools operated by respondents, which refused to recognize or bargain with the unions; the NLRB issued cease-and-desist orders against respondents, holding that it had properly assumed jurisdiction over the schools. Exercise of jurisdiction was asserted to be in line with its policy of declining jurisdiction only when schools are “completely religious” not just “religiously associated,” as it found to be the case here, because the schools taught secular as well as religious subjects. On respondents' challenges to the NLRB orders, the Court of Appeals denied enforcement, holding that the NLRB standard failed to provide a workable guide for the exercise of its discretion and that the NLRB's assumption of jurisdiction was foreclosed by the Religion Clauses of the First Amendment. Held: Schools operated by a church to teach both religious and secular subjects are not within the jurisdiction granted by the National Labor Relations Act, and the NLRB was therefore without authority to issue the orders against respondents. Pp. 1318-1322.


(b) Neither the language of the statute nor its legislative history discloses any affirmative intention by Congress that church-operated schools be within the NLRB's jurisdiction, and, absent a clear expression of Congress' intent to bring teachers of church-operated schools within the NLRB's jurisdiction, the Court will not construe the Act in such a way as would call for the resolution of difficult and sensitive First Amendment questions. Pp. 1320-1322.

559 F.2d 1112, affirmed.


Don H. Reuben, Chicago, Ill., for respondents.

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

This case arises out of the National Labor Relations Board's exercise of jurisdiction over lay faculty members at two groups of Catholic high schools. We granted certiorari to consider two questions: (a) Whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (b) if the Act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the First Amendment? 434 U.S. 1061, 98 S.Ct. 1231, 55 L.Ed.2d 760 (1978).

*492 I

One group of schools is operated by the Catholic Bishop of Chicago, a corporation sole; the other group is operated by the Diocese of Fort Wayne-South Bend, Inc. The group operated by the Catholic Bishop of Chicago consists of two schools, Quigley North and Quigley South. FN1 Those schools are termed “minor seminaries” because of their role in educating high school students who may become priests. At one time, only students...
who manifested a positive and confirmed desire to be priests were admitted to the Quigley schools. In 1970, the requirement was changed so that students admitted to these schools need not show a definite inclination toward the priesthood. Now the students need only be recommended by their parish priest as having a potential for the priesthood or for Christian leadership. The schools continue to provide special religious instruction not offered in other Catholic secondary schools. The Quigley schools also offer essentially the same college-preparatory curriculum as public secondary schools. Their students participate in a variety of extracurricular activities which include secular as well as religious events. The schools are recognized by the State and accredited by a regional educational organization. 

FN1. The Catholic Bishop operates other schools in the Chicago area, but they were not involved in the proceedings before the Board.

FN2. As explained to the Board's Hearing Officer, in Illinois the term “approval” is distinct from “recognition.” Before a school may operate, it must be approved by the State's Department of Education. Approval is given when a school meets the minimal requirements under state law, such as for compulsory attendance; approval does not require any evaluation of the school's program. Recognition, which is not required to operate, is given only after the school has passed the State's evaluation.

The Diocese of Fort Wayne-South Bend, Inc., has five high schools. FN3 Unlike the Quigley schools, the special recommendation of a priest is not a prerequisite for admission. Like the Quigley schools, however, these high schools seek to provide a traditional secular education but oriented to the tenets of the Roman Catholic faith; religious training is also mandatory. These schools are similarly certified by the State.

FN3. The Diocese also has 47 elementary schools. They were not involved in the proceedings before the Board. 

FN4. As explained to the Board's Hearing Officer, “certification” by the State of Indiana is roughly equivalent to “recognition” by the State of Illinois. Both are voluntary procedures which involve some evaluation by the state educational authorities. 

In 1974 and 1975, separate representation petitions were filed with the Board by interested union organizations for both the Quigley and the Fort Wayne-South Bend schools; representation was sought only for lay teachers. The schools challenged the assertion of jurisdiction on two grounds: (a) that they do not fall within the Board's discretionary jurisdictional criteria; and (b) that the Religion Clauses of the First Amendment preclude the Board's jurisdiction. The Board rejected the jurisdictional arguments on the basis of its decision in Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975). There the Board explained that its policy was to decline jurisdiction over religiously sponsored organizations “only when they are completely religious, not just religiously associated”. Id., at 250. Because neither group of schools was found to fall within the Board's “completely religious” category, the Board ordered elections.

FN5. The certification and order cover only “all full-time and regular part-time lay teachers, including physical education teachers . . .; and excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act . . . .” Catholic Bishop

FN6. The decision concerning the Diocese of Fort Wayne-South Bend, Inc., is not reported.

*494 In the Board-supervised election at the Quigley schools, the Quigley Education Alliance, a union affiliated with the Illinois Education Association, prevailed and was certified as the exclusive bargaining representative for 46 lay teachers. In the Diocese of Fort Wayne-South Bend, the Community Alliance for Teachers of Catholic High Schools, a similar union organization, prevailed and was certified as the representative for the approximately 180 lay teachers. Notwithstanding the Board's order, the schools declined to recognize the unions or to bargain. The unions filed unfair labor practice complaints with the Board under §§ 8(a)(1) and (5) of the National Labor Relations Act, 49 Stat. 452, as **1316 amended, 29 U.S.C. §§ 158(a)(1) and (5). The schools opposed the General Counsel's motion for summary judgment, again challenging the Board's exercise of jurisdiction over religious schools on both statutory and constitutional grounds.

The Board reviewed the record of previous proceedings and concluded that all of the arguments had been raised or could have been raised in those earlier proceedings. Since the arguments had been rejected previously, the Board granted summary judgment, holding that it had properly exercised its statutory discretion in asserting jurisdiction over these schools. FN7 The Board concluded that the schools had violated the Act and ordered that they cease their unfair labor practices and that they bargain collectively with the unions. *495Catholic Bishop of Chicago, 224 N.L.R.B. 1221 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226 (1976).

FN7. The Board relied on its reasoning in Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, 223 N.L.R.B. 1218 (1976): “We also do not agree that the schools are religious institutions intimately involved with the Catholic Church. It has heretofore been the Board’s policy to decline jurisdiction over institutions only when they are completely religious, not just religiously associated. Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, 216 NLRB 249 (1975). The schools perform in part the secular function of educating children, and in part concern themselves with religious instruction. Therefore, we will not decline to assert jurisdiction over these schools on such a basis.” 223 N.L.R.B., at 1218.

II

The schools challenged the Board’s orders in petitions to the Court of Appeals for the Seventh Circuit. That court denied enforcement of the Board’s orders. 559 F.2d 1112 (1977). FN8 The court considered the Board’s actions in relation to its discretion in choosing to extend its jurisdiction only to religiously affiliated schools that were not “completely religious.” It concluded that the Board had not properly exercised its discretion, because the Board’s distinction between “completely religious” and “merely religiously associated” failed to provide a workable guide for the exercise of discretion:


“We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where ‘completely religious' takes over or, on the other hand, ceases. In our
opinion the dichotomous ‘completely religious—merely religiously associated’ standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition. See, e. g., [Wisconsin v.] Yoder, . . . 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 [(1972)].” Id., at 1118.

The Court of Appeals recognized that the rejection of the Board’s policy as to church-operated schools meant that the Board would extend its jurisdiction to all church-operated *496 schools. The court therefore turned to the question of whether the Board could exercise that jurisdiction, consistent with constitutional limitations. It concluded that both the Free Exercise Clause and the Establishment Clause of the First Amendment foreclosed the Board’s jurisdiction. It reasoned that from the initial act of certifying a union as the bargaining agent for lay teachers the Board’s action would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion. It analyzed the Board’s action in this way:

“At some point, factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost**1317 necessarily raise First Amendment problems. If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an ‘integral part of the religious mission of the Catholic Church,’ *Lemon v. Kurtzman,* 403 U.S. 602, 616 [ 91 S.Ct. 2105, 2113, 29 L.Ed.2d 745] [(1971) ], courts and agencies would be hard pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry, and English literature.” *Ibid.*

The court distinguished local regulations which required fire inspections or state laws mandating attendance, reasoning that they did not “have the clear inhibiting potential upon the relationship between teachers and employers with which the present Board order is directly concerned.” *Id.*, at 1124. The court held that interference with management prerogatives, found acceptable in an ordinary commercial setting, was not acceptable in an area protected by the First Amendment. “The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops’ control of the religious mission of the schools.” *Ibid.*

*497 III*

The Board’s assertion of jurisdiction over private schools is, as we noted earlier, a relatively recent development. Indeed, in 1951 the Board indicated that it would not exercise jurisdiction over nonprofit, educational institutions because to do so would not effectuate the purposes of the Act. *Trustees of Columbia University in the City of New York, 97 N.L.R.B. 424.* In 1970, however, the Board pointed to what it saw as an increased involvement in commerce by educational institutions and concluded that this required a different position on jurisdiction. In *Cornell University, 183 N.L.R.B. 329,* the Board overruled its *Columbia University* decision. *Cornell University* was followed by the assertion of jurisdiction over nonprofit, private secondary schools. *Shattuck School, 189 N.L.R.B. 886* (1971). See also *Judson School,* 209 N.L.R.B. 677 (1974). The Board now asserts jurisdiction over all private, nonprofit, educational institutions with gross annual revenues that meet its jurisdictional requirements whether they are secular or religious. 29 CFR § 103.1 (1978). See, e. g., *Academia San Jorge,* 234 N.L.R.B. 1181 (1978) (advisory opinion stating that Board would not assert jurisdiction over Catholic educational institution which did not meet jurisdictional standards); *Windsor School, Inc., 199 N.L.R.B. 457, 200 N.L.R.B. 991* (1972) (declining jurisdiction where private, proprietary school did not meet jurisdictional amounts).

That broad assertion of jurisdiction has not gone unchallenged. But the Board has rejected the
contention that the Religion Clauses of the First Amendment bar the extension of its jurisdiction to church-operated schools. Where the Board has declined to exercise jurisdiction, it has done so only on the grounds of the employer's minimal impact on commerce. Thus, in *Association of Hebrew Teachers of Metropolitan Detroit*, 210 N.L.R.B. 1053 (1974), the Board did not assert jurisdiction over the Association which offered *498* courses in Jewish culture in after-school classes, a nursery school, and a college. The Board termed the Association an “isolated instance of [an] atypical employer.” *Id.*, at 1058-1059. It explained: “Whether an employer falls within a given ‘class’ of enterprise depends upon those of its activities which are predominant and give the employing enterprise its character. . . . [T]he fact that an employer’s activity . . . is dedicated to a sectarian religious purpose is not a sufficient reason for the Board to refrain from asserting jurisdiction.” *Id.*, at 1058. Cf. *Board of Jewish Education of Greater Washington, D. C.*, 210 N.L.R.B. 1037 (1974). In the same year the Board asserted jurisdiction over an Association chartered by the State of New York to operate diocesan high schools. **1318**Henry M. Hald High School Assn., 213 N.L.R.B. 415 (1974). It rejected the argument that its assertion of jurisdiction would produce excessive governmental entanglement with religion. In the Board's view, the Association had chosen to entangle itself with the secular world when it decided to hire lay teachers. *Id.*, at 418 n. 7. FN9

When it ordered an election for the lay professional employees at five parochial high schools in Baltimore in 1975, the Board reiterated its belief that exercise of its jurisdiction is not contrary to the First Amendment:

“[T]he Board's policy in the past has been to decline jurisdiction over similar institutions only when they are completely religious, not just religiously associated, and the Archdiocese concedes that instruction is not limited to religious subjects. That the Archdiocese seeks to provide an education based on Christian principles does not lead to a contrary conclusion. Most religiously associated institutions seek to operate in conformity with *499* their religious tenets.” *Roman Catholic Archdiocese of Baltimore*, 216 N.L.R.B., at 250.

The Board also rejected the First Amendment claims in *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles*, 223 N.L.R.B. 1218, 1218 (1976): “Regulation of labor relations does not violate the First Amendment when it involves a *minimal intrusion* on religious conduct and is necessary to obtain [the Act's] objective.” (Emphasis added.)

The Board thus recognizes that its assertion of jurisdiction over teachers in religious schools constitutes some degree of intrusion into the administration of the affairs of church-operated schools. Implicit in the Board's distinction between schools that are “completely religious” and those “religiously associated” is also an acknowledgment of some degree of entanglement. Because that distinction was measured by a school's involvement with commerce, however, and not by its religious association, it is clear that the Board never envisioned any sort of religious litmus test for determining when to assert jurisdiction. Nevertheless, by expressing its traditional jurisdictional standards in First Amendment terms, the Board has plainly recognized that intrusion into this area could run afoul of the Religion Clauses and hence preclude jurisdiction on constitutional grounds.

IV

That there are constitutional limitations on the Board's actions has been repeatedly recognized by this Court even while acknowledging the broad
scope of the grant of jurisdiction. The First Amend-
ment, of course, is a limitation on the power of
Congress. Thus, if we were to conclude that the Act
granted the challenged jurisdiction over these
teachers we would be required to decide whether
that was constitutionally permissible under the Re-
ligion Clauses of the First Amendment.

*500 Although the respondents press their
claims under the Religion Clauses, the question we
consider first is whether Congress intended the
Board to have jurisdiction over teachers in church-
operated schools. In a number of cases the Court
has heeded the essence of Mr. Chief Justice Mar-
shall's admonition in Murray v. The Charming
Betsy, 2 Cranch 64, 118, 2 L.Ed. 208 (1804), by
holding that an Act of Congress ought not be con-
strued to violate the Constitution if any other pos-
sible construction remains available. Moreover, the
Court has followed this policy in the interpretation
of the Act now before us and related statutes.

In Machinists v. Street, 367 U.S. 740, 81 S.Ct.
1784, 6 L.Ed.2d 1141 (1961), for example, the
Court considered claims that serious First Amend-
ment questions would arise if the Railway Labor
Act were construed to allow compulsory union dues
to be used to support political candidates or causes
not approved by some members. The Court **1319
looked to the language of the Act and the legislat-
ive history and concluded that they did not permit
union dues to be used for such political purposes,
thus avoiding “serious doubt of [the Act's] constitu-
tionality.” Id., at 749, 81 S.Ct. at 1789.

Similarly in McCulloch v. Sociedad Nacional
de Marineros de Honduras, 372 U.S. 10, 83 S.Ct.
671, 9 L.Ed.2d 547 (1963), a case involving the
Board's assertion of jurisdiction over foreign sea-
men, the Court declined to read the National Labor
Relations Act so as to give rise to a serious question
of separation of powers which in turn would have
implicated sensitive issues of the authority of the
Executive over relations with foreign nations. The
international implications of the case led the Court
to describe it as involving “public questions partic-
ularly high in the scale of our national interest.” Id.,
at 17, 83 S.Ct., at 675. Because of those questions
the Court held that before sanctioning the Board's
exercise of jurisdiction “ ‘there must be present the
affirmative intention of the Congress clearly ex-
pressed.’ ” Id., at 21-22, 83 S.Ct., at 678 (quoting
Benz v. Compania Naviera Hidalgo, 353 U.S. 138,
147, 77 S.Ct. 699, 704, 1 L.Ed.2d 709 (1957)).

*501 The values enshrined in the First Amend-
ment plainly rank high “in the scale of our national
values.” In keeping with the Court's prudential
policy it is incumbent on us to determine whether
the Board's exercise of its jurisdiction here would
give rise to serious constitutional questions. If so,
we must first identify “the affirmative intention of
the Congress clearly expressed” before concluding
that the Act grants jurisdiction.

V

In recent decisions involving aid to parochial
schools we have recognized the critical and unique
role of the teacher in fulfilling the mission of a
church-operated school. What was said of the
schools in Lemon v. Kurtzman, 403 U.S. 602, 617,
91 S.Ct. 2105, 2113, 29 L.Ed.2d 745 (1971), is true
of the schools in this case: “Religious authority ne-
cessarily pervades the school system.” The key role
played by teachers in such a school system has been
the predicate for our conclusions that governmental
aid channeled through teachers creates an imper-
missible risk of excessive governmental entangle-
ment in the affairs of the church-operated schools.
For example, in Lemon, supra, at 617, 91 S.Ct., at
2113, we wrote:

“In terms of potential for involving some as-
pect of faith or morals in secular subjects, a text-
book's content is ascertainable, but a teacher's
handling of a subject is not. We cannot ignore the
danger that a teacher under religious control and
discipline poses to the separation of the religious
from the purely secular aspects of pre-college edu-
cation. The conflict of functions inheres in the sit-
uation.” (Emphasis added.)
Only recently we again noted the importance of the teacher's function in a church school: “Whether the subject is ‘remedial reading,’ ‘advanced reading,’ or simply ‘reading,’ a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists.” *Meek v. Pittenger*, 421 U.S. 349, 370, 95 S.Ct. 1753, 1766, 44 L.Ed.2d 217 (1975). Cf. *Wolman v. Walter*, 433 U.S. 229, 244, 97 S.Ct. 2593, 2603, 53 L.Ed.2d 714 (1977). Good intentions by government-or third parties-can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon, Meek*, and *Wolman*.

The Board argues that it can avoid excessive entanglement since it will resolve only factual issues such as whether an anti-union animus motivated an employer's action. But at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed.

**1320** Moreover, it is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

The Board's exercise of jurisdiction will have at least one other impact on church-operated schools. The Board will be called upon to decide what are “terms and conditions of *employment*” and therefore mandatory subjects of bargaining. See 29 U.S.C. § 158(d). Although the Board has not interpreted that phrase as it relates to educational institutions, similar state provisions provide insight into the effect of mandatory bargaining. The Oregon Court of Appeals noted that “nearly everything that goes on in the schools affects teachers and is therefore arguably a ‘condition of employment.’” *Springfield Education Assn. v. Springfield School Dist. No. 19*, 24 Or.App. 751, 759, 547 P.2d 647, 650 (1976).


FN10

FN10. This kind of inquiry and its sensitivity are illustrated in the examination of Monsignor O'Donnell, the Rector of Quigley North, by the Board's Hearing Officer, which is reproduced in the appendix to this opinion.
“Parochial schools involve substantial religious activity and purpose.

“The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.” (Footnote omitted.)

Mr. Justice Douglas emphasized this in his concurring opinion in Lemon, noting “the admitted and obvious fact that the raison d’être of parochial schools is the propagation of a religious faith.” 403 U.S., at 628, 91 S.Ct., at 2118.

*504* The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board’s exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow. We therefore turn to an examination of the National Labor Relations Act to decide whether it must be read to confer jurisdiction that would in turn require a decision on the constitutional claims raised by respondents.

VI

There is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act. Admittedly, Congress defined the Board’s jurisdiction in very broad terms; we must therefore examine the legislative history of the Act to determine whether Congress contemplated that the grant of jurisdiction would include teachers in such schools.

In enacting the National Labor Relations Act in 1935, Congress sought to protect the right of American workers to bargain collectively. The concern that was repeated throughout the debates was the need to assure workers the right to organize to counterbalance the collective activities of employers which had been authorized by the National Industrial Recovery Act. But congressional attention focused on employment in private industry and on industrial recovery. See, e. g., 79 Cong.Rec. 7573 (1935) (remarks of Sen. Wagner), 2 National Labor Relations Board, Legislative History of the National Labor Relations Act, 1935, pp. 2341-2343 (1949).

Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools. It is not without significance, however, that the Senate Committee on Education and Labor chose a college professor’s dispute with the college as an example of *505* employer-employee relations not covered by the Act. S.Rep.No.573, 74th Cong., 1st Sess., 7 (1935), 2 Legislative History *supra*, at 2307.


*FN11* The National Labor Relations Act was amended again when Congress passed the Labor-Management Reporting and Disclosure Act in 1959. 73 Stat. 519. That Act made no changes in the definition of “employer” and the legislative history contains no reference to church-operated schools. See generally National Labor Relations Board, Legislative History of the

[1] The most recent significant amendment to the Act was passed in 1974, removing the exemption of nonprofit hospitals. Pub.L. 93-360, 88 Stat. 395. The Board relies upon that amendment as showing that Congress approved the Board’s exercise of jurisdiction over church-operated schools. A close examination of that legislative history, however, reveals nothing to indicate an affirmative intention that such schools be within the Board’s jurisdiction. Since the Board did not assert jurisdiction over teachers in a church-operated school until after the 1974 amendment, nothing in the history of the amendment can be read as reflecting Congress’ tacit approval of the Board’s action.

[2] During the debate there were expressions of concern about the effect of the bill on employees of religious hospitals whose religious beliefs would not permit them to join a union. 120 Cong.Rec. 12946, 16914 (1974), Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974, 93d Cong., 2d Sess., 118, 331-332 (1974) (remarks of Sen. Ervin and Rep. Erlenborn). The result of those concerns was an amendment which reflects congressional sensitivity to First Amendment guarantees:

“Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of title 26, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.” 29 U.S.C. § 169.

The absence of an “affirmative intention of the Congress clearly expressed” fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.

The Board relies heavily upon *507 Associated Press v. NLRB, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937). There the Court held that the First Amendment was no bar to the application of the Act to the Associated Press, an organization engaged in collecting information and news throughout the world and distributing it to its members. Perceiving nothing to suggest that application of the Act would infringe First Amendment guarantees of press freedoms, the Court sustained Board jurisdiction. Id., at 131-132, 57 S.Ct., at 655. Here, on the contrary, the record affords abundant evidence that the Board’s exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses.

Accordingly, in the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

Affirmed.

APPENDIX TO OPINION OF THE COURT

Q. [by Hearing Officer] Now, we have had quite a bit of testimony already as to liturgies, and I don’t want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?

A. I think our first problem with that would be
defining liturgies. That word would have many definitions. Do you want to go into that?

Q. I believe you defined it before, is that correct, when you first testified?

A. I am not sure. Let me try briefly to do it again, okay?

Q. Yes.

A. A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman *508 Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer.

Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of these—and there is a big spectrum in between those two extremes—all of these are popularly referred to as liturgies.

Q. I see.

A. Now, possibly in repeating your question, you could give me an idea of that spectrum, I could respond more accurately.

Q. Well, let us stick with the formal Masses. If you know, how many Masses are required at Catholic parochial high schools?

A. Some have none, none required. Some would have two or three during the year where what we call Holy Days of Obligation coincide with school days. Some schools on those days prefer to have a Mass within the school day so the students attend there, rather than their parish churches. Some schools feel that is not a good idea. *1323 they should always be in their parish church; so that varies a great deal from school to school.

Mr. Justice BRENNAN, with whom Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join, dissenting.

The Court today holds that coverage of the National Labor Relations Act does not extend to lay teachers employed by church-operated schools. That construction is plainly wrong in light of the Act’s language, its legislative history, and this Court’s precedents. It is justified solely on the basis of a canon of statutory construction seemingly invented by the Court for the purpose of deciding this case. I dissent.

I

The general principle of construing statutes to avoid unnecessary constitutional decisions is a well-settled and salutary *509 one. The governing canon, however, is not that expressed by the Court today. The Court requires that there be a “clear expression of an affirmative intention of Congress” before it will bring within the coverage of a broadly worded regulatory statute certain persons whose coverage might raise constitutional questions. Ante, at 1320. But those familiar with the legislative process know that explicit expressions of congressional intent in such broadly inclusive statutes are not commonplace. Thus, by strictly or loosely applying its requirement, the Court can virtually remake congressional enactments. This flouts Mr. Chief Justice Taft’s admonition “that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitation.” Yu Cong Eng v. Trinidad, 271 U.S. 500, 518, 46 S.Ct. 619, 623, 70 L.Ed. 1059 (1926). See Aptheker v. Secretary of State, 378 U.S. 500, 515, 84 S.Ct. 1659, 1668, 12 L.Ed.2d 992 (1964); Jay v. Boyd, 351 U.S. 345, 357 n. 21, 76 S.Ct. 919, 926, 100 L.Ed. 1242 (1956); Shapiro v. United States, 335 U.S. 1, 31, and n. 40, 68 S.Ct. 1375, 1391, 92 L.Ed. 1242 (1948); United States v. Sullivan, 332 U.S. 689, 693, 68 S.Ct. 331, 334, 92 L.Ed. 297 (1948); Hopkins Federal Savings & Loan Ass’n v. Cleary, 296 U.S. 315, 335, 56 S.Ct. 235, 240, 80 L.Ed. 251 (1935).FN1

FN1. The Court’s new canon derives from the statement, “there must be present the affirmative intention of the Congress
clearly expressed,” in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22, 83 S.Ct. 671, 678, 9 L.Ed.2d 547 (1963). Reliance upon that case here is clearly misplaced. The question in *McCulloch* was whether the National Labor Relations Act extended to foreign seamen working aboard foreign-flag vessels. No question as to the constitutional power of Congress to cover foreign crews was presented. Indeed, all parties agreed that Congress was constitutionally empowered to reach the foreign seamen involved while they were in American waters. *Id.*, at 17, 83 S.Ct., at 675. The only question was whether Congress had intended to do so.

The *McCulloch* Court held that Congress had not meant to reach disputes between foreign shipowners and their foreign crews. *McCulloch*, however, did not turn simply upon an absence of affirmative evidence that Congress wanted to reach alien seamen, but rather upon the fact, as a prior case had already held, that the legislative history “‘inescapably describe[d] the boundaries of the Act as including only the workingmen of our own country and its possessions.’” *Id.*, at 18, 83 S.Ct., at 676 quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 144, 77 S.Ct. 699, 702, 1 L.Ed.2d 709 (1957). The Court also noted that under well-established rules of international law, “the law of the flag state ordinarily governs the internal affairs of a ship. See *Wildenhus's Case*, [120 U.S. 1,] at 12, 7 S.Ct. [385], at 387, 30 L.Ed. 565,” 372 U.S., at 21, 83 S.Ct., at 677. In light of that contrary legislative history and domestic and international precedent, it is not at all surprising that *McCulloch* balked at holding foreign seamen covered without a strong affirmative showing of congressional intent. As the Court today admits, there is no such contrary legislative history or precedent with respect to jurisdiction over church-operated schools. *Ante*, at 1320-1321. The *McCulloch* statement, therefore, has no role to play in this case.

The settled canon for construing statutes wherein constitutional questions may lurk was stated in *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), cited by the Court, *ante*, at 1318:

> **1324** “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598. *Id.*, at 749-750, 81 S.Ct., at 1790 (emphasis added).

*FN2* In *Street*, the Court construed the Railway Labor Act as not permitting the use of an employee’s compulsorily checked-off union dues for political causes with which he disagreed. As in *McCulloch*, see n. 1, *supra*, it so held not because of an absence of affirmative evidence that Congress did mean to permit such uses, but rather because the language and history of the Act indicated affirmatively that Congress did not mean to permit such constitutionally questionable practices. See 367 U.S., at 765-770, 81 S.Ct., at 1798-1800.

77 L.Ed. 1265 (1933). This limitation to constructions that are “fairly possible,” and “reasonable,” see Yu Cong Eng v. Trinidad, supra, 271 U.S., at 518, 46 S.Ct., at 623, acts as a *511 brake against wholesale judicial dismemberment of congressional enactments. It confines the judiciary to its proper role in construing statutes, which is to interpret them so as to give effect to congressional intention. The Court’s new “affirmative expression” rule releases that brake.

II

The interpretation of the National Labor Relations Act announced by the Court today is not “fairly possible.” The Act’s wording, its legislative history, and the Court’s own precedents leave “the intention of the Congress . . . revealed too distinctly to permit us to ignore it because of mere misgivings as to power.” Moore Ice Cream Co. v. Rose, supra, 289 U.S., at 379, 53 S.Ct., at 622. Section 2(2) of the Act, 29 U.S.C. § 152(2), defines “employer” as

“. . . any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.” (Emphasis added.)

Thus, the Act covers all employers not within the eight express exceptions. The Court today substitutes amendment for construction to insert one more exception—for church-operated schools. This is a particularly transparent violation of the judicial role: The legislative history reveals that Congress itself considered and rejected a very similar amendment.

The pertinent legislative history of the NLRA begins with the Wagner Act of 1935, 49 Stat. 449. Section 2(2) of that Act, identical in all relevant respects to the current section, excluded neither church-operated schools nor any other private nonprofit organization. Accordingly, in applying that Act, the National Labor Relations Board did not recognize an exception for nonprofit employers, even when religiously associated. An argument for **1325 an implied nonprofit exemption was rejected because the design of the Act was as clear then as it is now: “[N]either charitable institutions nor their employees are exempted from operation of the Act by its terms, although certain other employers and employees are exempted.” Central Dispensary & Emergency Hospital, 44 N.L.R.B. 533, 540 (1942) (footnotes omitted), enf’d, 79 U.S.App.D.C. 274, 145 F.2d 852 (1944). Both the lower courts and this Court concurred in the Board’s construction. See Polish National Alliance v. NLRB, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944), aff’g 136 F.2d 175 (CA7 1943); Associated Press v. NLRB, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937), aff’g 85 F.2d 56 (CA2 1936); NLRB v. Central Dispensary & Emergency Hospital, 79 U.S.App.D.C. 274, 145 F.2d 852 (1944).

FN3. Section 2(2), 49 Stat. 450, stated:

“The term ‘employer’ includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”

FN4. See Christian Board of Publication, 13 N.L.R.B. 534, 537 (1939), enf’d, 113 F.2d 678 (CA8 1940); American Medical Assn., 39 N.L.R.B. 385, 386 (1942); Central Dispensary & Emergency Hospital, 44 N.L.R.B. 533, 539 (1942), enf’d, 79 U.S.App.D.C. 274, 145 F.2d 852 (1944); Henry Ford Trade School, 58 N.L.R.B. 1535, 1536 (1944); Polish National Alli-
ance, 42 N.L.R.B. 1375, 1380 (1942), enf’d, 136 F.2d 175 (CA7 1943), aff’d, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944); Associated Press, 1 N.L.R.B. 788, 790, enf’d, 85 F.2d 56 (CA2 1936), aff’d, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937). In unpublished decisions, the Board also exercised jurisdiction over the YWCA and the Welfare & Recreational Association. See Central Dispensary & Emergency Hospital, 44 N.L.R.B., at 538 n. 8.

The Hartley bill, which passed the House of Representatives\(^5\) in 1947, would have provided the exception the Court today writes into the statute:

“The term ‘employer’ . . . shall not include . . . any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . .” (Emphasis added.) H.R. 3020, 80th Cong., 1st Sess., § 2(2) (Apr. 18, 1947), reprinted in National Labor Relations Board, Legislative History of the Labor Management Relations Act, 1947, pp. 160-161 (hereafter, 1947 Leg.Hist.).

But the proposed exception was not enacted. FN5
The bill reported by the Senate Committee on Labor and Public Welfare did not contain the Hartley exception. See S. 1126, 80th Cong., 1st Sess., § 2(2) (Apr. 17, 1947), 1947 Leg.Hist. 99, 102. Instead, the Senate proposed an exception limited to nonprofit hospitals, and passed the bill in that form. See H.R. 3020, 80th Cong., 1st Sess., § 2(2) (Senate, May 13, 1947), 1947 Leg.Hist. 226, 229. The Senate version was accepted by the House in conference, thus limiting the exception *\(^\text{514}\) for nonprofit employers to nonprofit hospitals. Ch. 120, 61 Stat. 136. FN6

FN5. A number of reasons were offered for the rejection of the Hartley bill's exception.

Some Congressmen strongly opposed the exception, see 93 Cong.Rec. 3446 (1947) (remarks of Rep. Klein); some were opposed to additional exceptions to the Board's jurisdiction, see id., at 4997 (remarks of Sen. Taft); and some thought it unnecessary, see H.R.Conf.Rep.No.510, 80th Cong., 1st Sess., 32 (1947), 1947 Leg.Hist. 536. See generally NLRB v. Wentworth Institute, 515 F.2d 550, 555 (CA1 1975) (“[P]erhaps the most obvious, interpretation of the rejection of the House exclusion would be that Congress meant to include nonprofit organizations [within the scope of the Act]”); Sherman & Black, The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption, 83 Harv.L.Rev. 1323, 1331-1337 (1970). But whatever the reasons, it is clear that an amendment similar to that made by the Court today was proposed and rejected in 1947.

FN6. The Board's contemporaneous construction of the 1947 amendment was that only nonprofit hospitals were intended to be exempt. In 1950, for example, in asserting jurisdiction over a nonprofit religious organization, the Board stated:

“The Employer asserts that, as it is a nonprofit organization which is engaged in purely religious activities, it is not engaged in commerce within the meaning of the Act. We find no merit in this contention. . . . As this Board and the courts have held, it is immaterial that the Employer may be a nonprofit organization, or that its activities may be motivated by considerations other than those applicable to enterprises which are, in the generally accepted sense, commercial.” Sunday School Board of the Southern Baptist Convention, 92 N.L.R.B. 801, 802.
“It is true that in *Trustees of Columbia University*, 97 N.L.R.B. 424 (1951), the Board indicated that it would not exercise jurisdiction over nonprofit, educational institutions; but it expressly did so as a matter of discretion, affirming that the activities of the University did come within the Act and the Board's jurisdiction. *Id.*, at 425. That 1951 discretionary decision does not undermine the validity of the Board's determination in *Cornell University*, 183 N.L.R.B. 329 (1970), that changing conditions—particularly the increasing impact of such institutions on interstate commerce—now required a change in policy leading to the renewed exercise of Board jurisdiction. As we emphasized in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-266, 95 S.Ct. 959, 967-968, 43 L.Ed.2d 171 (1975):

“To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking. ‘Cumulative experience’ begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.’ *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 [73 S.Ct. 287, 290, 97 L.Ed. 377] (1953).”


Moreover, it is significant that in considering the 1974 amendments, the Senate expressly rejected an amendment proposed by Senator Ervin that was analogous to the one the Court today creates—an amendment to exempt nonprofit hospitals operated by religious groups. 120 Cong.Rec. 12950, 12968 (1974), 1974 Leg.Hist. 119, 141. Senator Cranston, floor manager of the Senate Committee bill and primary opponent of the proposed religious exception, explained:

FN7. The House Report stated: “Currently, the only broad area of charitable, eleemosynary, educational institutions wherein the Board does not now exercise jurisdiction concerns the nonprofit hospitals, explicitly excluded by section 2(2) of the Act. . . . [T]he bill removes the existing Taft-Hartley exemption in section 2(2) of the Act. It restores to the employees of nonprofit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees.” H.R.Rep.No.93-1051, p. 4 (1974). Similarly, Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, criticized the nonprofit-hospital exemption as “not only inconsistent with the protection enjoyed by proprietary hospitals and other types of health care institutions, but it is also inconsistent with the coverage of other nonprofit activities.” 120 Cong.Rec. 12938 (1974), 1974 Leg.Hist. 95. See also 120 Cong.Rec. 16900 (1974), 1974 Leg.Hist. 291 (Rep. Ashbrook).

“[S]uch an exception for religiously affiliated
hospitals would seriously erode the existing national policy which holds religiously affiliated institutions generally such as proprietary nursing homes, residential communities, and educational facilities to the same standards as their nonsectarian counterparts.” 120 Cong.Rec. 12957 (1974), 1974 Leg.Hist. 137 (emphasis added).


FN8. The Court relies upon the fact that the 1974 amendments provided that “[a]ny employee of a health care institution who is a member of . . . a bona fide religion . . . which has historically held conscientious objections to joining . . . labor organizations shall not be required to join . . . any labor organization as a condition of employment . . . .” 29 U.S.C. § 169 (emphasis added). This is, of course, irrelevant to the instant case, as no employee has alleged that he was required to join a union against his religious principles and not even the respondent-employers contend that collective bargaining itself is contrary to their religious beliefs. Recognizing this, the Court has limited its inference from the amendment to the proposition that it reflects “congressional sensitivity to First Amendment guarantees.” Ante, at 1322. This is quite true, but its usefulness as support for the Court’s opinion is completely negated by the rejection of the Ervin amendment, see text, supra, which makes clear the balance struck by Congress. While Congress agreed to exclude conscientiously objecting employees, it expressly refused to sanction an exclusion for all religiously affiliated employers.

**1327 In construing the Board's jurisdiction to exclude church-operated schools, therefore, the Court today is faithful to neither the statute's language nor its history. Moreover, it is also untrue to its own precedents. “This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause. See, e. g., Guss v. Utah Labor Relations Board, 353 U.S. 1, 3, 77 S.Ct. 598, 599, 609, 1 L.Ed.2d 601; Polish National Alliance v. National Labor Relations Board, 322 U.S. 643, 647-648, 64 S.Ct. 1196, 1198-1199, 88 L.Ed. 1509; National Labor Relations Board v. Fainblatt, 306 U.S. 601, 607, 59 S.Ct. 668, 672, 83 L.Ed. 1014.” NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226, 83 S.Ct. 312, 313, 9 L.Ed.2d 279 (1963) (emphasis in original). As long as an employer is within the reach of Congress' power under the Commerce Clause-and no one doubts that respondents are-the Court has held him to be covered by the Act regardless of the nature of his activity. See, e. g., Polish National Alliance v. NLRB, 322 U.S. 643, 59 S.Ct. 668, 83 L.Ed. 1014 (1944) (nonprofit fraternal organization). Indeed, Associated Press v. NLRB, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937), construed the Act to *517 cover editorial employees of a nonprofit news-gathering organization despite a claim—precisely parallel to that made here—that their inclusion rendered the Act in violation of the First Amendment. FN9 Today's opinion is simply unable to explain the grounds that distinguish that case from this one. FN10

FN9. Associated Press stated the employer's argument as follows:

“The conclusion which the petitioner draws is that whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news, that there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee to color or to distort what he writes, and that the Associated Press cannot be free to furnish unbiased and impartial news re-
ports unless it is equally free to determine for itself the partiality or bias of editorial employees. So it is said that any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press." 301 U.S., at 131.

FN10. The Court would distinguish Associated Press on the ground that there the Court “[p]erceiv[ed] nothing to suggest that application of the Act would infringe First Amendment guarantees . . . [while h]ere, on the contrary, the record affords abundant evidence that the Board’s exercise of jurisdiction . . . would implicate the guarantees of the Religion Clauses.” Ante, at 1322. But this is mere assertion. The Court does not explain why the press’ First Amendment problem in Associated Press was any less substantial than the church-supported schools’ First Amendment challenge here. In point of fact, the problems raised are of precisely the same difficulty. The Court therefore cannot square its judicial “reconstruction” of the Act in this case with the refusal to rewrite the same Act in Associated Press.

Thus, the available authority indicates that Congress intended to include-not exclude-lay teachers of church-operated schools. The Court does not counter this with evidence that Congress did not state explicitly that they were covered. In Mr. Justice Cardozo’s words, this presses “avoidance of A *518 DIFFICULTY . . . TO THE POINT OF DISINGENUOUS EVASION.” Moore Ice Cream Co. v. Rose, 289 U.S., at 379, 53 S.Ct., at 622.

FN11. Not even the Court's redrafting of the statute causes all First Amendment problems to disappear. The Court’s opinion implies limitation of its exception to church-operated schools. That limitation is doubtless necessary since this Court has already rejected a more general exception for nonprofit organizations. See Polish National Alliance v. NLRB, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944). But such an exemption, available only to church-operated schools, generates a possible Establishment Clause question of its own. Walz v. Tax Comm'n, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), does not put that question to rest, for in upholding the property tax exemption for churches there at issue, we emphasized that New York had “not singled out . . . churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations . . . .” Id., at 673, 90 S.Ct., at 1413. Like the Court, “at this stage of [my] consideration [I am] not compelled to determine whether the [Establishment Clause problem] is [as significant] and [I] would were [I] considering the constitutional issue.” Ante, at 1319-1320. It is enough to observe that no matter which way the Court turns in interpreting the Act, it cannot avoid constitutional questions.

**1328 III

Under my view that the NLRA includes within its coverage lay teachers employed by church-operated schools, the constitutional questions presented would have to be reached. I do not now do so only because the Court does not. See Sierra Club v. Morton, 405 U.S. 727, 755, 92 S.Ct. 1361, 1376, 31 L.Ed.2d 636 (1972) (Brennan, J., dissenting). I repeat for emphasis, however, that while the resolution of the constitutional question is not without difficulty, it is irresponsible to avoid it by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent. A statute is

N.L.R.B. v. Catholic Bishop of Chicago

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Supreme Court of the United States
NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, Appellant
v.
Eric H. HOLDER, Jr., Attorney General, et al.

No. 08–322.
Argued April 29, 2009.
Decided June 22, 2009.

Background: Texas municipal utility district, a covered jurisdiction, brought action against the Attorney General, seeking declaratory judgment exempting it from Voting Rights Act's preclearance obligation, and, alternatively, challenging constitutionality of preclearance requirement. The United States District Court for the District of Columbia, David S. Tatel, Circuit Judge, granted Attorney General's motion for summary judgment. Utility district appealed.

Holdings: The Supreme Court, Chief Justice Roberts, held that:
(1) Supreme Court would apply principle of constitutional avoidance to refrain from deciding whether preclearance requirements were unconstitutional, and
(2) utility district was “political subdivision” eligible to file suit to bail out of preclearance requirements.

Reversed and Remanded.

Justice Thomas filed opinion concurring in the judgment in part and dissenting in part.

[1] Elections 144 Denial or Abridgment on Account of Race

144 Elections
144I Right of Suffrage and Regulation Thereof

in General
144k12 Denial or Abridgment on Account of Race
144k12(8) k. Federal preclearance of changes in voting procedure. Most Cited Cases


92 Constitutional Law
92XVII Political Rights and Discrimination
92k1482 k. Fifteenth Amendment. Most Cited Cases

Elections 144 Denial or Abridgment on Account of Race

144 Elections
144I Right of Suffrage and Regulation Thereof

in General
144k12 Denial or Abridgment on Account of Race
144k12(8) k. Federal preclearance of changes in voting procedure. Most Cited Cases
Past success of the preclearance requirements of § 5 of the Voting Rights Act, alone, is not adequate justification to retain the preclearance requirements against a constitutional challenge under the Enforcement Clause of the Fifteenth Amendment; the Act imposes current burdens and must be justified by current needs. U.S.C.A. Const.Amend. 15, § 2; Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

[3] States 360

360 States
360I Political Status and Relations
360I(A) In General
360k4 k. Status under Constitution of United States, and relations to United States in gen-
eral. Most Cited Cases

Distinctions between States in federal legislation can be justified in some cases, and the doctrine of the equality of States does not bar remedies for local evils which have appeared since states were admitted to the union; but a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.


92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)2 Necessity of Determination

92k976 k. Resolution of non-constitutional questions before constitutional questions. Most Cited Cases

Constitutional Law 92 \(\text{\textcopyright 1976}\)

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)1 In General

92k2454 k. Determination of constitutionality of statutes. Most Cited Cases

The Supreme Court will not shrink from its duty as the bulwark of a limited constitution against legislative encroachments, but it is a well-established principle governing the prudent exercise of the Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.

[5] Constitutional Law 92 \(\text{\textcopyright 1976}\)

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)2 Necessity of Determination

92k976 k. Resolution of non-constitutional questions before constitutional questions. Most Cited Cases

Supreme Court would apply principle of constitutional avoidance to refrain from deciding question whether preclearance requirements of \(\text{§ 5}\) of Voting Rights Act exceeded Congress' powers under Enforcement Clause of Fifteenth Amendment, where municipal utility district also raised statutory claim that it was eligible to bail out of its preclearance obligations under Act, and expressly described its challenge to \(\text{§ 5}\) as being in the alternative to its statutory argument. U.S.C.A. Const.Amend. 15, \(\text{§ 2}\); Voting Rights Act of 1965, \(\text{§§ 4, 5}\), 42 U.S.C.A. \(\text{§ 1973b, 1973c}\).

[6] Elections 144 \(\text{\textcopyright 12(1)}\)

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k12 Denial or Abridgment on Account of Race

144k12(1) k. In general. Most Cited Cases

The statutory definition of “political subdivision” in the Voting Rights Act does not apply to every use of the term “political subdivision” in the Act. Voting Rights Act of 1965, \(\text{§ 14(c)(2)}\), 42 U.S.C.A. \(\text{§ 1973l(c)(2)}\).

[7] Elections 144 \(\text{\textcopyright 12(8)}\)

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k12 Denial or Abridgment on Account of Race

144k12(8) k. Federal preclearance of changes in voting procedure. Most Cited Cases

All political subdivisions, not only those described in the Voting Rights Act's definition of “political subdivision,” are eligible to file a suit to bail out of the preclearance requirements set by the Act’s \(\text{§ 5}\). Voting Rights Act of 1965, \(\text{§§ 5, 14(c)(2)}\), 42 U.S.C.A. \(\text{§ 1973c, 1973l(c)(2)}\).
144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race

144k12(8) k. Federal preclearance of changes in voting procedure. Most Cited Cases

Texas municipal utility district was “political subdivision” eligible to file suit to bail out of preclearance requirements set by § 5 of Voting Rights Act, notwithstanding that it was not county or parish and did not conduct its own voter registration. Voting Rights Act of 1965, § 14(c)(2), 42 U.S.C.A. § 1973(c)(2).

West Codenotes
Validity Called into Doubt 42 U.S.C.A. 1973c

**2505 *193 Syllabus FN**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The appellant is a small utility district with an elected board. Because it is located in Texas, it is required by § 5 of the Voting Rights Act of 1965 (Act) to seek federal preclearance before it can change anything about its elections, even though there is no evidence it has ever discriminated on the basis of race in those elections. The district filed suit seeking relief under the “bailout” provision in § 4(a) of the Act, which allows a “political subdivision” to be released from the preclearance requirements if certain conditions are met. The district argued in the alternative that, if § 5 were interpreted to render it ineligible for bailout, § 5 was unconstitutional. The Federal District Court rejected both claims. It concluded that bailout under § 4(a) is available only to counties, parishes, and subunits that register voters, not to an entity like the district that does not register its own voters. It also concluded that a 2006 amendment extending § 5 for 25 years was constitutional.

**2506 Held:**

1. The historic accomplishments of the Voting Rights Act are undeniable, but the Act now raises serious constitutional concerns. The preclearance requirement represents an intrusion into areas of state and local responsibility that is otherwise unfamiliar to our federal system. Some of the conditions that the Court relied upon in upholding this statutory scheme in South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769, and City of Rome v. United States, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119, have unquestionably improved. Those improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success, but the Act imposes current burdens and must be justified by current needs. The Act also differentiates between the States in ways that may no longer be justified.

At the same time, the Court recognizes that judging the constitutionality of an Act of Congress is “the gravest and most delicate duty that this Court is called upon to perform.” Blodgett v. Holden, 275 U.S. 142, 147–148, 48 S.Ct. 105, 72 L.Ed. 206 (Holmes, J., concurring). Here the District Court found that the sizable record compiled by Congress to support extension of § 5 documented continuing racial discrimination and that § 5 deterred discriminatory changes.

The Court will not shrink from its duty “as the bulwark of a limited Constitution against legislative encroachments,” The Federalist No. 78, but “[i]t is ... well established ... that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case,” Escambia County v. McMillan, 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36. Here, the district also raises a statutory claim that it is eligible to bail out under §§ 4 and 5, and that claim is sufficient to resolve the appeal. Pp. —— – ———.
2. The Act must be interpreted to permit all political subdivisions, including the district, to seek to bail out from the preclearance requirements. It is undisputed that the district is a “political subdivision” in the ordinary sense, but the Act also provides a narrower definition in § 14(c)(2): “‘political subdivision’ shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” The court below concluded that the district did not qualify for § 4(a) bailout under this definition, but specific precedent, the Act’s structure, and underlying constitutional concerns compel a broader reading.

This Court has already established that § 14(c)(2)’s definition does not apply to the term “political subdivision” in § 5’s preclearance provision. See, e.g., United States v. Sheffield Bd. of Comm’rs, 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148. Rather, the “definition was intended to operate only for purposes of determining which political units in nondesignated States may be separately designated for coverage under § 4(b).” Id., at 128–129, 98 S.Ct. 965. “[O]nce a State has been [so] designated ..., [the] definition ... has no operative significance in determining [§ 5’s] reach.” Dougherty County Bd. of Ed. v. White, 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269. In light of these decisions, § 14(c)(2)’s definition should not constric the availability of bailout either.

The Government responds that any such argument is foreclosed by City of Rome. In 1982, however, Congress expressly repudiated City of Rome. Thus, City of Rome’s logic is no longer applicable. The Government’s contention that the district is subject to § 5 under Sheffield not because it is a “political subdivision” but because it is a “State” is counterintuitive and similarly untenable after the 1982 amendments. The Government’s contrary interpretation has helped to render the bailout provision all but a nullity. **2507 Since 1982, only 17 jurisdictions—out of the more than 12,000 covered political subdivisions—have successfully bailed out of the Act. It is unlikely that Congress intended the provision to have such limited effect.

573 F.Supp.2d 221, reversed and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part.

Gregory S. Coleman, for appellant Eric H. Holder, Jr., Attorney General.

Debo P. Adegbile, for intervenor-appellees.


The plaintiff in this case is a small utility district raising a big question—the constitutionality of § 5 of the Voting Rights Act. The district has an elected board, and is required by § 5 to seek preclearance from federal authorities in Washington, D.C., before it can change anything about those elections. This is required even though there has never been any evidence of racial discrimination in voting in the district.

The district filed suit seeking relief from these preclearance obligations under the “bailout” provision of the Voting Rights Act. That provision allows the release of a “political subdivision” from the preclearance requirements if certain rigorous conditions are met. The court below denied relief, concluding that bailout was unavailable to a political subdivision like the utility district that did not register its own voters. The district appealed, arguing that the Act imposes no such limitation on bailout, and that if it does, the preclearance requirements are unconstitutional.

That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual
practice is to avoid the unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of § 5.

I

A

The Fifteenth Amendment promises that the “right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude.” U.S. Const., Amdt. 15, § 1. In addition to that self-executing right, the Amendment also gives Congress the “power to enforce this article by appropriate legislation.” § 2. The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure. Early enforcement Acts were inconsistently applied and repealed with the rise of Jim Crow. South Carolina v. Katzenbach, 383 U.S. 301, 310, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); A. Keyssar, The Right to Vote 105–111 (2000). Another series of enforcement statutes in the 1950s and 1960s depended on individual lawsuits filed by the Department of Justice. But litigation is slow and expensive, and the States were **2509 creative in “contriving new rules” to continue violating the Fifteenth Amendment *198 “in the face of adverse federal court decrees.” Katzenbach, supra, at 335, 86 S.Ct. 803; Riley v. Kennedy, 553 U.S. 406, ———, 128 S.Ct. 1970, 1976–1977, 170 L.Ed.2d 837 (2008).

Congress responded with the Voting Rights Act. Section 2 of the Act operates nationwide; as it exists today, that provision forbids any “standard, practice, or procedure” that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C. § 1973(a). Section 2 is not at issue in this case.

The remainder of the Act constitutes a “scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant.” Katzenbach, supra, at 315, 86 S.Ct. 803. Rather than continuing to depend on case-by-case litigation, the Act directly pre-empted the most powerful tools of black disenfranchisement in the covered areas. All literacy tests and similar voting qualifications were abolished by § 4 of the Act. Voting Rights Act of 1965, §§ 4(a)-(d), 79 Stat. 438–439. Although such tests may have been facially neutral, they were easily manipulated to keep blacks from voting. The Act also empowered federal examiners to override state determinations about who was eligible to vote. §§ 6, 7, 9, 13, id., at 439–442, 444–445.

These two remedies were bolstered by § 5, which suspended all changes in state election procedure until they were submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General. Id., at 439, codified as amended at 42 U.S.C. § 1973c(a). Such pre-clearance is granted only if the change neither “has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.” Ibid. We have interpreted the requirements of § 5 to apply not only to the ballot-access rights guaranteed by § 4, but to drawing district lines as well. Allen v. State Bd. of Elections, 393 U.S. 544, 564–565, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

To confine these remedies to areas of flagrant disenfranchisement, the Act applied them only to States that had used a forbidden test or device in November 1964, and had less *199 than 50% voter registration or turnout in the 1964 Presidential election. § 4(b), 79 Stat. 438. Congress recognized that the coverage formula it had adopted “might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices.” Briscoe v. Bell, 432 U.S. 404, 411, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977). It therefore “afforded such jurisdictions immediately available protection in the form of ... [a] ‘bailout’ suit.” Ibid.

To bail out under the current provision, a jurisdiction must seek a declaratory judgment from a three-judge District Court in Washington, D.C. 42 U.S.C. §§ 1973b(a)(1), 1973c(a). It must show that for the previous 10 years it has not used any forbid-
den voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations; it must also show that it has “engaged in constructive efforts to eliminate intimidation and harassment” of voters, and similar measures. §§ 1973b(a)(1)(A)-(F). The Attorney General can consent to entry of judgment in favor of bailout if the evidence warrants it, though other interested parties are allowed to intervene in the declaratory judgment action. § 1973b(a)(9).

There are other restrictions: To bail out, a covered jurisdiction must show that every jurisdiction in its territory has complied with all of these requirements. § 1973b(a)(3). The District Court also retains continuing jurisdiction over a successful bailout suit for 10 years, and may reinstate coverage if any violation is found. § 1973b(a)(5).

As enacted, §§ 4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years. § 4(a), 79 Stat. 438. We upheld the temporary Voting Rights Act of 1965 as an appropriate exercise of congressional power in Katzenbach, explaining that “[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.” 383 U.S., at 308, 86 S.Ct. 803. We concluded that the problems Congress faced when it passed the Act were so dire that “exceptional conditions [could] justify legislative measures not otherwise appropriate.” Id., at 334–335, 86 S.Ct. 803 (citing Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934), and Wilson v. New, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755 (1917)).

Congress reauthorized the Act in 1970 (for 5 years), 1975 (for 7 years), and 1982 (for 25 years). The coverage formula remained the same, based on the use of voting-eligibility tests and the rate of registration and turnout among all voters, but the pertinent dates for assessing these criteria moved from 1964 to include 1968 and eventually 1972. 42 U.S.C. § 1973b(b). We upheld each of these reauthorizations against constitutional challenges, finding that circumstances continued to justify the provisions. Georgia v. United States, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); City of Rome v. United States, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980); Lopez v. Monterey County, 525 U.S. 266, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999). Most recently, in 2006, Congress extended § 5 for yet another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577. The 2006 Act retained 1972 as the last baseline year for triggering coverage under § 5. It is that latest extension that is now before us.

B

Northwest Austin Municipal Utility District Number One was created in 1987 to deliver city services to residents of a portion of Travis County, Texas. It is governed by a board of five members, elected to staggered terms of four years. The district does not register voters but is responsible for its own elections; for administrative reasons, those elections are run by Travis County. Because the district is located in Texas, it is subject to the obligations of § 5, although there is no evidence that it has ever discriminated on the basis of race.

The district filed suit in the District Court for the District of Columbia, seeking relief under the statute’s bailout provisions and arguing in the alternative that, if interpreted to render the district ineligible for bailout, § 5 was unconstitutional. The three-judge District Court rejected both claims. Under the statute, only a “State or political subdivision” is permitted to seek bailout, 42 U.S.C. § 1973b(a)(1)(A), and the court concluded that the district was not a political subdivision because that term includes only “counties, parishes, and voter-registering subunits,” Northwest Austin Municipal Util. Dist. No. One v. Mukasey, 573 F.Supp.2d 221, 232 (2008). Turning to the district’s constitutional challenge, the court concluded that the 25-year extension of § 5 was constitutional both because “Congress ... rationally concluded that extending [§ 5] was necessary to protect minorities from contin-
ued racial discrimination in voting” and because “the 2006 Amendment qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting.” Id., at 283. We noted probable jurisdiction, 555 U.S. 1091, 129 S.Ct. 894, 172 L.Ed.2d 768 (2009), and now reverse.

II

The historic accomplishments of the Voting Rights Act are undeniable. When it was first passed, unconstitutional discrimination was rampant and the “registration of voting-age whites ran roughly 50 percentage points or more ahead” of black registration in many covered States. Katzenbach, supra, at 313, 86 S.Ct. 803; H.R.Rep. No. 109–478, p. 12 (2006). Today, the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites. Id., at 12–13. Similar dramatic improvements have occurred for other racial minorities. Id., at 18–20. “[M]any of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated.” Id., at 12; Bartlett v. Strickland, 556 U.S. 1, ———, 129 S.Ct. 1231, 1240–1241, 173 L.Ed.2d 173 (2009) (plurality opinion) (“Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities *202 who seek to exercise one of the most fundamental rights of our citizens: the right to vote”).

At the same time, § 5, “which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial ‘federalism costs.’ ” Lopez, supra, at 282, 119 S.Ct. 693 (quoting Miller v. Johnson, 515 U.S. 900, 926, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995)). These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of § 5. Katzenbach, 383 U.S., at 358–362, 86 S.Ct. 803 (Black, J., concurring and dissenting); Allen, 393 U.S., at 586, n. 4, 89 S.Ct. 817 (Harlan, J., concurring in part and dissenting in part); Georgia, supra, at 545, 93 S.Ct. 1702 (Powell, J., dissenting); City of Rome, 446 U.S., at 209–221, 100 S.Ct. 1548 (Rehnquist, J., dissenting); id., at 200–206, 100 S.Ct. 1548 (Powell, J., dissenting); Lopez, 525 U.S., at 293–298, 119 S.Ct. 693 (THOMAS, J., dissenting); id., at 288, 119 S.Ct. 693 (KENNEDY, J., concurring in judgment).

[1] Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C. The preclearance requirement applies broadly, NAACP v. Hampton County Election Comm’n, 470 U.S. 166, 175–176, 105 S.Ct. 1128, 1240–1241, 84 L.Ed.2d 124 (1985), and in particular to every political subdivision in a covered State, no matter how small, United States v. Sheffield Bd. of Comm’rs, 435 U.S. 110, 117–118, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978).

Some of the conditions that we relied upon in upholding this statutory scheme in Katzenbach and City of Rome have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. See generally H.R.Rep. No. 109–478, at 12–18.

[2] These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements. See *203 Issacharoff, Is Section 5 of the Voting Rights Act a Victim of Its Own Success? 104 Colum. L.Rev. 1710 (2004). It may be that these improvements are insufficient and that **2512 conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.

[3] The Act also differentiates between the
States, despite our historic tradition that all the States enjoy “equal sovereignty.” United States v. Louisiana, 363 U.S. 1, 16, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960) (citing Lessee of Pollard v. Hagan, 3 How. 212, 223, 11 L.Ed. 565 (1845)); see also Texas v. White, 7 Wall. 700, 725–726, 19 L.Ed. 227 (1869). Distinctions can be justified in some cases. “The doctrine of the equality of States ... does not bar ... remedies for local evils which have subsequently appeared.” Katzenbach, supra, at 328–329, 86 S.Ct. 803 (emphasis added). But a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.

These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. See Georgia v. Ashcroft, 539 U.S. 461, 491–492, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003) (KENNEDY, J., concurring) (“Race cannot be the predominant factor in redistricting under our decision in Miller v. Johnson, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5”). Additional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere.

The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide.*204 E. Blum & L. Campbell, Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act 3–6 (American Enterprise Institute, 2006). Congress heard warnings from supporters of extending § 5 that the evidence in the record did not address “systematic differences between the covered and the non-covered areas of the United States[,] ... and, in fact, the evidence that is in the record suggests that there is more similarity than difference.” The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., 10 (2006) (statement of Richard H. Pildes); see also Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 208 (2007) (“The most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would ... disrupt settled expectations”).

The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. The district argues that “‘[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,’ ” Brief for Appellant 31, quoting City of Boerne v. Flores, 521 U.S. 507, 520, 118 S.Ct. 2157, 138 L.Ed.2d 624 (1997); the Federal Government asserts that it is enough that the legislation be a “‘rational means to effectuate the constitutional prohibition,’ ” Brief for Federal Appellee 6, quoting **2513Katzenbach, supra, at 324, 86 S.Ct. 803. That question has been extensively briefed in this case, but we need not resolve it. The Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test.

In assessing those questions, we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is “the gravest and most delicate duty that this Court is called on to perform.” *205Blodgett v. Holden, 275 U.S. 142, 147–148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). “The Congress is a coequal branch of government whose Members take the same oath we do to uphold the
Constitution of the United States." Rostker v. Goldberg, 453 U.S. 57, 64, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). The Fifteenth Amendment empowers "Congress," not the Court, to determine in the first instance what legislation is needed to enforce it. Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the District Court determined "document[ed] contemporary racial discrimination in covered states." 573 F.Supp.2d, at 265. The District Court also found that the record "demonstrat[ed] that section 5 prevents discriminatory voting changes" by "quietly but effectively deterring discriminatory changes." Id., at 264.

We will not shrink from our duty "as the bulwark of a limited constitution against legislative encroachments," The Federalist No. 78, p. 526 (J. Cooke ed. 1961) (A.Hamilton), but "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case," Escambia County v. McMillan, 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (per curiam). Here, the district also raises a statutory claim that it is eligible to bail out under §§ 4 and 5.

Justice THOMAS argues that the principle of constitutional avoidance has no pertinence here. He contends that even if we resolve the district's statutory argument in its favor, we would still have to reach the constitutional question, because the district's statutory argument would not afford it all the relief it seeks. Post, at ———— – ———— (opinion concurring in judgment in part and dissenting in part).

We disagree. The district expressly describes its constitutional challenge to § 5 as being "in the alternative" to its statutory argument. See Brief for Appellant 64 ("[T]he Court should reverse the judgment of the district court and *206 render judgment that the district is entitled to use the bailout procedure or, in the alternative, that § 5 cannot be constitutionally applied to the district"). The district's counsel confirmed this at oral argument. See Tr. of Oral Arg. 14 ("[Question:] Do you acknowledge that if we find in your favor on the bailout point we need not reach the constitutional point? [Answer:] I do acknowledge that"). We therefore turn to the district's statutory argument.

Section 4(b) of the Voting Rights Act authorizes a bailout suit by a "State or political subdivision." 42 U.S.C. § 1973b(a)(1)(A). There is no dispute that the district is a political subdivision of the State of Texas in the ordinary sense of the term. See, e.g., Black's Law Dictionary 1197 (8th ed. 2004) ("A division of a state that exists primarily to discharge some function of local government").

The district was created under Texas law with "powers of government" relating to local utilities and natural resources. Tex. Const., Art. XVI, § 59(b); *2514 Tex. Water Code Ann. § 54.011 (West 2002); see also Bennett v. Brown Cty. Water Improvement Dist. No. 1, 153 Tex. 599, 272 S.W.2d 498, 500 (1954) ("[W]ater improvement district[s] ... are held to be political subdivisions of the State" (internal quotation marks omitted)).

The Act, however, also provides a narrower statutory definition in § 14(c)(2): "[P]olitical subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973l (c)(2). The District Court concluded that this definition applied to the bailout provision in § 4(a), and that the district did not qualify, since it is not a county or parish and does not conduct its own voter registration.

"Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual *207 case." Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198, 201, 69 S.Ct. 1274, 93 L.Ed. 611 (1949); see also Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 764, 69 S.Ct. 1274, 93 L.Ed. 1672 (1949); Philko Aviation,
considered in isolation from the rest of the statute
and our prior cases, the District Court’s approach
might well be correct. But here specific precedent,
the structure of the Voting Rights Act, and underlying
constitutional concerns compel a broader read-
ing of the bailout provision.

Importantly, we do not write on a blank slate.
Our decisions have already established that the stat-
utory definition in § 14(c)(2) does not apply to
every use of the term “political subdivision” in the
Act. We have, for example, concluded that the
definition does not apply to the preclearance obli-
gation of § 5. According to its text, § 5 applies only
“[w]henever a [covered] State or political subdivi-
sion” enacts or administers a new voting practice.
Yet in Sheffield Bd. of Comm’rs, 435 U.S. 110, 98
S.Ct. 965, 55 L.Ed.2d 148, we rejected the argu-
ment by a Texas city that it was neither a State nor
a political subdivision as defined in the Act, and
therefore did not need to seek preclearance of a vot-
ing change. The dissent agreed with the city, point-
ing out that the city did not meet the statutory
definition of “political subdivision” and therefore
could not be covered. Id., at 141–144, 98 S.Ct. 965
(opinion of STEVENS, J.). The majority, however,
relying on the purpose and structure of the Act,
concluded that the “definition was intended to oper-
ate only for purposes of determining which political
units in nondesignated States may be separately
designated for coverage under § 4(b).” Id., at 128–129,
98 S.Ct. 965; see also id., at 130, n. 18, 98 S.Ct. 965 (“Congress’s exclusive objective in §
14(c)(2) was to limit the jurisdictions which may be
separately designated for coverage under § 4(b)”).

We reaffirmed this restricted scope of the stat-
utory definition the next Term in Dougherty County
Bd. of Ed. v. White, 439 U.S. 32, 99 S.Ct. 368, 58
L.Ed.2d 269 (1978). There, a school board argued
*208 that because “it d [id] not meet the definition”
of political subdivision in § 14(c)(2), it “d [id] not
come within the purview of § 5.” Id., at 43, 44, 99
S.Ct. 368. We responded:

“This contention is squarely foreclosed by our
decision last Term in [Sheffield]. There, we ex-
pressly rejected the suggestion that the city of
Sheffield was beyond the ambit of § 5 because it
did not itself register voters and hence was not a
political subdivision as the term is defined in §
14(c)(2) of the Act. ... [O]nce a State has been
designated for coverage, § 14(c)(2)’s definition of
political**2515 subdivision has no operative sig-
ificance in determining the reach of § 5.” Id., at
44, 99 S.Ct. 368 (internal quotation marks omitted).

[6] According to these decisions, then, the stat-
utory definition of “political subdivision” in §
14(c)(2) does not apply to every use of the term
“political subdivision” in the Act. Even the inter-
venors who oppose the district’s bailout concede,
for example, that the definition should not apply to
§ 2, which bans racial discrimination in voting by
“any State or political subdivision.” 42 U.S.C. §
1973(a). See Brief for Intervenor–Appellee Texas
State Conference of NAACP Branches et al. 17
(citing Smith v. Salt River Project Agricultural
Improvement and Power Dist., 109 F.3d 586, 592–593
(C.A.9 1997)); see also United States v. Uvalde
Consol. Independent School Dist., 625 F.2d 547,
554 (C.A.5 1980) (“[T]he Supreme Court has held
that this definition [in § 14(c)(2) ] limits the mean-
ning of the phrase ‘State or political subdivision’
only when it appears in certain parts of the Act, and
that it does not confine the phrase as used else-
where in the Act”). In light of our holdings that the
statutory definition does not constrict the scope of
preclearance required by § 5, the district argues, it
only stands to reason that the definition should not
constrict the availability of bailout from those pre-
clearance requirements either.

*209 The Government responds that any such
argument is foreclosed by our interpretation of the
statute in City of Rome, 446 U.S. 156, 100 S.Ct.
1548, 64 L.Ed.2d 119. There, it argues, we made
clear that the discussion of political subdivisions in
Sheffield] was dictum, and “specifically held that a ‘city is not a ‘political subdivision’ for purposes of § 4(a) bailout.’ ” Brief for Federal Appellee 14 (quoting [City of Rome, supra, at 168, 100 S.Ct. 1548].

Even if that is what City of Rome held, the premises of its statutory holding did not survive later changes in the law. In City of Rome we rejected the city’s attempt to bail out from coverage under § 5, concluding that “political units of a covered jurisdiction cannot independently bring a § 4(a) bailout action.” 446 U.S., at 167, 100 S.Ct. 1548. We concluded that the statute as then written authorized a bailout suit only by a “State” subject to the coverage formula, or a “political subdivision with respect to which [coverage] determinations have been made as a separate unit.” id., at 164, n. 2, 100 S.Ct. 1548 (quot ing 42 U.S.C. § 1973b(a) (1976 ed.)); see also 446 U.S., at 163–169, 100 S.Ct. 1548. Political subdivisions covered because they were part of a covered State, rather than because of separate coverage determinations, could not separately bail out. As Justice STEVENS put it, “[t]he political subdivisions of a covered State” were “not entitled to bail out in a piecemeal fashion.” Id., at 192, 100 S.Ct. 1548 (concurring opinion).

In 1982, however, Congress expressly repudiated City of Rome and instead embraced “piecemeal” bailout. As part of an overhaul of the bailout provision, Congress amended the Voting Rights Act to expressly provide that bailout was also available to “political subdivisions” in a covered State, “though [coverage] determinations were not made with respect to such subdivision as a separate unit.” Voting Rights Act Amendments of 1982, 96 Stat. 131, codified at 42 U.S.C. § 1973b(a)(1) (emphasis added). In other words, Congress decided that a jurisdiction covered because it was within a covered State need not remain covered for as long 210 as the State did. If the subdivision met the bailout requirements, it could bail out, even if the State could not. In light of these amendments, our logic for denying bailout in City of Rome is no longer applicable to the Voting Rights Act— if anything, that logic compels the opposite conclusion.

Bailout and preclearance under § 5 are now governed by a principle of symmetry. “Given the Court’s decision in Sheffield that all political units in a covered State are to be treated for § 5 purposes as though they were ‘political subdivisions’ of that State, it follows that they should also be treated as such for purposes of § 4(a)’s bailout provisions.” City of Rome, supra, at 192, 100 S.Ct. 1548 (STEVENS, J., concurring).

The Government contends that this reading of Sheffield is mistaken, and that the district is subject to § 5 under our decision in Sheffield not because it is a “political subdivision” but because it is a “State.” That would mean it could bail out only if the whole State could bail out.

The assertion that the district is a State is at least counterintuitive. We acknowledge, however, that there has been much confusion over why Sheffield held the city in that case to be covered by the text of § 5. See City of Rome, 446 U.S., at 168–169, 100 S.Ct. 1548; id., at 192, 100 S.Ct. 1548 (STEVENS, J., concurring); see also Uvalde Consol. Independent School Dist. v. United States, 451 U.S. 1002, 1004, n. 4, 101 S.Ct. 2341, 68 L.Ed.2d 858 (1981) (Rehnquist, J., dissenting from denial of certiorari) (“[T]his Court has not yet settled on the proper construction of the term ‘political subdivision’ ”).

But after the 1982 amendments, the Government’s position is untenable. If the district is considered the State, and therefore necessarily subject to preclearance so long as Texas is covered, then the same must be true of all other subdivisions of the State, including counties. That would render even counties unable to seek bailout so long as their State was covered. But that is the very restriction the 1982 amendments overturned. Nobody denies that counties in a 211 covered State can seek bail-
out, as several of them have. See Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., 2599–2834 (2005) (detailing bailouts). Because such piecemeal bailout is now permitted, it cannot be true that § 5 treats every governmental unit as the State itself.

The Government’s contrary interpretation has helped to render the bailout provision all but a nullity. Since 1982, only 17 jurisdictions—out of the more than 12,000 covered political subdivisions—have successfully bailed out of the Act. App. to Brief for Jurisdictions That Have Bailed Out as Amici Curiae 3; Dept. of Commerce, Bureau of Census, 2002 Census of Governments, Vol. 1, No. 1, pp. 1, 22–60. It is unlikely that Congress intended the provision to have such limited effect. See United States v. Hayes, 555 U.S. 415, ———, 129 S.Ct. 1079, 1087, 172 L.Ed.2d 816 (2009).

[7] We therefore hold that all political subdivisions—not only those described in § 14(c)(2)—are eligible to file a bailout suit.

* * *

[8] More than 40 years ago, this Court concluded that “exceptional conditions” prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. Katzenbach, 383 U.S., at 334, 86 S.Ct. 803. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including**2517 the district in this case, to seek relief from its preclearance requirements.

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

*It is so ordered.*

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*212* Justice THOMAS, concurring in the judgment in part and dissenting in part.

This appeal presents two questions: first, whether appellant is entitled to bail out from coverage under the Voting Rights Act of 1965(VRA); and second, whether the preclearance requirement of § 5 of the VRA is unconstitutional. Because the Court's statutory decision does not provide appellant with full relief, I conclude that it is inappropriate to apply the constitutional avoidance doctrine in this case. I would therefore decide the constitutional issue presented and hold that § 5 exceeds Congress' power to enforce the Fifteenth Amendment.

I

The doctrine of constitutional avoidance factors heavily in the Court's conclusion that appellant is eligible for bailout as a “political subdivision” under § 4(a) of the VRA. See ante, at ———. Regardless of the Court's resolution of the statutory question, I am in full agreement that this case raises serious questions concerning the constitutionality of § 5 of the VRA. But, unlike the Court, I do not believe that the doctrine of constitutional avoidance is applicable here. The ultimate relief sought in this case is not bailout eligibility—it is bailout itself. See First Amended Complaint in No. 06–1384(DDC), p. 8, Record, Doc. 83 (“Plaintiff requests the Court to declare that the district has met the bail-out requirements of § 4 of the [VRA] and that the preclearance requirements of § 5 ... no longer apply to the district; or, in the alternative, that § 5 of the Act as applied to the district is an unconstitutional overextension of Congress's enforcement power to remedy past violations of the Fifteenth Amendment”).

Eligibility for bailout turns on the statutory question addressed by the Court—the proper definition of “political subdivision” in the bailout clauses of § 4(a) of the VRA. Entitlement to bailout, however, requires a covered “political subdivision” to submit substantial evidence indicating that *213* it is not engaging in “discrimination in voting on account of race,” see 42 U.S.C. § 1973b(a)(3). The
Court properly declines to give appellant bailout because appellant has not yet proved its compliance with the statutory requirements for such relief. See §§ 1973b(a)(1)-(3). In fact, the record below shows that appellant’s factual entitlement to bailout is a vigorously contested issue. See, e.g., NAACP’s Statement of Undisputed Material Facts in No. 06–1384(DDC), pp. 490–492, Record, Doc. 100; Attorney General’s Statement of Uncontested Material Facts in No. 06–1384(DDC), ¶¶ 19, 59, Record, Doc. 98. Given its resolution of the statutory question, the Court has thus correctly remanded the case for resolution of appellant’s factual entitleinent to bailout. See ante, at ——.

But because the Court is not in a position to award appellant bailout, adjudication of the constitutionality of § 5, in my view, cannot be avoided. “Traditionally, the avoidance canon was not a doctrine under which courts read statutes to avoid mere constitutional doubts. Instead, it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading.” Clark v. Martinez, 543 U.S. 371, 395, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (THOMAS, J., dissenting). To the extent that constitutional avoidance is a worthwhile tool of statutory construction, it is because it allows a court to dispose of an entire case on grounds that do not require the court to pass on a statute’s constitutionality. See Ashwander v. TVA, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also some other ground upon which the case may be disposed of”); see also, e.g., Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 629, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974). The doctrine “avoids decision of constitutional questions where possible, and it permits one lawsuit, rather than two, to resolve the entire controversy.” C. Wright, The Law of Federal Courts § 19, p. 104 (4th ed.1983). Absent a determination that appellant is not just eligible for bailout, but is entitled to it, this case will not have been entirely disposed of on a nonconstitutional ground. Cf. Tr. of Oral Arg. 14 (“[I]f the Court were to give us bailout ... the Court might choose on its own not to reach the constitutional issues because we would receive relief”). Invocation of the doctrine of constitutional avoidance is therefore inappropriate in this case.

The doctrine of constitutional avoidance is also unavailable here because an interpretation of § 4(a) that merely makes more political subdivisions eligible for bailout does not render § 5 constitutional and the Court notably does not suggest otherwise. See Clark, supra, at 396, 125 S.Ct. 716 (THOMAS, J., dissenting). Bailout eligibility is a distant prospect for most covered jurisdictions. To obtain bailout a covered jurisdiction must satisfy numerous objective criteria. It must show that during the previous 10 years: (A) no “test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color”; (B) “no final judgment of any court of the United States ... has determined that denials or abridgments of the right to vote on account of race or color have occurred anywhere in the territory of” the covered jurisdiction; (C) “no Federal examiners or observers ... have been assigned to” the covered jurisdiction; (D) the covered jurisdiction has fully complied with § 5; and (E) “the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under [§ 5].” §§ 1973b(a)(1)(A)-(E). The jurisdiction also has the burden of presenting “evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.” § 1973b(a)(2).

*215 These extensive requirements may be difficult to satisfy, see Brief for Georgia Governor Sonny Purdue as Amicus Curiae 20–26, but at least
they are objective. The covered jurisdiction seeking bailout must also meet subjective criteria: it must “(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under the Act; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.” §§ 1973b(a)(1)(F)(i)-(iii).

As a result, a covered jurisdiction meeting each of the objective conditions could nonetheless be denied bailout because it has not, in the subjective view of the United States District Court for the District of Columbia, engaged in sufficiently “constructive efforts” to expand voting opportunities, § 1973b(a)(1)(F)(iii). Congress, of course, has complete authority to set the terms of bailout. But its promise of a bailout opportunity has, in the great majority of cases, turned out to be no more than a mirage. As the Court notes, only a handful “of the more than 12,000 covered political subdivisions ... have successfully bailed out of the Act.” Ante, at ———; see Williamson, The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions, 62 Wash. U.L.Q. 1, 42 (1984) (explaining that *216 “the conditions for termination of coverage have been made so restrictive that bailout will continue to be impossible for most jurisdictions”). Accordingly, bailout eligibility does not eliminate the issue of § 5’s constitutionality.

FN1. All 17 covered jurisdictions that have been awarded bailout are from Virginia, see App. to Brief for Jurisdictions That Have Bailed Out as Amici Curiae 3, and all 17 were represented by the same attorney—a former lawyer in the Voting Rights Section of the Department of Justice, see Hebert, An Assessment of the Bailout Provisions of the Voting Rights Act, in Voting Rights Act Reauthorization of 2006, p. 257, n. 1 (A. Henderson ed.2007). Whatever the reason for this anomaly, it only underscores how little relationship there is between the existence of bailout and the constitutionality of § 5.

II

The Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional. See ante, at ——— – ———. And, although I respect the Court's careful approach to this weighty issue, I nevertheless believe it is necessary to definitively resolve that important question. For the reasons set forth below, I conclude that the lack of current evidence of intentional discrimination with respect to voting renders § 5 unconstitutional. The provision can no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment.

A

“The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people.” United States v. Cruikshank, 92 U.S. 542, 551, 23 L.Ed. 588 (1876); see also U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 848, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (THOMAS, J., dissenting). In the specific area of voting rights, this Court has consistently recognized that the Constitution gives the States primary authority over the structuring of electoral systems. See, e.g., White v. Weiser, 412 U.S. 783, 795, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973); Burns v. Richardson, 384 U.S. 73, 84–85, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966). “No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices

State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority. See U.S. Const., Amdt. 10 (“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”); see also *Alden v. Maine,* 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). In the main, the “Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” *Gregory v. Ashcroft,* 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (internal quotation marks omitted).

To be sure, state authority over local elections is not absolute under the Constitution. The Fifteenth Amendment guarantees that 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,” § 1, and it grants Congress the authority to “enforce” these rights “by appropriate legislation,” § 2. The Fifteenth Amendment thus renders unconstitutional any federal or state law that would limit a citizen’s access to the ballot on one of the three bases enumerated in the Amendment. See *Mobile v. Bolden,* 446 U.S. 55, 65, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion) (the Fifteenth Amendment guards against “purposefully discriminatory denial or abridgment by government of the freedom to vote”). Nonetheless, because States still retain sovereign authority over their election systems, any measure enacted in furtherance of the Fifteenth Amendment must be closely examined to ensure that its encroachment on state authority in this area is limited to the appropriate enforcement of this ban on discrimination.

There is certainly no question that the VRA initially “was passed pursuant to Congress’ authority under the Fifteenth Amendment.” *Lopez v. Monterey County,* 525 U.S. 266, 282, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999). For example, §§ 2 and 4(a) seek to implement the Fifteenth Amendment’s substantive command by creating a private cause of action to enforce § 1 of the Fifteenth Amendment, see § 1973(a), and by banning discriminatory tests and devices in covered jurisdictions, see § 1973b(a); see also *City of Lockhart v. United States,* 460 U.S. 125, 139, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983) (Marshall, J., concurring in part and dissenting in part) (explaining that § 2 reflects Congress’ determination “that voting discrimination was a nationwide problem” that called for a “general prohibition of discriminatory practices”). Other provisions of the VRA also directly enforce the Fifteenth Amendment. See § 1973h (elimination of poll taxes that effectively deny certain racial groups the right to vote); § 1973i(a) (“No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote ... or willfully fail or refuse to tabulate, count, and report such person’s vote”).

Section 5, however, was enacted for a different purpose: to prevent covered jurisdictions from circumventing the direct prohibitions imposed by provisions such as §§ 2 and 4(a). See *Reno v. Bossier Parish School Bd.,” 520 U.S. 471, 477, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (explaining that §§ 2 and 5 “combat different evils” and “impose very different duties upon the States”). Section 5 “was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory.” **Beer v. United States,* 425 U.S. 130, 140, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976) (internal quotation marks omitted).
The rebellion against the enfranchisement of blacks in the wake of ratification of the Fifteenth Amendment illustrated the need for increased federal intervention to protect the right to vote. Almost immediately following Reconstruction, blacks attempting to vote were met with coordinated intimidation and violence. See, e.g., L. McDonald, A Voting Rights Odyssey: Black Enfranchisement in Georgia 34 (2003) (“By 1872, the legislative and executive branches of state government ... were once again firmly in the control of white Democrats, who resorted to a variety of tactics, including fraud, intimidation, and violence, to take away the vote from blacks, despite ratification of the Fifteenth Amendment in 1870 ...”). FN2 A soon-to-be victorious mayoral candidate in Wilmington, North Carolina, for example, urged white voters in an 1898 election-eve speech: “Go to the polls tomorrow and if you find the negro out voting, tell him to leave the polls, and if he refuses kill him; shoot him down in his tracks.” S. Tolnay & E. Beck, A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930, p. 67 (1995).

FN2 See also S.Rep. No. 41, 42d Cong., 2d Sess., pt. 7, p. 610 (1872) (quoting a Ku Klux Klan letter warning a black man from Georgia to “'stay at home if you value your life, and not vote at all, and advise all of your race to do the same thing. You are marked and closely watched by K.K.K. ...'”); see also Jackson Daily Mississippian, Dec. 29, 1887, reprinted in S. Misc. Doc. No. 106, 50th Cong., 1st Sess., 14 (1888) (“[W]e hereby warn the negroes that if any one of their race attempts to run for office in the approaching municipal election he does so at his supremest peril, and we further warn any and all negroes of this city against attempting, at their utmost hazard, by vote or influence, to foist on us again this black and damnable machine miscalled a government of our city” (publishing resolutions passed by the Young White Men's League of Jackson)).

This campaign of violence eventually was supplemented, and in part replaced, by more subtle methods engineered to deny blacks the right to vote. See South Carolina v. Katzenbach, 383 U.S. 301, 310–312, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Literacy tests were particularly effective: “as of 1890 in ... States [with literacy tests], more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write,” id., at 311, 86 S.Ct. 803, because “[p]rior to the Civil War, most of the slave States made it a crime to teach Negroes how to read or write,” see also id., at 311, 86 S.Ct. 803. FN3 Compounding the tests’ discriminatory impact on blacks, alternative voter qualification laws such as “grandfather clauses, property qualifications, [and] ‘good character’ tests” were enacted to protect those whites who were unable to pass the literacy tests. Id., at 311, 86 S.Ct. 803; see also Lopez, supra, at 297, 119 S.Ct. 693 (THOMAS, J., dissenting) (“Literacy tests were unfairly administered; whites were given easy questions, and blacks were given more difficult questions, such as the number of bubbles in a soap bar, the news contained in a copy of the Peking Daily, the meaning of obscure passages in state constitutions, and the definition of terms such as habeas corpus” (internal quotation marks omitted)).

FN3 Although tests had become the main tool for disenfranchising blacks, state governments engaged in violence into 1965. See Daniel, Tear Gas, Clubs Halt 600 in Selma March, Washington Times Herald, Mar. 8, 1965, pp. A1, A3 (“State troopers and mounted deputies bombarded 600 praying Negroes with tear gas today and then waded into them with clubs, whips and ropes, injuring scores .... The Negroes started out today to walk the 50 miles to Montgomery to protest to [Governor] Wallace the denial of Negro voting rights in Alabama”); Banner, Aid for Selma Negroes, N.Y. Times, Mar. 14, 1965, p. E11 (“We should remember March 7, 1965
as ‘Bloody Sunday in Selma.’ It is now clear that the public officials and the police of Alabama are at war with those citizens who are Negroes and who are determined to exercise their rights under the Constitution of the United States”).

The Court had declared many of these “tests and devices” unconstitutional, see Katzenbach, supra, at 311–312, 86 S.Ct. 803, but case-by-case eradication was woefully inadequate to ensure that the franchise extended to all citizens regardless of race, see id., at 328, 86 S.Ct. 803. As a result, enforcement efforts before the enactment of § 5 had rendered the right to vote illusory for blacks in the Jim Crow South. Despite the Civil War’s bloody purchase of the Fifteenth Amendment, “the reality remained far from the promise.” Rice v. Cayetano, 528 U.S. 495, 512–513, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000); see also R. Wardlaw, Negro Suffrage in Georgia, 1867–1930, p. 34 (Phelps–Stokes Fellowship Studies*221 No. 11, 1932) (“Southern States were setting out to accomplish an effective nullification of the war measures of Congress”).

Thus, by 1965, Congress had every reason to conclude that States with a history of disenfranchising voters based on race would continue to do all they could to evade the constitutional ban on voting discrimination. By that time, race-based voting discrimination had “infected the electoral process in parts of our country for nearly a century.” Katzenbach, 383 U.S., at 308, 86 S.Ct. 803. Moreover, the massive scale of disenfranchisement efforts made case-by-case enforcement of the Fifteenth Amendment impossible, if not Sisyphean. See id., at 309, 86 S.Ct. 803 (“Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment”); Rice, supra, at 513, 120 S.Ct. 1044 (“Progress was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter”); Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 Geo. J.L. & Pub. Pol’y 41, 44 (2007) (“In 1965, it was perfectly reasonable to believe that any move affecting black enfranchisement in the Deep South was deeply suspect. And only such a punitive measure [as § 5] had any hope of forcing the South to let blacks vote” (emphasis in original)).

It was against this backdrop of “historical experience” that § 5 was first enacted and upheld against a constitutional challenge. See Katzenbach, supra, at 308, 86 S.Ct. 803. As the Katzenbach Court explained, § 5, which applied to those States and political subdivisions that had employed discriminatory tests and devices in the previous Presidential election, see 42 U.S.C. § 1973b(b), directly targeted the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” 383 U.S., at 309, 86 S.Ct. 803; see also id., at 329, 86 S.Ct. 803 (“Congress began work with reliable evidence of actual voting*222 discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act”). According to the Court, it was appropriate to radically interfere with control over local elections only in those jurisdictions with a history of discriminatory disenfranchisement as those were “the geographic areas where immediate action seemed necessary.” Id., at 328, 86 S.Ct. 803. The Court believed it was thus “permissible to impose the new remedies” on the jurisdictions covered under § 4(b) “at least in the absence of proof that they ha[d] been free of substantial **2523 voting discrimination in recent years.” Id., at 330, 86 S.Ct. 803.

In upholding § 5 in Katzenbach, the Court nonethelss noted that the provision was an “uncommon exercise of congressional power” that would not have been “appropriate” absent the “exceptional conditions” and “unique circumstances” present in the targeted jurisdictions at that particular time. Id., at 334–335, 86 S.Ct. 803. In
reaching its decision, the Court thus refused to simply accept Congress’ representation that the extreme measure was necessary to enforce the Fifteenth Amendment; rather, it closely reviewed the record compiled by Congress to ensure that § 5 was “‘appropriate’” antievasion legislation. See id., at 308, 86 S.Ct. 803. In so doing, the Court highlighted evidence showing that black voter registration rates ran approximately 50 percentage points lower than white voter registration in several States. See id., at 313, 86 S.Ct. 803. It also noted that the registration rate for blacks in Alabama “rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964.” Ibid. The Court further observed that voter turnout levels in covered jurisdictions had been at least 12% below the national average in the 1964 Presidential election. See id., at 329–330, 86 S.Ct. 803.

The statistical evidence confirmed Congress’ judgment that “the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting *223 discrimination in the face of adverse federal court decrees” was working and could not be defeated through case-by-case enforcement of the Fifteenth Amendment. Id., at 335, 86 S.Ct. 803. This record also clearly supported Congress’ predictive judgment that such “States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.” Ibid. These stark statistics—in conjunction with the unrelenting use of discriminatory tests and practices that denied blacks the right to vote—constituted sufficient proof of “actual voting discrimination” to uphold the preclearance requirement imposed by § 5 on the covered jurisdictions as an appropriate exercise of congressional power under the Fifteenth Amendment. Id., at 330, 86 S.Ct. 803. It was only “[u]nder the compulsion of these unique circumstances [that] Congress responded in a permissibly decisive manner.” Id., at 335, 86 S.Ct. 803.

B

Several important principles emerge from Katzenbach and the decisions that followed it. First, § 5 prohibits more state voting practices than those necessarily encompassed by the explicit prohibition on intentional discrimination found in the text of the Fifteenth Amendment. The explicit command of the Fifteenth Amendment is a prohibition on state practices that in fact deny individuals the right to vote “on account of” race, color, or previous servitude. In contrast, § 5 is the quintessential prophylaxis; it “goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.” Ante, at ———. The Court has freely acknowledged that such legislation is preventative, upholding it based on the view that the Reconstruction Amendments give Congress the power “both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the *224 Amendment’s text.” **2524 Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (emphasis added).

119 S.Ct. 693 (THOMAS, J., dissenting) (“Section 5 is a unique requirement that exacts significant federalism costs”); ante, at –––– (“[Section] 5, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs” (internal quotation marks omitted)).

Indeed, § 5’s preclearance requirement is “one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a ‘substantial departure ... from ordinary concepts of our federal system’; its encroachment on state sovereignty is significant and undeniable.” United States v. Sheffield Bd. of Comm’rs, 435 U.S. 110, 141, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978) (STEVENS, J., dissenting) (footnote omitted). This “encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity.” City of Rome, supra, at 201, 100 S.Ct. 1548 (Powell, J., dissenting). More than 40 years after its enactment, this intrusion has become increasingly difficult to justify.

Third, to accommodate the tension between the constitutional imperatives of the Fifteenth and Tenth Amendments—a balance between allowing the Federal Government*225 to patrol state voting practices for discrimination and preserving the States’ significant interest in self-determination—the constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible. See Katzenbach, 383 U.S., at 308, 86 S.Ct. 803 (“Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting”); Katzenbach v. Morgan, 384 U.S. 641, 667, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) (Harlan, J., dissenting) (“Congress made a detailed investigation of various state practices that had been used to deprive Negroes of the franchise”). “There can be no remedy without a wrong. Essential to our holdings in [ South Carolina v.] Katzenbach and City of Rome was our conclusion that Congress was remedying the effects of prior intentional racial discrimination. In both cases, we required Congress to have some evidence that the jurisdiction burdened with preclearance obligations had actually engaged in such intentional discrimination.” Lopez, supra, at 294–295, 119 S.Ct. 693 (THOMAS, J., dissenting) (emphasis in original).

The Court has never deviated from this understanding. We have explained that prophylactic legislation designed to enforce the Reconstruction Amendments must “identify conduct transgressing the ... substantive provisions” it seeks to enforce and be tailored “to remedying or preventing**2525 such conduct.” Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 639, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). Congress must establish a “history and pattern” of constitutional violations to establish the need for § 5 by justifying a remedy that pushes the limits of its constitutional authority. Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 368, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). As a result, for § 5 to withstand renewed constitutional scrutiny, there must be a demonstrated connection between the “remedial measures” chosen and the “evil presented” in the record made by Congress when it renewed the Act. City of Boerne v. Flores, 521 U.S. 507, 530, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). *226 “Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” Ibid.

C

The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists. Covered jurisdictions are not now engaged in a systematic campaign to deny black citizens access to the ballot through intimidation and violence. And the days of “grandfather clauses, property qualifications, ‘good character’ tests, and the requirement that registrants ‘understand’ or ‘interpret’ certain matter,” Katzenbach, 383 U.S., at 311, 86 S.Ct. 803, are gone.
There is thus currently no concerted effort in these jurisdictions to engage in the “unremitting and ingenious defiance of the Constitution,” id., at 309, 86 S.Ct. 803, that served as the constitutional basis for upholding the “uncommon exercise of congressional power” embodied in § 5, id., at 334, 86 S.Ct. 803.

The lack of sufficient evidence that the covered jurisdictions currently engage in the type of discrimination that underlay the enactment of § 5 undermines any basis for retaining it. Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose. Those supporting § 5’s reenactment argue that without it these jurisdictions would return to the racially discriminatory practices of 30 and 40 years ago. But there is no evidence that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting. Without such evidence, the charge can only be premised on outdated assumptions about racial attitudes in the covered jurisdictions. Admitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory.

*227 The current statistical evidence confirms that the emergency that prompted the enactment of § 5 has long since passed. By 2006, the voter registration rates for blacks in Alabama, Louisiana, and Mississippi had jumped to 71.8%, 66.9%, and 72.2%, respectively. See App. to Brief for Southeastern Legal Foundation as Amicus Curiae 6a–7a (hereinafter SLF Brief). Therefore, in contrast to the Katzenbach Court’s finding that the “registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration” in these States in 1964, see 383 U.S., at 313, 86 S.Ct. 803, since that time this disparity has nearly vanished. In 2006, the disparity was only 3 percentage points in Alabama, 8 percentage points in Louisiana, and in Mississippi, black voter registration actually exceeded white voter registration by 1.5 percentage points. See App. to SLF Brief 6a–7a. In addition, blacks in these three covered States also have higher registration numbers than the **2526 registration rate for whites in non-covered states. See E. Blum & L. Campbell, Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act 3–6 (American Enterprise Institute, 2006); see also S.Rep. No. 109–295, p. 11 (2006) (noting that “presently in seven of the covered States, African-Americans are registered at a rate higher than the national average”; in two more, black registration in the 2004 election was “identical to the national average”; and in “California, Georgia, Mississippi, North Carolina, and Texas, black registration and turnout in the 2004 election ... was higher than that for whites”).

Indeed, when reenacting § 5 in 2006, Congress evidently understood that the emergency conditions which prompted § 5’s original enactment no longer exist. See H.R.Rep. No. 109–478, p. 12 (2006) (“The record reveals that many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated”). Instead of relying on the kind of evidence*228 that the Katzenbach Court had found so persuasive, Congress instead based reenactment on evidence of what it termed “second generation barriers constructed to prevent minority voters from fully participating in the electoral process.” § 2(b)(2), 120 Stat. 577. But such evidence is not probative of the type of purposeful discrimination that prompted Congress to enact § 5 in 1965. For example, Congress relied upon evidence of racially polarized voting within the covered jurisdictions. But racially polarized voting is not evidence of unconstitutional discrimination, see Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47, is not state action, see James v. Bowman, 190 U.S. 127, 136, 23 S.Ct. 678, 47 L.Ed. 979 (1903), and is not a problem unique to the South, see Katz, Aisenbrey, Baldwin, Cheuse, & Weisbrodt, Documenting Discrimination in Voting: Judicial Findings Under Section
The Voting Rights Act Since 1982, 39 U. Mich. J.L. Reform 643, 665 (2006). The other evidence relied on by Congress, such as § 5 enforcement actions, §§ 2 and 4 lawsuits, and federal examiner and observer coverage, also bears no resemblance to the record initially supporting § 5, and is plainly insufficient to sustain such an extraordinary remedy. See SLF Brief 18–35. In sum, evidence of “second generation barriers” cannot compare to the prevalent and pervasive voting discrimination of the 1960’s.

This is not to say that voter discrimination is extinct. Indeed, the District Court singled out a handful of examples of allegedly discriminatory voting practices from the record made by Congress. See, e.g., *Northwest Austin Municipal Util. Dist. No. One v. Mukasey*, 573 F.Supp.2d. 221, 252–254, 256–262 (D.D.C.2008). But the existence of discrete and isolated incidents of interference with the right to vote has never been sufficient justification for the imposition of § 5’s extraordinary requirements. From its inception, the statute was promoted as a measure needed to neutralize a coordinated and unrelenting campaign to deny an entire race access to the ballot. See *City of Boerne*, 521 U.S., at 526, 117 S.Ct. 2157 (concluding that *Katzenbach* confronted a “widespread and *229* persisting deprivation of constitutional rights resulting from this country’s history of racial discrimination”). Perfect compliance with the Fifteenth Amendment’s substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment. The burden remains with Congress to prove that the extreme circumstances warranting § 5’s enactment persist today. A record of scattered**2527** infringement of the right to vote is not a constitutionally acceptable substitute.

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In 1870, the Fifteenth Amendment was ratified in order to guarantee that no citizen would be denied the right to vote based on race, color, or pre-

Original actions to determine constitutionality of certain 1970 amendments of Voting Rights Act. The Supreme Court held that amendments enfranchising 18-year-olds in federal elections, abolishing literacy tests as requisite to vote, and abolishing state durational residency requirements in presidential elections were within power of Congress to enact, but that amendment enfranchising 18-year-olds in state and local elections was beyond power of Congress to enact.

Judgment accordingly.

Mr. Justice Douglas filed opinion dissenting from judgment that Congress could not enfranchise 18-year-olds in state and local elections and concurring in other judgments; Mr. Justice Brennan filed opinion dissenting from same judgment and concurring in other judgments, in which Mr. Justice White and Mr. Justice Marshall joined.

Mr. Justice Harlan filed opinion dissenting from judgment that Congress could enfranchise 18-year-olds in federal elections and from judgment that Congress could establish residency requirements for presidential elections and concurring in other judgments.

Mr. Justice Stewart filed opinion dissenting from judgment that Congress could enfranchise 18-year-olds in federal elections and concurring in other judgments, in which The Chief Justice and Mr. Justice Blackmun joined.

West Headnotes

[1] Constitutional Law 92 4865
92 Constitutional Law 92XXVIII Enforcement of Fourteenth Amendment 92XXVIII(B) Particular Issues and Applications 92k4865 k. Civil rights legislation in general. Most Cited Cases

Elections 144 18
144 Elections 144I Right of Suffrage and Regulation Thereof in General 144k18 k. Power to prescribe qualifications. Most Cited Cases
1970 amendment of Voting Rights Act authorizing 18-year-olds to vote in federal elections was within power of Congress to enact, one judge being of the opinion that power was conferred by constitutional provision relating to power of Congress to regulate national elections, and four justices being of the opinion that power was conferred by enforcement clause of Fourteenth Amendment. Voting Rights Act of 1965, § 302 as amended 42 U.S.C.A. § 1973bb–1; U.S.C.A.Const. art. 1, § 4; Amend. 14.

[2] States 360 18.71
360 States 360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.71 k. Public officers and employees; elections. Most Cited Cases
(Formerly 360k4.17)

[3] Constitutional Law 92 ☞1482
92 Constitutional Law
92XVII Political Rights and Discrimination
92k1482 k. Fifteenth Amendment. Most Cited Cases

Constitutional Law 92 ☞4865
92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(B) Particular Issues and Applications
92k4865 k. Civil rights legislation in general. Most Cited Cases

Elections 144 ☞18
144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k18 k. Power to prescribe qualifications. Most Cited Cases

1970 amendment of Voting Rights Act prohibiting use of literacy tests and other discriminatory tests and devices in federal and state elections was within power of Congress to enact, eight justices being of the opinion that power was conferred by enforcement clause of Fifteenth Amendment and one justice being of the opinion that power was conferred by enforcement clause of Fourteenth Amendment. Voting Rights Act of 1965, § 201 as amended 42 U.S.C.A. § 1973aa; U.S.C.A.Const. Amends. 14, 15.

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(B) Particular Issues and Applications
92k4865 k. Civil rights legislation in general. Most Cited Cases

Elections 144 ☞21
144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k20 Power to Regulate Nominations and Ballots
144k21 k. In general. Most Cited Cases

1970 amendment of Voting Rights Act abolishing state durational residency requirements and providing for absentee balloting in presidential elections was within power of Congress to enact, one justice being of the opinion that power was conferred by constitutional provision relating to power of Congress to regulate national elections, four justices being of the opinion that power was conferred by enforcement clause of Fourteenth Amendment, and three justices being of the opinion that enactment was within authority of Congress to protect right to travel. Voting Rights Act of 1965, § 202 as amended 42 U.S.C.A. § 1973aa–1; U.S.C.A.Const. art. 1, § 4; Amend. 14.

**261 *115 Lee Johnson, Salem, Or., for plaintiff State of Oregon.
Charles Alan Wright, Austin, Tex., for plaintiff State of Texas.
Mr. Justice BLACK, announcing the judgments of the Court in an opinion expressing his own view of the cases.

In these suits certain States resist compliance with the Voting Rights Act Amendments of 1970, Pub.L. 91—285, 84 Stat. 314, because they believe that the Act takes away from them powers reserved to the States by the Constitution to control their own elections. By its terms the Act does three things. First: It lowers the minimum age of voters in both state and federal elections from 21 to 18. Second: Based upon a finding by Congress that literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amendments by barring the use of such tests in all elections, state and national, for a five-year period. Third: The Act forbids States from disqualifying voters in national elections for presidential and vice-presidential electors because they have not met state residency requirements.

FN1 In Nos. 43, Orig., and 44 Orig., Oregon and Texas, respectively, invoke the original jurisdiction of this Court to sue the United States Attorney General seeking an injunction against the enforcement of Title III (18-year-old vote) of the Act. In No. 46 the United States invokes our original jurisdiction seeking to enjoin Arizona from enforcing its laws to the extent that they conflict with Title II (abolition of residency requirements in presidential and vice-presidential elections), s 202, 84 Stat. 316, and Title III (18-year-old vote) of the Act. No question has been raised concerning the standing of the parties or the jurisdiction of this Court.

[1][2] For the reasons set out in Part I of this opinion, I believe Congress can fix the age of voters in national elections, such as congressional, senatorial, vice-presidential *118 and presidential elections, but cannot set the voting age in state and local elections. For reasons expressed in separate opinions, my Brothers DOUGLAS, BRENNAN, WHITE, and MARSHALL join me in concluding that Congress can enfranchise 18-year-old citizens in national elections, but dissent from the judgment that Congress cannot extend the franchise to 18-year-old citizens in state and local elections. For reasons expressed in separate opinions, my Brothers THE CHIEF JUSTICE, HARLAN, STEWART, and BLACKMUN join me in concluding that Congress cannot interfere with the age for voters set by the States for state and local elections. They, however, dissent from the judgment that Congress can control voter qualifications in federal elections. In summary, it is the judgment of the Court that the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections.

[3] For the reasons set out in Part II of this opinion, I believe that Congress, **262 in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections. For reasons expressed in separate opinions, all of my Brethren join me in this judgment. Therefore the literacy-test provisions of the Act are upheld.
[4] For the reasons set out in Part III of this opinion, I believe Congress can set residency requirements and provide for absentee balloting in elections for presidential and vice-presidential electors. For reasons expressed in separate opinions, my Brothers THE CHIEF JUSTICE, DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN concur in this judgment. My Brother *119 HARLAN, for the reasons stated in his separate opinion, considers that the residency provisions of the statute are unconstitutional. Therefore the residency and absentee balloting provisions of the Act are upheld.

Let judgments be entered accordingly.

I

The Framers of our Constitution provided in Art. I, s 2, that members of the House of Representatives should be elected by the people and that the voters for Representatives should have ‘the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.’ Senators were originally to be elected by the state legislatures, but under the Seventeenth Amendment Senators are also elected by the people, and voters for Senators have the same qualifications as voters for Representatives. In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations, if it deemed it advisable to do so. FN2 This was done in Art. I, s 4, of the Constitution which provides:

FN2. Article I, s 4, was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections, 2 J. Story, Commentaries on the Constitution of the United States 280—292 (1st ed. 1833). The contemporary interpretation of this compromise reveals that those who favored national authority over national elections prevailed. Six States included in their resolutions of ratification the recommendation that a constitutional amendment be adopted to curtail the power of the Federal Government to regulate national elections. Such an amendment was never adopted.

A majority of the delegates to the Massachusetts ratifying convention must have assumed that Art. I, s 4, gave very broad powers to Congress. Otherwise that convention would not have recommended an amendment providing:

‘That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution.’ 2 V. Elliot's Debates on the Federal Constitution 177 (1876).

The speech of Mr. Cabot, one delegate to the Massachusetts convention, who argued that Art. I, s 4, was ‘to be as highly prized as any in the Constitution,’ expressed a view of the breadth of that section which must have been shared by most of his colleagues:

‘(I)f the state legislatures are suffered to regulate conclusively the elections of the democratic branch, they may * * * finally annihilate that control of the general government, which the people ought always to have * * *.’ Id., at 26.

And Cabot was supported by Mr. Parsons, who added:

‘* * * They might make an unequal and partial division of the states into districts
for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our com-
motions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election.' Id., at 27.

‘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 chusing Senators.’ (Emphasis supplied.) Moreover, the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause. See McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819). In United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), where the Court upheld congressional power to regulate party primaries, Mr. Justice Stone speaking for the Court construed the interrelation of these clauses of the Constitution, stating:

‘While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states * * * this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by s 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution ‘To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.’‘ 313 U.S., at 315, 61 S.Ct., at 1037.

See also Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1880); Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); Swafford v. Templeton, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005 (1902); Wiley v. Sinkler, 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84 (1900).

The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers ‘argued that the power given Congress in Art. I, s 4, was meant to be used to vindicate the people's right to equality of representation in the House.’ Wesberry v. Sanders, 376 U.S. 1, 16, 84 S.Ct. 1432, 11 L.Ed.2d 481 (1964), and that Congress would ‘most probably * * * lay the state off into districts.’ And in Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946), no Justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

*122 Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate ‘rotten boroughs,’FN3 and Congress has in fact used its power to prevent States from electing all Congressmen at large. There can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal elections.


Any doubt about the powers of Congress to regulate congressional elections, including the age and other qualifications of the voters, should be dispelled by the opinion of this Court in Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932). There, Chief Justice Hughes writing for a unanimous Court discussed the scope of congressional power under s 4 at some length. He said:

‘The subject matter is the ‘times, places and manner of holding elections for senators and representatives.’ It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. * * *

‘This view is confirmed by the second clause of Article I, s 4, which provides that ‘the Congress may at any time by law make or alter such regulations,’ with the single exception stated. The phrase ‘such regulations’ plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. * * * It has a general supervisory power over the whole subject.’’ Id., at 366—367, 52 S.Ct., at 399.

In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them. A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws. The Voting Rights Act Amendments of 1970 now before this Court evidence dissatisfaction of Congress with the voting age set by many of the States for national elections. I would hold, as have a long line of decisions in this Court, that Congress has ultimate supervisory power over congressional elections. Similarly, it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.

FN5. My Brother STEWART has cited the debates of the Constitutional Convention to show that Ellsworth, Mason, Madison, and Franklin successfully opposed granting Congress the power to regulate federal elections, including the qualifications of voters, in the original Constitution. I read the history of our Constitution differently. Mr. Madison, for example, explained Art. I, s 4, to the Virginia ratifying convention as follows: ‘(I)t was thought that the regulation of the time, place, and manner, of electing the representatives, should be uniform throughout the continent. Some States might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. * * * Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.’ 3 J. Elliot's Debates on the Federal Constitution 367 (1876).

And Mr. Mason, who was supposedly successful in opposing a broad grant of power to Congress to regulate federal elections, still found it necessary to support an unsuccessful Virginia proposal to curb the power of Congress under Art. I, s 4. Id., at 403.
FN7. With reference to the selection of the President and Vice President, Art. II, s 1, provides: ‘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 this Court in Burroughs v. United States, 290 U.S. 534, 54 S.Ct. 287, 78 L.Ed. 484 (1934), unheld the power of Congress to regulate certain aspects of elections for presidential and vice-presidential electors, specifically rejecting a construction of Art. II, s 1, that would have curtailed the power of Congress to regulate such elections. Finally, and most important, inherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause. **265

On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother HARLAN has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, *125 as provided in the Tenth Amendment, the power to regulate elections. My major disagreement with my Brother HARLAN is that, while I agree as to the States' power to regulate the elections of their own officials, I believe, contrary to his view, that Congress has the final authority over federal elections. No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices. Pope v. Williams, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904); Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627 (1875). Moreover, Art. I, s 2, FN9 is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, s 4. It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. Amendments Fourteen, Fifteen, Nineteen, and Twenty-four, each of which has assumed that the States had general supervisory power over state elections, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous. My brother BRENNAN's opinion, if carried to its logical conclusion, would, under the guise of insuring equal protection, blot out all state power, leaving the 50 States as little more than impotent figureheads. In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.
FN8. ‘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.’ U.S.Const., Amdt. X.

FN9. ‘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.’

Of course, the original design of the Founding Fathers was altered by the Civil War Amendments and various other amendments to the Constitution. The Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments have expressly authorized Congress to ‘enforce’ the limited prohibitions of those amendments by ‘appropriate legislation.’ The Solicitor General contends in these cases that Congress can set the age qualifications for voters in state elections under its power to enforce the Equal Protection Clause of the Fourteenth Amendment.

Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate **266 against persons on account of their race. Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); Slaughter-House Cases, 16 Wall. 36, 71—72, 21 L.Ed. 394 (1873). While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations*127 other than those on account of race, see Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); Hadley v. Junior College District, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); see also Kotch v. Board of River Port Pilot, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093 (1947), and cases cited therein, it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

FN10. My Brother BRENNAN relies upon Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); and Evans v. Cornman, 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970). These typical equal protection cases in which I joined are not relevant or material to our decision in the cases before us. The establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause. The crucial question here is not who is denied equal protection, but, rather, which political body, state or federal, is empowered to fix the minimum age of voters. The Framers intended the States to make the voting age decision in all elections with the provision that Congress could override state judgments concerning the qualifications of voters in federal elections.

To fulfill their goal of ending racial discrimination and to prevent direct or indirect state legislative encroachment on the rights guaranteed by the amendments, the Framers gave Congress power to enforce each of the Civil War Amendments. These enforcement powers are broad. In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439, 88 S.Ct. 2186, 2203, 20 L.Ed.2d 1189 (1968), the Court held that s 2 of the Thirteenth **128 Amendment ‘clothed
'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.' In construing s 5 of the Fourteenth Amendment, the Court has stated:

'It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged.' Ex parte Virginia, 100 U.S. 339, 345, 25 L.Ed. 676 (1880). (Emphasis added in part.)


As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central **267 government of unrestrained authority over every inch of the whole Nation. Third, Congress may only ‘enforce’ the provisions of the amendments and may do so only by ‘appropriate legislation.’ Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination, see Katzenbach v. Morgan, 384 U.S. 641, 651 n. 10, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828 (1966), *129 or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.


Of course, we have upheld congressional legislation under the Enforcement Clauses in some cases where Congress has interfered with state regulation of the local electoral process. In Katzenbach v. Morgan, supra, the Court upheld a statute which outlawed New York's requirement of literacy in English as a prerequisite to voting as this requirement was applied to Puerto Ricans with certain educational qualifications. The New York statute overruled by Congress applied to all elections. And in South Carolina v. Katzenbach, supra (Black, J., dissenting on other grounds), the Court upheld the literacy test ban of the Voting Rights Act of 1965. That Act proscribed the use of the literacy test in all elections in certain areas. But division of power between state and national governments, like every provision of the Constitution, was expressly qualified by the Civil War Amendments' ban on racial discrimination. Where Congress attempts to remedy

*130 In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence. Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections. On the other hand, where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race.

To invalidate part of the Voting Rights Act Amendments of 1970, however, does not mean that the entire Act must fall or that the constitutional part of the 18-year-old vote provision cannot be given effect. In passing the Voting Rights Act Amendments of 1970, Congress recognized that the limits of its power under the Enforcement Clauses **268 were largely undetermined, and therefore included a broad severability provision:

‘If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.’ 84 Stat. 318.

In this case, it is the judgment of the Court that Title III, lowering the voting age to 18, is invalid as applied to voters in state and local elections. It is also the judgment of the Court that Title III is valid with respect to national elections. We would fail to follow the *131 express will of Congress in interpreting its own statute if we refused to sever these two distinct aspects of Title III. Moreover, it is a longstanding canon of statutory construction that legislative enactments are to be enforced to the extent that they are not inconsistent with the Constitution, particularly where the valid portion of the statute does not depend upon the invalid part. See, e.g., Watson v. Buck, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941); Marsh v. Buck, 313 U.S. 406, 61 S.Ct. 969, 85 L.Ed. 1426 (1941). Here, of course, the enforcement of the 18-year-old vote in national elections is in no way dependent upon its enforcement in state and local elections.

II

It Title I of the Voting Rights Act Amendments of 1970 Congress extended the provisions of the Voting Rights Act of 1965 which ban the use of literacy tests in certain States upon the finding of certain conditions by the United States Attorney General. The Court upheld the provisions of the 1965 Act over my partial dissent in South Carolina v. Katzenbach, supra, and Gaston County v. United States, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309 (1969). The constitutionality of Title I is not raised by any of the parties to these suits.

FN12. Yuma County, Arizona, is presently subject to the literacy-test ban of the Voting Rights Act of 1965 pursuant to a determination of the Attorney General under s 4(a) of the 1965 Act. I do not understand Arizona to contest the application of the 1965 Act or its extension to that county. Arizona ‘does not question’ Congress' authority to enforce the Fourteenth and Fifteenth Amendments 'when Congress possesses a 'special legislative competence''; and cites South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); and Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d
828 (1966), with approval. Answer and Brief for Arizona, No. 46, Orig., O.T. 1970.

In Title II of the Amendments Congress prohibited until August 6, 1975, the use of any test or device resembling a literacy test in any national, state, or local election *132 in any area of the United States where such test is not already proscribed by the Voting Rights Act of 1965. The State of Arizona maintains that Title II cannot be enforced to the extent that it is inconsistent with Arizona's literacy test requirement, Ariz.Rev.Stat.Ann. ss 16—101, subsec. A, par. 4, 16—101, subsec. A, par. 5 (1956). I would hold that the literacy test ban of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment and that it supersedes Arizona's conflicting statutes under the Supremacy Clause of the Federal Constitution.

In enacting the literacy test ban of Title II Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. Congress could have found that as late as the summer of 1968, the percentage registration of nonwhite voters in seven Southern States was substantially below the percentage registration of white voters. FN13 Moreover, Congress had before it striking evidence to show that the provisions of the 1965 Act had had in the span of four years a remarkable impact on minority group voter **269 registration. FN14 Congress also had evidence to show that voter registration in areas with large Spanish-American populations was consistently below the state and national averages. In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average. FN15 Arizona also has a serious problem of deficient voter registration among Indians. Congressional*133 concern over the use of a literacy test to disfranchise Puerto Ricans in New York State is already a matter of record in this Court. Katzenbach v. Morgan, supra. And as to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests. FN16


FN14. Id., at 93.


FN16. Id., at 401.

Congress also had before it this country's history of discriminatory educational opportunities in both the North and the South. The children who were denied an equivalent education by the 'separate but equal' rule of Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), overruled in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), are now old enough to vote. There is substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement. Moreover, the history of this legislation suggests that concern with educational inequality was perhaps uppermost in the minds of the congressmen who sponsored the Act. The hearings are filled with references to educational inequality. Faced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout the Nation, Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to en-
force the Civil War amendments.

Finally, there is yet another reason for upholding the literacy test provisions of this Act. In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is—a serious national dilemma that touches every corner of our land. *134 In this legislation Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation. Compare South Carolina v. Katzenbach, supra, and Gaston County v. United States, supra.

III

In Title II of the Voting Rights Act Amendments Congress also provided that in presidential and vice-presidential elections, no voter could be denied his right to cast a ballot because he had not lived in the jurisdiction long enough to meet its residency requirements. Furthermore, Congress provided uniform national rules for absentee voting in presidential and vice-presidential elections. In enacting these regulations Congress was attempting to insure a fully effective voice to all citizens in national elections. What I said in Part I of this opinion applies with equal force here. Acting under its broad authority to create and maintain a national government, Congress unquestionably has power under the Constitution to regulate federal elections. The Framers of our Constitution were vitally concerned with setting up a national government that could survive. Essential to the survival and to the growth of our national government**270 is its power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent.

IV

Our judgments today give the Federal Government the power the Framers conferred upon it, that is, the final control of the elections of its own officers. Our judgments also save for the States the power to control state and *135 local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them. FN17 The generalities of the Equal Protection Clause of the Fourteenth Amendment were not designed or adopted to render the States impotent to set voter qualifications in elections for their own local officials and agents in the absence of some specific constitutional limitations.

FN17. That these views are not novel is demonstrated by Mr. Justice Story in his Commentaries on the Constitution of the United States, vol. 2, pp. 284—285 (1st ed. 1833):

‘There is, too, in the nature of such a provision (Art. I, s 4), something incongruous, if not absurd. What would be said of a clause introduced into the national constitution to regulate the state elections of the members of the state legislatures? It would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments. It would be deemed so flagrant a violation of principle, as to require no comment. It would be said, and justly, that the state governments ought to possess the power of self-existence and self-organization, independent of the pleasure of the national government. Why does not the same reasoning apply to the national government? What reason is there to suppose, that the state governments will be more true to the Union, than the national government will be to the state governments?’ (Emphasis added.) (Footnote omitted.)

Mr. Justice DOUGLAS.

I dissent from the judgments of the from the judgments of the Court insofar as they declare s 302 of the Voting Rights Act, 84 Stat. 318, unconstitutional as applied to state elections and concur in the
judgments as they affect federal elections, but for different reasons. I rely on the Equal Protection Clause and on the Privileges and Immunities Clause of the Fourteenth Amendment.

I

The grant of the franchise to 18-year-olds by Congress is in my view valid across the board.

*136 I suppose that in 1920, when the Nineteenth Amendment was ratified giving women the right to vote, it was assumed by most constitutional experts that there was no relief by way of the Equal Protection Clause of the Fourteenth Amendment. In Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627, the Court held in the 1874 Term that a State could constitutionally restrict the franchise to men. While the Fourteenth Amendment was relied upon, the thrust of the opinion was directed at the Privileges and Immunities Clause with a subsidiary reference to the Due Process Clause. It was much later, indeed not until the 1961 Term—nearly a century after the Fourteenth Amendment was adopted—that discrimination against voters on grounds other than race was struck down.

The first case in which this Court struck down a statute under the Equal Protection Clause of the Fourteenth Amendment was Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664, decided in the 1879 Term. In the 1961 Term we squarely held that the manner of apportionment**271 of members of a state legislature raised a justiciable question under the Equal Protection Clause, Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663. That case was followed by numerous others, e.g.: that one person could not be given twice or 10 times the voting power of another person in a statewide election merely because he lived in a rural area or *137 in the smallest rural county; ** that political parties receive protection under the Equal Protection Clause just as voters do.

FN1. Strauder was tried for murder. He had sought removal to federal courts on the ground that 'by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State.' Id., at 304, 25 L.Ed. 664. He was convicted of murder and the West Virginia Supreme Court affirmed. This Court held the West Virginia statute limiting jury duty to whites only unconstitutional:

‘We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. * * * (The aim of the Fourteenth Amendment) was against discrimination because of race or color.’ 100 U.S., at 310, 25 L.Ed. 664.


FN4. Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24. We also held in federal elections that the command of Art. I, s 2, of the Constitution that representatives be chosen ‘by the People of the several States' means that ‘as nearly as is practicable one man's vote in a congressional
The reapportionment cases, however, are not quite in point here, though they are the target of my Brother HARLAN’S dissent. His painstaking review of the history of the Equal Protection Clause leads him to conclude that ‘political’ rights are not protected though ‘civil’ rights are protected. The problem of what questions are ‘political’ has been a recurring issue in this Court from the beginning, and we recently reviewed them all in Baker v. Carr, supra, and in Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491. Baker v. Carr was a reapportionment case and Powell v. McCormack involved the exclusion from the House of Representatives of a Congressman. The issue of ‘political’ question versus ‘justiciable’ question was argued pro and con in those cases; and my Brother Harlan stated in Baker v. Carr, 369 U.S., at 330, 82 S.Ct., at 771 et seq., and on related occasions ( Gray v. Sanders, 372 U.S. 368, 382, 83 S.Ct. 801, 809, 9 L.Ed.2d 821; Wesberry v. Sanders, 376 U.S. 1, 20, 84 S.Ct. 526, 536, 11 L.Ed.2d 481; Reynolds v. Sims, 377 U.S. 553, 589, 84 S.Ct. 1362, 1395—1396, 12 L.Ed.2d 506) *138 his views on the constitutional dimensions of the ‘political’ question in the setting of the reapportionment problem.

Those cases involved the question whether legislatures must be so structured as to reflect with approximate equality the voice of every voter. The ultimate question was whether, absent a proper apportionment by the legislature, a federal court could itself make an apportionment. That kind of problem raised issues irrelevant here. Reapportionment, as our experience shows, presented a tangle of partisan politics in which geography, economics, urban life, rural constituencies, and numerous other non-legal factors play varying roles. The competency of courts to deal with them was challenged. Yet we held the issues were justiciable. None of those so-called ‘political’ questions are involved here.

This case, so far as equal protection is concerned, is no whit different from a controversy over a state law that disqualifies women from certain types of employment, Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163, or that imposes a heavier punishment on one class of offender than on another whose crime is not intrinsically different. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655. The right to vote is, of course, different in one respect from the other rights in the economic, social, or political field which, as indicated in the Appendix to this opinion, are under the Equal Protection Clause. The right to vote is a civil right deeply embedded in the Constitution. Article I, s 2, provides that the House is composed of members ‘chosen * * * by the People’ and the electors ‘shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.’ The Seventeenth Amendment states that Senators shall be ‘elected by the people.’ The Fifteenth Amendment speaks of the ‘right of citizens of the United States to vote’—not only in federal but in state elections. The Court in Ex parte Yarbrough, 110 U.S. 651, 665, 4 S.Ct. 152, 159, 28 L.Ed. 274, stated:

‘This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimina-
It was in that tradition that we said in Reynolds v. Sims, supra, 377 U.S., at 555, 84 S.Ct., at 1378, ‘The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.’

This ‘right to choose, secured by the Constitution,’ United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, is a civil right of the highest order. Voting concerns ‘political’ matters; but the right is not ‘political’ in the constitutional sense. Interference with it has given rise to a long and consistent line of decisions by the Court; and the claim has always been upheld as justiciable. FN5 Whatever distinction may have been made, following the Civil War, between ‘civil’ and ‘political’ rights, has passed into history. In Harper v. Virginia State Board of Elections, 383 U.S. 663, 669, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169, we stated: ‘Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.’ That statement is in harmony with my view of the Fourteenth Amendment, as expressed by my Brother BRENNAN: ‘We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted*140 by future generations in accordance with the vision and needs of those generations.’ Post, at 341. Hence the history of the Fourteenth Amendment tendered by my Brother HARLAN is irrelevant to the present problem.


Since the right is civil and not ‘political,’ it is protected by the Equal Protection Clause of the Fourteenth Amendment which in turn, by § 5 of that Amendment, can be ‘enforced’ by Congress.

In Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, we held that Texas could not bar a person, otherwise qualified, from voting merely because he was a member of the armed services. Occupation, we held, when used to bar a person from voting, was that invidious discrimination which the Equal Protection Clause condemns. In Evans v. Cornman, 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370, we held that a State could not deny the vote to residents of a federal **273 enclave when it treated them as residents for many other purposes. In Harper v. Virginia State Board of Elections, 383 U.S., at 666, 86 S.Ct., at 1081, we held a State could not in harmony with the Equal Protection Clause keep a person from voting in state elections because of ‘the affluence of the voter or payment of any fee.’ In Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, we held that a person could not be barred from voting in school board elections merely because he was a bachelor. So far as the Equal Protection Clause was concerned, we said that the line between those qualified to vote and those not qualified turns on whether those excluded have ‘a distinct and direct interest in the school meeting decisions.’ Id., at 632, 89 S.Ct., at 1892. In Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, we held that a state law which gave only ‘property taxpayers’ the right to vote on the issuance of revenue bonds of a municipal utility system violated equal protection as ‘the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike.’ Id., at 705, 89 S.Ct., at 1900. And only on June 23, 1970, we held in Phoenix v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523, that *141 it violates equal protection to restrict those who may vote on general obligation bonds to real property taxpayers. We looked to see if there was any ‘compelling state interest’ in the voting restrictions.
We held that ‘nonproperty owners’ are not ‘substantially less interested in the issuance of these securities than are property owners,’ id., at 212, 90 S.Ct., at 1996, and that presumptively ‘when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise.’ FN6 Id., at 209, 90 S.Ct., at 1994. And as recently as November 9, 1970, we summarily affirmed a district court decision (310 F.Supp. 1172) on the basis of Kolodziejski. Parish School Board of St. Charles v. Stewart, 400 U.S. 884, 91 S.Ct. 136, 27 L.Ed.2d 129, where Louisiana gave a vote on municipal bond issues only to ‘property taxpayers.’

FN6. We noted that general obligation bonds may be satisfied not from real property taxes but from revenues from other local taxes paid by nonowners of property as well as those who own realty. Moreover, we noted that property taxes paid initially by property owners are often passed on to tenants or customers. 399 U.S., at 209—211, 90 S.Ct., at 1994—1995.

The powers granted Congress by s 5 of the Fourteenth Amendment to ‘enforce’ the Equal Protection Clause are ‘the same broad powers expressed in the Necessary and Proper Clause, Art. I, s 8, cl. 18.’ Katzenbach v. Morgan, 384 U.S. 641, 650, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828. As we stated in that case, ‘Correctly viewed, s 5 is 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.’ Id., at 651, 86 S.Ct., at 1723.

Congress might well conclude that a reduction in the voting age from 21 to 18 was needed in the interest of equal protection. The Act itself brands the denial of *142 the franchise to 18-year-olds as ‘a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed’ on them. s 301(a)(1), Voting Rights Act, 84 Stat. 318. The fact that only males are drafted while the vote extends to females as well is not relevant, for the female component of these families or prospective families is also caught up in war and hit hard by it. Congress might well believe that men and women alike should share the fateful decision.

It is said, why draw the line at 18? Why not 17? Congress can draw lines and I see no reason why it cannot conclude that 18-year-olds have that degree of maturity which entitles them to the franchise. They are ‘generally considered**274 by American law to be mature enough to contract, to marry, to drive an automobile, to own a gun, and to be responsible for criminal behavior as an adult.’ FN7 Moreover, we are advised that under state laws, mandatory school attendance does not, as a matter of practice, extend beyond the age of 18. On any of these items the States, of course, have leeway to raise or lower the age requirements. But voting is ‘a fundamental matter in a free and democratic society,’ Reynolds v. Sims, 377 U.S. 533, 561—562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506. Where ‘fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.’ Harper v. Virginia State Board of Elections, 383 U.S. 663, 670, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169. There we were speaking of state restrictions on those rights. Here we are dealing with the right of Congress to ‘enforce’ the principles of equality enshrined in the Fourteenth Amendment. The right to ‘enforce’ granted by s 5 of that Amendment is, as noted, parallel with the Necessary and Proper Clause whose reach Chief Justice Marshall described in *143McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579: ‘Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.’

Equality of voting by all who are deemed mature enough to vote is certainly consistent ‘with the letter and spirit of the constitution.’ Much is made of the fact that Art. I, s 4, of the Constitution FN8 gave Congress only the power to regulate the ‘Manner of holding Elections,’ not the power to fix qualifications for voting in elections. But the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth—made vast in-roads on the power of the States Equal protection became a standard for state action and Congress was given authority to ‘enforce’ it. See Katzenbach v. Morgan, 384 U.S. 641, 647, 86 S.Ct. 1717, 1721, 16 L.Ed.2d 828. The manner of enforcement involves discretion; but that discretion is largely entrusted to the Congress, not to the courts. If racial discrimination were the only concern of the Equal Protection Clause, then across-the-board voting regulations set by the States would be of no concern to Congress. But it is much too late in history to make that claim, as the cases listed in the Appendix to this opinion show. Moreover, election inequalities created by state laws and based on factors other than race may violate the Equal Protection Clause, as we have held over and over again. The reach of s 5 to ‘enforce’ equal protection by eliminating election inequalities would seem quite broad. Certainly there is *144 not a word of limitation in s 5 which would restrict its applicability to matters of race alone. And if, as stated in McCulloch v. Maryland, the measure of the power of Congress is whether the remedy is consistent ‘with the letter and spirit of the constitution,’ we should have no difficulty here. We said in Gray v. Sanders, 372 U.S. 368, 381, 383 S.Ct. 801, 809, 9 L.Ed.2d 821: ‘The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.’

FN8. Article I, s 4, provides: ‘(1) 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 chusing Senators.

‘(2) 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.’

**275 It is a reasoned judgment that those who have such a large ‘stake’ in modern elections as 18-year-olds, whether in times of war or peace, should have political equality. As was made plain in the dissent in Colegrove v. Green, 328 U.S. 549, 566, 66 S.Ct. 1198, 90 L.Ed. 1432 (whose reasoning was approved in Gray v. Sanders, 372 U.S. 368, 379, 383 S.Ct. 801, 808, 9 L.Ed.2d 821), the Equal Protection Clause does service to protect the right to vote in federal as well as in state elections.

I would sustain the choice which Congress has made.

II

I likewise find the objections that Arizona and Idaho make to the literacy and residence requirements of the 1970 Act to be insubstantial.

Literacy. We held in Lassiter v. Northampton Election Board, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072, that a State could apply a literacy test in selecting qualified voters provided the test is not ‘discriminatory’ and does not contravene ‘any restriction that Congress, acting pursuant to its constitutional powers, has imposed.’ Id., at 51, 79 S.Ct., at 990. The question in these cases is whether Congress has the power under s 5 of the Fourteenth Amendment to bar literacy tests in all federal, state, or local elections.

Section 201 bars a State from denying the right
to vote in any federal, state, or local election because of ‘any test or device’ which is defined, inter alia, to include literacy. We traveled most of the distance needed to sustain this Act in Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828, where we upheld the constitutionality of an earlier Act which prohibited the application of English literacy tests to persons educated in Puerto Rico. The power of Congress in s 5 to ‘enforce’ the Equal Protection Clause was sufficiently broad, we held, to enable it to abolish voting requirements which might pass muster under the Equal Protection Clause, absent an Act of Congress. Id., at 648—651, 86 S.Ct., at 1722—1724.

FN9. Section 201(b) defines ‘test or device’ as ‘any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.’ 84 Stat. 315.

The question, we said, was whether the Act of Congress was ‘appropriate legislation to enforce the Equal Protection Clause’:

‘It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed*146 the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.’ Id., at 653, 86 S.Ct., at 1724.

We also held that the Act might be sustained as an attack on the English language test as a device to discriminate. Id., at 654, 86 S.Ct., at 1725. And we went on to say that Congress might have concluded that ‘as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs.’ Id., at 655, 86 S.Ct., at 1726.

We took a further step toward sustaining the present type of law in Gaston County v. United States, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309. That decision involved a provision of the Voting Rights Act of 1965 which suspended the use of any ‘test or device,’ including literacy, as a prerequisite to registration in a State which was found by the Attorney General and the Director of the Census to have used it in any election on November 1, 1964, and in which less than 50% of the residents of voting age were registered or had voted. FN10 Gaston County, North Carolina, was so classified and its literacy test was thereupon suspended. In a suit to remove the ban we sustained it. We noted that Congress had concluded that ‘the County deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test.’ Id., at 291, 89 S.Ct., at 1723. Congress, it was argued, should have employed a formula based on educational disparities between the races or one based on *147 literacy rates. Id., at 292, 89 S.Ct., at 1723—1724. But the choice of appropriate remedies is for Congress and the range of available ones is wide. It was not a defect in the formula that some literate Negroes would be turned out by Negro schools.