LEGISLATION AND STATUTORY INTERPRETATION (LAW 266)

Spring 2025 (Revised)

Instructor: Nelson Lund
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Class Times: Tuesdays or Thursdays, 1:50–3:50 pm

IMPORTANT NOTICE

For students in section 002: our first class meeting will be on Thursday, January 23, and our last meeting will be on Friday, April 25.

Office Hours: Tuesdays, 4:00–4:30, Room 433i

Required Text: William N. Eskridge, Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Statutory Interpretation* (West, 2012), ISBN: 978-0-314-27818-0

Course Description: An introduction to the theory and practice of statutory interpretation.

Learning Outcomes: The American Bar Association requires that this syllabus describe what the ABA calls "learning outcomes." For this course, the learning outcomes include one that has been designated by the faculty: "Students will exercise the professional skills expected of members of the legal profession."

Evaluation: There will be an examination at the end of the course. Final grades may be raised or lowered to reflect the quality of class participation.

- Academic Regulation 4 has strict and specific rules about attendance, which I do not have the authority to waive. If you have questions or concerns about these rules, please contact the Associate Dean for Student Affairs and Academic Support.

- Class discussions are educationally important, and they require coming to class prepared. For that reason, final grades may be raised or lowered to reflect the quality of class participation. If you are not prepared when called on, please say so rather than waste everyone's time by trying to wing it.

- My job is not to indoctrinate you, and your job is not to figure out what I think in hopes of feeding my opinions back to me on the exam. I will not make any

great effort either to reveal or to conceal my views about the cases we're going to study. I neither expect nor welcome unthinking deference to anything I say, and I will ask you to offer reasoned arguments for whatever opinions you express.

- If you think I may not know how to pronounce your name, please send me an email with a phonetic spelling. If I mispronounce your name during class, please correct me.

- In order to encourage regular preparation and participation, the following policies will apply:

    - **No sound or video recording devices of any kind may be used during class.** This is partly to discourage inattentiveness, and partly to encourage participation by students who understandably don't relish the prospect of having their contributions immortalized on other people's recording devices.

    - When employing the Socratic method, I will call on students at random. That means that you may be called on in any given class, no matter how frequently or recently you've been called on before.

    - Everyone is expected to pay attention in class, *not just to my questions and comments but also to what other students are saying*, and to be ready to join the discussion. This is more important than taking extensive notes. Anyone who, when called on, seems not to have been paying attention will be marked down as unprepared.

ASSIGNMENTS

Class 1 – Tues. January 21; Thus. January 23 – The Civil Rights Act of 1964

Eskridge, Frickey, & Garrett, pp. 2-42

Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), excerpts attached to this syllabus at pp. 6-16

Class 2 – Tues. January 28; Thus. January 30 – Interpretations of Title VII of the Civil Rights Act of 1964

Griggs v. Duke Power Co., 401 U.S. 424 (1971), which is attached to this syllabus at pp. 17-22

Eskridge, Frickey, & Garrett, pp. 79-115, 125-34

> Along with the excerpts from the *Weber* case on pp. 85-98 of the casebook, please read the text of § 703(i) of the Civil Rights Act of 1964, which is attached to this syllabus at p. 23
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> Along with the editors' note on pp. 125-29 of the casebook, please read the excerpts from the Civil Rights Act of 1991 that are attached to this syllabus at p. 24

Class 3 – Tues. February 4; Thus. February 6

Class cancelled.

Class 4 – Tues. February 11; Thus. February 13 – Statutory Text and Spirit

Eskridge, Frickey, & Garrett, pp. 142-51, 169-76, 199-212

> Along with the excerpts from *Holy Trinity* on pp. 142-46 of the casebook, please read the full text of the statute at issue in the case, which is attached to this syllabus at pp. 25-26

Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989), excerpts attached to this syllabus at pp. 27-40

Class 5 – Tues. February 18; Thus. February 20 – Deference to Precedents and Agencies

Eskridge, Frickey, & Garrett, pp. 115-25

Loper Bright Enter. v. Raimondo, 2024 WL 3208360 (2024), excerpts attached to this syllabus at pp. 41-51

Class 6 – Tues. February 25; Thus. February 27 – The "New Textualism"

Eskridge, Frickey, & Garrett, pp. 214-32, 242-52, 261-74

Class 7 – Tues. March 4; Thus. March 6 – Textual Canons
Eskridge, Frickey, & Garrett, pp. 326-62

Fischer v. United States, 2024 WL 3208034 (2024), excerpts attached to this syllabus at pp. 52-62

Spring Break

Class 8 – Tues. March 18; Thus. March 20 – Substantive Canons

Eskridge, Frickey, & Garrett, pp. 362-70, 385-86

Post-*Skilling* case summaries attached to this syllabus at pp. 63-67

Snyder v. United States, 2024 WL 3165518 (2024), excerpts attached to this syllabus at pp. 68-80

Eskridge, Frickey, & Garrett, pp. 391-404

Class 9 – Tues. March 25; Thus. March 27 – Federalism Canons

Eskridge, Frickey, & Garrett, pp. 406-26

> Along with *Gregory v. Ashcroft*, pp. 407-18, please read excerpts from Justice White's partial dissent and excerpts from Justice Blackmun's dissent, which are attached to this syllabus at pp. 81-85

Bond v. United States, 572 U.S. 844 (2014), excerpts attached to this syllabus at pp. 86-96

Class 10 – Tues. April 1; Thus. April 3 – Legislative History

Eskridge, Frickey, & Garrett, pp. 469-92

Brown v. United States, 144 S. Ct. 1195 (2024), excerpts attached to this syllabus at pp. 123-25

Lockhart v. United States, 136 S. Ct. 958 (2016), excerpts attached to this syllabus at pp. 126-39

Class 11 – Tues. April 8; Thus. April 10 – Legislative History

Eskridge, Frickey, & Garrett, pp. 495-97, 512-20, 282-92, 523-33

Class 12 – Tues. April 15; Thus. April 17 – Legislative History and Implied Repeals

Eskridge, Frickey, & Garrett, pp. 533-40, 545-62, 580-88

Class 13 – Tues. April 22; Friday April 25 – A New "New Textualism"?

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), excerpts attached to this syllabus at pp. 140-48

Bostock v. Clayton County, 140 S. Ct. 1731 (2020), excerpts attached to this syllabus at pp. 149-66

Willie S. GRIGGS, et al., Appellants,
v.
DUKE POWER COMPANY, a corporation, Appellee.

United States Court of Appeals Fourth Circuit.

Argued April 10, 1969.
Decided Jan. 9, 1970.

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

BOREMAN, Circuit Judge:

. . . . The plaintiffs challenge the validity of the company's promotion and transfer system, which involves the use of general intelligence and mechanical ability tests, alleging racial discrimination and denial of equal opportunity to advance into jobs classified above the menial laborer category.

Duke is a corporation engaged in the generation, transmission and distribution of electric power to the general public in North Carolina and South Carolina. At the time this action was instituted, Duke had 95 employees at its Dan River Station, fourteen of whom were Negroes, thirteen of whom are plaintiffs in this action. The work force at Dan River is divided for operational purposes into five main departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. The positions of Watchman, Clerk and Storekeeper are in a miscellaneous category.

The employees in the Operations Department are responsible for the operation of the station's generating equipment, such as boilers, turbines, auxiliary and control equipment, and the electrical substation. They handle also interconnections between the station, the company's power system, and the systems of other power companies.

The Maintenance Department is responsible for maintenance of all the mechanical and electrical equipment and machinery in the plant.

Technicians working in the Laboratory Department analyze water to determine its fitness for use in the boilers and run analyses of coal samples to ascertain the quality of the coal for use as fuel in the power station. Test Department personnel are responsible for the performance of the station by maintaining the accuracy of instruments, gauges and control devices.

Employees in the Coal Handling Department unload, weigh, sample, crush, and transport coal received from the mines. In so doing, they operate diesel and electrical equipment, bulldozers, conveyor belts, crushers and other heavy equipment items. They must be able to read and understand manuals relating to such machinery and equipment.

The Labor Department provides service to all other departments and is responsible generally for the janitorial services in the plant. Its employees mix mortar, collect garbage, help construct forms, clean bolts, and provide the necessary labor involved in performing other miscellaneous jobs. The Labor Department is the lowest paid, with a maximum wage of $1.565 per hour, which is less than the minimum of $1.705 per hour paid to any other employee in the plant. Maximum wages paid to employees in other departments range from $3.18 per hour to $3.65 per hour.

Within each department specialized job classifications exist, and these classifications constitute a line of progression for purposes of employee advancement. Promotions within departments are made at Dan River as vacancies occur. Normally, the senior man in the classification directly below that in which the vacancy occurs will

be promoted, if qualified to perform the job. Training for promotions within departments is not formalized, as employees are given on the-job training within departments. In transferring from one department to another, an employee usually goes in at the entry level; however, at Dan River an employee is potentially able to move into another department above the entry level, depending on his qualifications.

In 1955, approximately nine years prior to the passage of the Civil Rights Act of 1964 and some eleven years prior to the institution of this action, Duke Power initiated a new policy as to hiring and ***1229** advancement; a high school education or its equivalent was thenceforth required for all new employees, except as to those in the Labor Department. The new policy also required an incumbent employee to have a high school education or its equivalent before he could be considered for advancement from the Labor Department or the position of Watchman into Coal Handling, Operations or Maintenance or for advancement from Coal Handling into Operations or Maintenance. The company claims that this policy was instituted because it realized that its business was becoming more complex and that there were some employees who were unable to adjust to the increasingly more complicated work requirements and thus unable to advance through the company's lines of progression.

The company subsequently amended its promotion and transfer requirements by providing that an employee who was on the company payroll prior to September 1, 1965, and who did not have a high school education or its equivalent, could become eligible for transfer or promotion from Coal Handling, Watchman or Labor positions into Operating, Maintenance or other higher classified jobs by taking and passing two tests, known as the Wonderlic general intelligence test and the Bennett Mechanical AA general mechanical test, with scores equivalent to those achieved by an average high school graduate. The company admits that this change was made in response to requests from employees in Coal Handling for a means of escape from that department but the same opportunity was also provided for employees in the Labor Department. . . .

The plaintiff Negro employees admit that at the present time Duke has apparently abandoned its policy of restricting all Negroes to the Labor Department; but the plaintiffs complain that the educational and testing requirements preserve and continue the effects of Duke's past racial discrimination, thereby violating the Civil Rights Act of 1964.

***1230** The district court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Negroes were relegated to the Labor Department and deprived of access to other departments by reason of racial discrimination practiced by the company. This finding is fully supported by the evidence.

However, the district court also held that Title VII of the Civil Rights Act of 1964 does not encompass the present and continuing effects of past discrimination. This holding is in conflict with other persuasive authority and is disapproved. While it is true that the Act was intended to have prospective application only, relief may be granted to remedy present and continuing effects of past discrimination. . . .

Those six Negro employee-plaintiffs without a high school education or its equivalent who were discriminatorily hired only into the Labor Department prior to Duke's institution of the educational requirement in 1955 were simply locked into the Labor Department by the adoption of this requirement. Yet, on the other hand, many white employees who likewise did not have a high school education or its equivalent had already been hired into the better departments and were free to remain there and be ***1231** promoted or transferred into better, higher paying positions. Thus, it is clear that those six plaintiff Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief; the educational requirement shall not be invoked as an absolute bar to advancement, but must be waived as to these plaintiffs and they shall be entitled to nondiscriminatory consideration for advancement to other departments if and when

job openings occur.

Likewise, as to these same six Negro plaintiffs, the testing requirements established in 1965 are also discriminatory. The testing requirements, as will be fully explained later in this opinion, were established as an approximate equivalent to a high school education for advancement purposes. Since the adoption of the high school education requirement was discriminatory as to these six Negro employees and the tests are used as an approximate equivalent for advancement purposes, it must follow that the testing requirements were likewise discriminatory as to them. These six plaintiffs had to pass these tests in order to escape from the Labor Department while their white counterparts, many of whom also did not have a high school education, had been hired into departments other than the Labor Department and therefore were not required to take the tests. Therefore, as to these six plaintiffs, the testing requirements must also be waived and shall not be invoked as a bar to their advancement.

Next, we consider the rights of the second group of plaintiffs, those four Negro employees without a high school education or its equivalent who were hired into the Labor Department after the institution of the educational requirement. We find that they are not entitled to relief for the reasons to be hereinafter assigned. In determining the rights of this second group of plaintiffs, it is necessary to analyze and determine the validity of Duke's educational and testing requirements under the Civil Rights Act of 1964. We have found no cases directly in point. The Negro employee-plaintiffs contend that the requirements continue the effects of past discrimination and, therefore, must be struck down as invalid under the Act. We find ourselves unable to agree with that contention.

Plaintiffs claim that Duke's educational and testing requirements are discriminatory and invalid because: (1) there is no evidence showing a business need for the requirements; (2) Duke Power did not conduct any studies to discern whether or not such requirements were related to an employee's ability to perform his duties; and (3) the tests were not job-related, and 703(h) of the Civil Rights Act of 1964 requires tests to be job-related in order to be valid.

The company admits that it initiated the requirements without making formal studies as to the relationship or bearing such requirements would have upon its employees' ability to perform their duties. But, Duke claims that the policy was instituted because its business was becoming more complex, it had employees who were unable to grasp situations, to read, to reason, and who did not have an intelligence level high enough to enable them to progress upward through the company's line of advancement.

Pointing out that it uses an intracompany promotion system to train its own employees for supervisory positions inside the company rather than hire supervisory personnel from outside, Duke claims that it initiated the high school education requirement, at least partially, so that it would have some reasonable assurance that its employees could advance into supervisory positions; further, that its educational and testing requirements are valid because they have a legitimate business purpose, and because the tests are professionally developed ability tests, as sanctioned under 703(h) of the Act.

***1232** In examining the validity of the educational and testing requirements, we must determine whether Duke had a valid business purpose in adopting such requirements or whether the company merely used the requirements to discriminate. The plaintiffs claim that centuries of cultural and educational discrimination have placed Negroes at a disadvantage in competing with whites for positions which involve an educational or testing standard and that Duke merely seized upon such requirements as a means of discrimination without a business purpose in mind.

Plaintiffs have admitted in their brief that an employer is permitted to establish educational or testing requirements which fulfill genuine business needs and that such

requirements are valid under the Act. . . . Thus, plaintiffs would apparently concede that if Duke adopted its educational and testing requirements with a genuine business purpose and without intent to discriminate against future Negro employees, such requirements would not be invalidated merely because of Negroes' cultural and educational disadvantages due to past discrimination. Although earlier in this opinion we upheld the district court's finding that the company had engaged in discriminatory hiring practices prior to the Act and we concluded also that the educational and testing requirements adopted by the company continued the effects of this prior discrimination as to employees who had been hired prior to the adoption of the educational requirement, it seems reasonably clear that this requirement did have a genuine business purpose and that the company initiated the policy with no intention to discriminate against Negro employees who might be hired after the adoption of the educational requirement. This conclusion would appear to be not merely supported, but actually compelled by the following facts:

(1) Duke had long ago established the practice of training its own employees for supervisory positions rather than bring in supervisory personnel from outside.

(2) Duke instituted its educational requirement in 1955, nine years prior to the passage of the Civil Rights Act of 1964 and well before the civil rights movement had gathered enough monentum to indicate the inevitability of the passage of such an act.

***1233** (3) Duke has, by plaintiffs' own admission, discontinued the use of discriminatory tactics in employment, promotions and transfers.

(4) The company's expert witness, Dr. Moffie, testified that he had observed the Dan River operation; had observed personnel in the performance of jobs; had studied the written summary of job duties; had spent several days with company representatives discussing job content; and he concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skilled classifications. This testimony is uncontroverted in the record.

(5) When the educational requirement was adopted it adversely affected the advancement and transfer of white employees who were Watchmen or were in the Coal Handling Department as well as Negro employees in the Labor Department.

(6) Duke has a policy of paying the major portion of the expenses incurred by an employee who secures a high school education or its equivalent. In fact, one of the plaintiffs recently obtained such equivalent, the company paying seventy-five percent of the cost.

Next, we consider the testing requirements to determine their validity and we conclude that they, too, are valid under 703(h) of the Civil Rights Act of 1964. In pertinent part, 703(h) reads: '* * * nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.'

There is no evidence in the record that there is any discrimination in the administration and scoring of the tests. Nor is there any evidence that the tests are not professionally developed. The company's expert, Dr. D. J. Moffie, testified that in his opinion the tests were professionally developed and are reliable and valid; that they are 'low level' tests and are given at Dan River by one who has had special training in the administration of such tests. The minimum acceptable scores used by the company are approximately those achieved by the average high school graduate, which fact indicates that the tests are accepted as a substitute for a high school education. . . .

The plaintiffs claim that tests must be job-related in order to be valid under 703(h). The Equal Employment Opportunity Commission which is charged with administering and implementing the Act supports plaintiffs' view. The EEOC has ruled that tests are unlawful '* * * in the absence of evidence that the tests are properly related to specific jobs and have been properly validated * * *.' . . . .

The amendment which incorporated the testing provision of 703(h) was proposed in a modified form by Senator Tower, who was concerned about a then recent finding by a hearing examiner for the Illinois Fair Employment Practices Commission in a case involving Motorola, Inc. The examiner had found that a pre-employment general intelligence test which Motorola had given to a Negro applicant for a job had denied the applicant an equal employment opportunity because Negroes were a culturally deprived or disadvantaged group. In proposing his original amendment, essentially the same as the version later unanimously accepted by the Senate, Senator Tower stated:

> 'It (the amendment which, in substance, became the ability testing provision of 703(h)) is an effort to protect the system whereby employers give general ability and intelligence tests to determine the trainability of prospective employees. The amendment arises from my concern about what happened in the Motorola FEPC case * * *.
>
> 'Let me say, only, in view of the finding in the Motorola case, that the Equal Employment Opportunity Commission, which would be set up by the act, operating in pursuance of Title VII, might attempt to regulate the use of tests by employers * * *.
>
> 'If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or trainability or suitability of a person to do a job.'

The discussion which ensued among members of the Senate reveals that proponents and opponents of the Act agreed that general intelligence and ability tests, if fairly administered and acted upon, were not invalidated by the Civil Rights ***1235** Act of 1964.

The 'Clark-Case' interpretative memorandum pertaining to Title VII fortifies the conclusion that Congress did not intend to invalidate an employer's use of bona fide general intelligence and ability tests. It was stated in said memorandum:

> 'There is no requirement in Title VII that employers abandon bona fide VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.'

When Senator Tower called up his modified amendment, which became the ability testing provision of 703(h), Senator Humphrey-- one of the leading proponents and the principal floor leader of the fight for passage of the entire Act-- stated:

> 'I think it should be noted that the Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and found it to be in accord with the intent and purpose of that title.
>
> 'I do not think there is any need for a rollcall. We can expedite it. The Senator has won his point.
>
> 'I concur in the amendment and ask for its adoption.

At no place in the Act or in its legislative history does there appear a requirement that employers may utilize only those tests which measure the ability and skill required by a specific job or group of jobs. In fact, the legislative history would

seem to indicate clearly that Congress was actually trying to guard against such a result. An amendment requiring a 'direct relation' between the test and a 'particular position' was proposed in May 1968, but was defeated. We agree with the district court that a test does not have to be job-related in order to be valid under 703(h).[FN8]

> FN8. This decision is not to be construed as holding that any educational or testing requirement adopted by any employer is valid under the Civil Rights Act of 1964. There must be a genuine business purpose in establishing such requirements and they cannot be designed or used to further the practice of racial discrimination. Future cases must be decided on the bases of their own fact situations in light of pertinent considerations such as the company's past hiring and advancement policies, the time of the adoption of the requirements, testimony of experts and other evidence as to the business purpose to be accomplished, and the company's stated reasons for instituting such policies.

Having determined that Duke's educational and testing requirements were valid under Title VII, we reach the conclusion that those four Negro employees without a high school education who were hired after the adoption of the educational requirement are not entitled to relief. These employees were hired subject to the educational requirement; each accepted a position in the Labor Department with his eyes wide open. Under this valid educational requirement these four plaintiffs could have been hired only in the Labor Department and could not have been promoted or advanced into any other department irrespective of race, since they could not meet the requirement. Consequently, it could not be said that they have been discriminated against. Furthermore, since the testing requirement is being applied to white and Negro employees alike as an approximate equivalent to a high school education for ***1236** advancement purposes, neither is it racially discriminatory. . . .

Briefly summarizing, only those six Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief. . . .

Affirmed in part, reversed in part, and remanded.

SOBELOFF, Circuit Judge (concurring in part and dissenting in part):

The decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years. . . .

While I concur in the grant of relief to six of the plaintiffs, I dissent from the majority opinion insofar as it upholds the Company's educational and testing requirements and denies relief to four Negro employees on that basis.

The case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified. . . . On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the ***1238** Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.

The pattern of racial discrimination in employment parallels that which we have witnessed in other areas. Overt bias, when prohibited, has ofttimes been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before. Illustrative is the use of the Grandfather Clause in voter registration-- a scheme that was condemned by the Supreme Court without dissent over a half century ago. Guinn v. United States, 238

U.S. 347 (1915). Another illustration is the resort to pupil transfer plans to nullify rezoning which would otherwise serve to desegregate school districts. Again, the illusory even-handedness did not shield the artifice from attack; the Supreme Court unanimously repudiated the plan. Goss v. Bd. of Education, 373 U.S. 683 (1963). It is long recognized constitutional doctrine that 'sophisticated as well as simple-minded modes of discrimination' are prohibited. Lane v. Wilson, 307 U.S. 268, 275 (1938) (Frankfurter, J.). We should approach enforcement of the Civil Rights Act in the same spirit.

In 1964 Congress sought to equalize employment opportunity in the private sector. Title VII, 703(a) of the 1964 Civil Rights Act provides:

> It shall be an unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that 'objective' or 'neutral' standards that favor whites but do not serve business needs are indubitably unlawful employment practices. The critical inquiry is business necessity and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end. For example, a requirement that all applicants for employment shall have attended a particular type of school would seem racially neutral. But what if it develops that the specified schools were open only to whites, and if, moreover, they taught nothing of particular significance to the employer's needs? No one can doubt that the requirement would be invalid.

I. Use of Non-Job-Related Educational and Testing Standards

. . . . The era of outrightly acknowledged bias at Duke Power is admittedly at an end. However, plaintiffs contend that administration of certain 'objective' transfer criteria have accomplished substantially the same result. It was not until August 1966 that any Negro was promoted out of the Labor Department. Altogether, as of this date, three blacks have advanced from that department. They were the only ones that could measure up to the Company's requisites for transfer.

In 1955 the Company first imposed its educational requirement: a high school diploma (or successful completion of equivalency ('GED') tests) would be necessary to progress from any of the outside departments (Labor, Coal Handling, Watchmen) to any of the inside departments (Operations, Maintenance, Laboratory and Test) or from Labor to the two other outside classifications. In 1965 the Company provided that in lieu of a high school diploma or equivalent, employees could satisfy the transfer standards by passing two 'general intelligence' tests, the 12 minute 'Wonderlic' test and the 30 minute 'Bennett Mechanical AA' test. It is uncontroverted that all of these requirements are equivalent.

A. The Necessity for Job-Relatedness

Whites fare overwhelmingly better than blacks on all the criteria,[FN6] as evidenced by the relatively small promotion rate from the Labor Department since 1965. . . . The requirements, to withstand ***1240** attack, must be shown to appraise accurately those characteristics (and only those) necessary for the job or jobs an employee will be expected to perform. In other words, the standards must be 'job-related.'

> FN6. No one seriously questions the fact that, in general, whites register far better on the Company's alternative requirements than blacks. The reasons are not mysterious. In North Carolina, census statistics show, as of 1960, while 34% Of white males had completed high school, only 12% Of Negro males had done so. On a gross level, then, use of the high school diploma requirement would favor whites by a ratio of approximately 3 to 1. It is generally known that standardized aptitude tests are designed to predict future ability by testing a cumulation of acquired knowledge. In other words, an aptitude test is necessarily measuring a student's background, his environment. It is a test of his cumulative experiences in his home, his community and his school. Since for generations blacks have been afforded inadequate educational opportunities and have been culturally segregated from white society, it is no more surprising that their performance on 'intelligence' tests is significantly different than whites' than it is that fewer blacks have high school diplomas. In one instance, for example, it was found that 58% of whites could pass a battery of standardized tests, as compared with only 6% of the blacks. Included among those tests were the Wonderlic and Bennett tests.

Plaintiffs are not asking, as the majority implies, that blacks be accorded favored treatment in order to remedy centuries of past discrimination. That many members of the long disfavored group find themselves ill equipped for certain employments is a burden which the 1964 Civil Rights Act does not seek to lift. The argument is only that educational and cultural differences caused by that history of deprivation may not be fastened on as a test for employment when they are irrelevant to the issue of whether the job can be adequately performed.

Duke Power, on the other hand, maintains that its selection standards are unimpeachable since in its view the tests (and therefore also the equivalent educational standard) are protected by 703(h) of Title VII.

Section 703(h) provides, in pertinent part:

> * * * nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

The Company asserts that its tests are 'professionally developed ability tests' and thus do not have to be job-related. . . . The Company would have us hold that any test authored by a professional test designer is 'professionally developed' and automatically merits the court's blessing. But, what is professionally developed for one purpose is not necessarily so far another. A professionally developed typing test, or example, could not be considered professionally developed to test teachers. Similarly, a test that is adequately designed to determine academic ability, such as a college entrance examination, may be grossly wide of the mark when used in hiring a machine

operator. . . . Although certainly not so intended, my brethren's resolution of the issue contains a built-in invitation to evade the mandate of the statute. To continue his discriminatory practices an employer need only choose any test that favors whites and is irrelevant to actual job qualifications. In this very case, the Company's oft-reiterated but totally unsubstantiated claim of business need has been deemed sufficient to sustain its employment standards. The record furnishes no supporting evidence, only the defendant's ipse dixit. . . .

Congressional discussion of employment testing came in the swath of the ***1242** famous decision of an Illinois Fair Employment Practices Commission hearing examiner, Myart v. Motorola. That case went to the extreme of suggesting that standardized tests on which whites performed better than Negroes could never be used. The decision was generally taken to mean that such tests could never be justified even if the needs of the business required them.

Understandably, there was an outcry in Congress that Title VII might produce a Motorola decision. Senators Clark and Case moved to counter that speculation. In their interpretive memorandum they announced that

> there is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

Read against the context of the Motorola controversy, the import of the Clark-Case statement plainly appears: employers were not to be prohibited from using tests that determine qualifications. 'Qualification' implies qualification for something. A reasonable interpretation of what the Senators meant, in light of the events, was that nothing in the Act prevents employers from requiring that applicants be fit for the job. Tests for that purpose may be as difficult as an employer may desire.

Senator Tower, however, was not satisfied that a Motorola decision was beyond the purview of Title VII as written. He introduced an amendment which had the object of preventing the feared result. His amendment provided that a test, administered to all applicants without regard to race, would be permissible 'if * * * in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment (or promotion or transfer) in the particular business or enterprise involved * * *.' It was emphatically represented by the author that the amendment was 'not an effort to weaken the bill' and 'would not legalize discriminatory tests' but was offered to stave off an apprehended Motorola ruling that might 'invalidate tests * * * to determine the professional competence or ability or trainability or suitability of a person to do a job.' It is highly noteworthy that Senator Tower's exertions were not on behalf of tests unrelated to job qualifications, but his aim was to make sure that job related ***1243** tests would be permitted. He squarely disavowed any broader aim.

Senators Case and Humphrey opposed the amendment as redundant. Reiterating the message of the Clark-Case memorandum, Senator Case declared that 'the Motorola case could not happen under the bill the Senate is now considering.' Senator Case also feared that some of the language in the amendment would be susceptible to misinterpretation. The amendment was defeated.

Two days later Senator Tower offered 703(h) in its present form, stating that it had been agreed to in principle 'but the language was not drawn as carefully as it should have been.' The new amendment was acceptable to the proponents of the bill and it passed.

What does this history denote? It reveals that because of the Motorola case there

was serious concern that tests that select for job qualifications-- job-related tests-- might be deemed invalid under Title VII. Senators Clark, Case and Humphrey thought the fear illusory, but Senator Tower expended great effort to insure against the possibility. At the same time he gave assurance that he did not mean to weaken the Act. His first proposed amendment contained language which contemplated that tests were to be job-related. According to his own formulation tests had to be of such character as to determine whether 'an individual is suitable with respect to his employment.' At no time was there a clash of opinion over this principle but the amendment was opposed by proponents of the bill for other reasons and was rejected. The final amendment, which was acceptable to all sides could hardly have required less of a job relation than the first. Since job-relatedness was never in dispute there is no room for the inference that the bill in its enacted form embodied a compromise on this point. The conclusion is inescapable that the Commission's construction of 703(h) is well supported by the legislative history.

***1244** Manifestly, then, so far as Duke Power relies on 703(h) for the proposition that its tests (or other requirements) need not be job-related, it must fail.

B. The District Court's Finding and the Evidence Supporting It.

. . . . To insure that a criterion is suitably fitted to a job or jobs, an employer is called upon to demonstrate that the standard was adopted after sufficient study and evaluation. It is not enough that officials think or hope that a requirement will work. In the District Court, Dr. Richard Barrett was qualified as an expert witness for plaintiff on the 'use of tests and other selection procedures for selection in promotion and employment.' He testified as to what sound business practice would dictate: First, a careful job analysis should be made, detailing the tasks involved in a job and the precise skills that are necessary. Then, on the basis of this analysis, selection procedures may be chosen that are adapted to the relevant abilities. Then, the most important step is to validate the chosen procedures, that is, to test their results with actual performance. . . . .

Compare with the above what Duke Power has done and what it has failed to do. Company officials say that the high school requirement was adopted because they thought it would be helpful. Indeed, a company executive candidly admitted that

> there is nothing magic about it, and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up, but we felt this was a reasonable requirement * * *.

Duke Power offered the testimony of Dr. Dannie Moffie, an expert 'psychologist in the field of industrial and personnel testing.' Dr. Moffie agreed that a professionally developed test 'should be reliable and * * * should be valid.' The question of validity, he said, is whether 'the test measures what it has been set up to measure.' Dr. Moffie ***1245** never asserted that the Bennett and Wonderlic tests had been validated for job-relatedness. In fact, he testified that a job-related validity study was begun at the Dan River plant in 1966 but has not yet been completed. What this expert did claim was that the tests had been validated for their express purpose of determining 'whether or not a person has the intelligence level and the mechanical ability level that is characteristic of the High School graduate. According to Dr. Moffie, when (the tests) function as a substitute or in lieu of a High School education, then the assumption is that the High School education is the kind of training and ability and judgment that a person needs to have, in order to do the jobs that we are talking about here * * *.

It is precisely this assumption that is totally unsubstantiated. The tests stand, and fall, with the high school requirement. The testimony does establish that the tests are the equivalent or a suitable substitute for a high school education, but there is an

utter failure to establish that they sufficiently measure the capacity of the employee to perform any of the jobs in the inside departments. This is a fatal omission and should mark the end of the story.

C. The Alleged Business Justification.

But on the majority's theory, there can be business justification in the absence of job-relatedness. The Company's promotion policy has always been to give on-the-job training-- the next senior man is promoted if, after he tries out on the job, he is found qualified. The Company claims that ten years before the start of this suit it found that, its business having become increasingly complex, some employees 'did not have an intelligence level high enough to enable them to progress' in the ordinary line of promotion. It is asserted that in order to ameliorate this situation and to 'upgrade the quality of its work force' the Company adopted the high school requirement, and later the alternative tests, as conditions for entry into the desirable inside departments. On these claims the majority grounds its determination of business need. . . . .

Distilled to its essence, the underpinning upon which my brethren posit their ***1246** argument is their expressed belief in the good faith of Duke Power. For them, the crucial inquiry is not whether the Company can establish business need, but whether it has a bad motive or has designed its tests with the conscious purpose to discriminate against blacks. Thus the majority stresses that the standards were adopted in 1955 when overt discrimination was the general rule, and hence the new policy was obviously not meant to accomplish that end. But this is not an answer.

A man who is turned down for a job does not care whether it was because the employer did not like his skin color or because, although the employer professed impartiality, procedures were used which had the effect of discriminating against the applicant's race. Likewise irrelevant to Title VII is the state of mind of an employer whose policy, in practice, effects discrimination. The law will not tolerate unnecessarily harsh treatment of Negroes even though an employer does not plan this result. The use of criteria that are not backed by valid and corroborated business needs cannot be allowed, regardless of subjective intent. There can be no legitimate business purpose apart from business need; and where no business need is shown, claims to business purpose evaporate.

It may be accepted as true that Duke Power did not develop its transfer procedures in order to evade Title VII, since in 1955 this enactment could not be foreseen. However, by continuing to utilize them at the present time, it is now evading the Act. And by countenancing the practice, this court opens the door to wholesale evasion. We may be sure that there will be many who will seek to pass through that door. . . .

III. Conclusion

. . . . This case deals with no mere abstract legal question. It confronts us with one of the most vexing problems touching racial justice and tests the integrity and credibility of the legislative and judicial process. We should approach our task of enforcing Title VII with full realization of what is at stake.

For all of the above reasons, the judgment of the District Court should be reversed with directions to grant relief to all of the plaintiffs.

401 U.S. 424 (1971)

Supreme Court of the United States

Willie S. GRIGGS et al., Petitioners,
v.
DUKE POWER COMPANY.

|
Argued Dec. 14, 1970.
|
Decided March 8, 1971.

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

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education *426 or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[1]

1 The Act provides:

'Sec. 703. (a) It shall be an unlawful employment practice for an employer—

'(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

'(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer * * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. * * *' 78 Stat. 255, 42 U.S.C. s 2000e—2.

Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act and this proceeding was brought by a group of incumbent Negro employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were Negroes; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the *427 Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four 'operating' departments in which only whites were employed.[2] Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

2 A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor Department in 1953, was promoted to a job in the Coal Handling Department.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any 'inside' department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the 'operating' **852 departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it become necessary to register satisfactory scores on two professionally prepared aptitude *428 tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an 'inside' job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.[3]

3 The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

*429 The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action.[4] The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related.[5] We **853 granted the writ on these claims.

4 The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying departments could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them. The Court of Appeals also required that the seniority rights of those Negroes be measured on a plantwide, rather than a departmental, basis. However, the Court of Appeals denied relief to the Negro employees without a high school education or its equivalent who were hired into the Labor Department after institution of the educational requirement.

5 One member of that court disagreed with this aspect of the decision, maintaining, as do the petitioners in this Court, that Title VII prohibits the use of employment criteria that operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove *430 barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, 'whites register far better on the Company's alternative requirements' than Negroes.[6] This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in Gaston County v. United States, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any *431 person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

6 In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so. U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Characteristics of the Population, pt. 35, Table 47.

Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks. Decision of EEOC, CCH Empl.Prac. Guide, 17,304.53 (Dec. 2, 1966). See also Decision of EEOC 70—552, CCH Empl.Prac. Guide, 6139 (Feb. 19, 1970).

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of

the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

**854 The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria *432 are now used.[7] The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such longrange requirements fulfill a genuine business need. In the present case the Company has made no such showing.

7 For example, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees.' 420 F.2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

*433 The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by s 703(h) of the Act.[8] That section authorizes the use of 'any professionally developed ability test' that is not 'designed, intended or *used* to discriminate because of race * * *.' (Emphasis added.)

8 Section 703(h) applies only to tests. It has no applicability to the high school diploma requirement.

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting s 703(h) to permit only the use of job-related tests.[9] The administrative **855 interpretation of the *434 Act by the enforcing agency is entitled to great deference. See, e.g., United States v. City of Chicago, 400 U.S. 8, 91 S.Ct. 18, 27 L.Ed.2d 9 (1970); Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); Power Reactor Development Co. v. Electricians, 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

9 EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, provide:

'The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.'

The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 29 CFR s 1607, 35 Fed.Reg. 12333 (Aug. 1, 1970). These guidelines demand that employers using tests have available 'data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' Id., at s 1607.4(c).

Section 703(h) was not contained in the House version of the Civil Rights Act but was added in the Senate during extended debate. For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination.[10] Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII 'expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.' 110 Cong.Rec. 7247.[11] (Emphasis added.) Despite *435 these assurances, Senator Tower of Texas introduced an amendment authorizing 'professionally developed ability tests.' Proponents of Title VII opposed the amendment because, as written, it would permit an employer to give any test, 'whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the **856 guise of compliance with the statute.' 110 Cong.Rec. 13504 (remarks of Sen. Case).

10 The congressional discussion was prompted by the decision of a hearing examiner for the Illinois Fair Employment Commission in Myart v. Motorola Co. (The decision is reprinted at 110 Cong.Rec. 5662.) That case suggested that standardized tests on which whites performed better than Negroes could never be used. The decision was taken to mean that such tests could never be justified even if the needs of the business required them. A number of Senators feared that Title VII might produce a similar result. See remarks of Senators Ervin, 110 Cong.Rec. 5614—5616; Smathers, id., at 5999—6000; Holland, id., at 7012—7013; Hill, id., at 8447; Tower, id., at 9024; Talmadge, id., at 9025—9026; Fulbright, id., at 9599—9600; and Ellender, id., at 9600.

11 The Court of Appeals majority, in finding no requirement in Title VII that employment tests be job related, relied in part on a quotation from an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:

'There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.' 110 Cong.Rec. 7213.

However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Cong.Rec. 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure 'applicable job qualifications' are permissible under Title VII. In the earlier memorandum Clark and Case assured the Senate that employers were not to be prohibited from using tests that determine qualifications. Certainly a reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.

The amendment was defeated and two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of s 703(h). Speaking for the supporters of Title VII, Senator Humphrey, who had vigorously opposed the first amendment, endorsed the substitute amendment, stating: 'Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this *436 amendment and have found it to be in accord with the intent and purpose of that title.' 110 Cong.Rec. 13724. The amendment was then adopted.[12] From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of s 703(h) to require that employment tests be job related comports with congressional intent.

12 Senator Tower's original amendment provided in part that a test would be permissible 'if * * * in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved * * *.' 110 Cong.Rec. 13492. This language indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed.

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

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Selected provisions of the Civil Rights Act of 1991

"The purposes of this Act are– . . . (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)"

An unlawful employment practice based on disparate impact is established if "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"

"No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice."

Act of February 26, 1885, 23 Stat. 332

Statute at issue in *Rector, Holy Trinity Church v. United States*
143 U.S. 457 (1892)

CHAP. 164.–An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories or the District of Columbia.

SEC. 2. That all contracts or agreements, express or implied, parol or special, which may hereafter be made by and between any person, company, partnership, or corporation, and any foreigner or foreigners, alien or aliens, to perform labor or service or having reference to the performance of labor or service by any person in the United States, its Territories, or the District of Columbia previous to the migration or importation of the person or persons whose labor or service is contracted for into the United States, shall be utterly void and of no effect.

SEC. 3. That for every violation of any of the provisions of section one of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging or soliciting the migration or importation of any alien or aliens, foreigner or foreigners, into the United States, its Territories, or the District of Columbia, to perform labor or service of any kind under contract or agreement, express or implied, parol or special, with such alien or aliens, foreigner or foreigners, previous to becoming residents or citizens of the United States, shall forfeit and pay for every such offence the sum of one thousand dollars, which may be sued for and recovered by the United States or by any person who shall first bring his action therefor including any such alien or foreigner who may be a party to any such contract or agreement, as debts of like amount are now recovered in the circuit courts of the United States; the proceeds to be paid into the Treasury of the United States; and separate suits may be brought for each alien or foreigner being a party to such contract or agreement aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit at the expense of the United States.

SEC. 4. That the master of any vessel who shall knowingly bring within the United States on any such vessel, and land, or permit to be landed, from any foreign port or place, any alien laborer, mechanic, or artisan who, previous to embarkation on such vessel, had entered into contract or agreement, parol or special, express or implied, to perform labor or service in the United States, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such alien laborer, mechanic or artisan so brought as aforesaid, and may also be imprisoned for a term not exceeding six months.

SEC. 5. That nothing in this act shall be so construed as to prevent any citizen or subject of any foreign country temporarily residing in the United States, either in private or official capacity, from engaging, under contract or otherwise, persons not residents or citizens of the United States to act as private secretaries, servants, or domestics for such foreigner temporarily residing in the United States as aforesaid; nor shall this act be so construed as to prevent any person, or persons, partnership, or corporation from engaging, under contract or agreement, skilled workman in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: *Provided,* That skilled labor for that purpose cannot be otherwise obtained; nor shall the provisions of this

act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal domestic servants: *Provided,* That nothing in this act shall be construed as prohibiting any individual from assisting any member of his family or any relative or personal friend, to migrate from any foreign country to the United States, for the purpose of settlement here.

SEC. 6. That all laws or parts of laws conflicting herewith be, and the same are hereby, repealed.

Approved, February 26, 1885.

491 U.S. 440

Supreme Court of the United States

PUBLIC CITIZEN, Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE et al.
WASHINGTON LEGAL FOUNDATION, Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE et al.

Argued April 17, 1989.
Decided June 21, 1989.

[BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, in which REHNQUIST, C.J., and O'CONNOR, J., joined, *post,* p. 2573. SCALIA, J., took no part in the consideration or decision of the cases.]

***443 Justice BRENNAN delivered the opinion of the Court.**

The Department of Justice regularly seeks advice from the American Bar Association's Standing Committee on Federal Judiciary regarding potential nominees for federal judgeships. The question before us is whether the Federal Advisory Committee Act (FACA), 86 Stat. 770, as amended, 5 U.S.C.App. § 1 *et seq.* (1982 ed. and Supp. V), applies to these consultations and, if it does, whether its application interferes unconstitutionally with the President's prerogative under Article II to nominate and appoint officers of the United States; violates the doctrine of separation of powers; or unduly infringes the First Amendment right of members of the American Bar Association to freedom of association and expression. We hold that FACA does not apply to this special advisory relationship. We therefore do not reach the constitutional questions presented.

I

A

The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" Supreme Court Justices and, as established by Congress, other federal judges. Art. II, § 2, cl. 2. Since 1952 the President, through the Department of Justice, has requested advice from the American Bar Association's Standing Committee on Federal Judiciary (ABA Committee) in making such nominations.

The American Bar Association is a private voluntary professional association of approximately 343,000 attorneys. It has several working committees, among them the advisory body whose work is at issue here. The ABA Committee consists of 14 persons belonging to, and chosen by, the American Bar Association. Each of the 12 federal judicial Circuits (not including the Federal Circuit) has one representative on the ABA Committee, except for the Ninth Circuit, which has ***444** two; in addition, one member is chosen at large. The ABA Committee receives no federal funds. It does not recommend persons for appointment to the federal bench of its own initiative.

Prior to announcing the names of nominees for judgeships on the courts of appeals, the district courts, or the Court of International Trade, the President, acting through the Department of Justice, routinely requests a potential nominee to complete a questionnaire drawn up by the ABA Committee and to submit it to the Assistant Attorney General for the Office of Legal Policy, to the chair of the ABA Committee, and to the committee member

(usually the representative of the relevant judicial Circuit) charged with investigating the nominee. The potential nominee's answers ****2562** and the referral of his or her name to the ABA Committee are kept confidential. The committee member conducting the investigation then reviews the legal writings of the potential nominee, interviews judges, legal scholars, and other attorneys regarding the potential nominee's qualifications, and discusses the matter confidentially with representatives of various professional organizations and other groups. The committee member also interviews the potential nominee, sometimes with other committee members in attendance.

Following the initial investigation, the committee representative prepares for the chair an informal written report describing the potential nominee's background, summarizing all interviews, assessing the candidate's qualifications, and recommending one of four possible ratings: "exceptionally well qualified," "well qualified," "qualified," or "not qualified." ***445** The chair then makes a confidential informal report to the Attorney General's Office. The chair's report discloses the substance of the committee representative's report to the chair, without revealing the identity of persons who were interviewed, and indicates the evaluation the potential nominee is likely to receive if the Department of Justice requests a formal report.

If the Justice Department does request a formal report, the committee representative prepares a draft and sends copies to other members of the ABA Committee, together with relevant materials. A vote is then taken and a final report approved. The ABA Committee conveys its rating--though not its final report--in confidence to the Department of Justice, accompanied by a statement whether its rating was supported by all committee members, or whether it only commanded a majority or substantial majority of the ABA Committee. After considering the rating and other information the President and his advisers have assembled, including a report by the Federal Bureau of Investigation and additional interviews conducted by the President's judicial selection committee, the President then decides whether to nominate the candidate. If the candidate is in fact nominated, the ABA Committee's rating, but not its report, is made public at the request of the Senate Judiciary Committee.

B

FACA was born of a desire to assess the need for the "numerous committees, boards, commissions, councils, and similar ***446** groups which have been established to advise officers and agencies in the executive branch of the Federal Government." § 2(a), as set forth in 5 U.S.C.App. § 2(a). [FN4] Its purpose was to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and ****2563** cost; and that their work be exclusively advisory in nature. § 2(b).

> FN4. Federal advisory committees are legion. During fiscal year 1988, 58 federal departments sponsored 1,020 advisory committees. General Services Administration, Seventeenth Annual Report of the President on Federal Advisory Committees 1 (1988). Over 3,500 meetings were held, and close to 1,000 reports were issued. *Ibid.* Costs for fiscal year 1988 totaled over $92 million, roughly half of which was spent on federal staff support. *Id.,* at 3.

To attain these objectives, FACA directs the Director of the Office of Management and Budget and agency heads to establish various administrative guidelines and management controls for advisory committees. It also imposes a number of requirements on advisory groups. For example, FACA requires that each advisory committee file a charter, § 9(c) and keep detailed minutes of its meetings. § 10(c). Those meetings must be chaired or attended by an officer or employee of the Federal Government who is authorized to adjourn any meeting when he or she deems its adjournment in the public interest. § 10(e). FACA also requires advisory committees to provide advance notice of their meetings and to open them to the public, § 10(a), unless the President or the agency head to which an advisory committee reports determines that it may be closed to the public in accordance with the Government in

the Sunshine Act, 5 U.S.C. § 552b(c). § 10(d). In addition, FACA stipulates that advisory committee minutes, records, and reports be made available ***447** to the public, provided they do not fall within one of the Freedom of Information Act's exemptions, see 5 U.S.C. § 552, and the Government does not choose to withhold them. § 10(b). Advisory committees established by legislation or created by the President or other federal officials must also be "fairly balanced in terms of the points of view represented and the functions" they perform. §§ 5(b)(2), (c). Their existence is limited to two years, unless specifically exempted by the entity establishing them. § 14(a)(1).

C

In October 1986, appellant Washington Legal Foundation (WLF) brought suit against the Department of Justice after the ABA Committee refused WLF's request for the names of potential judicial nominees it was considering and for the ABA Committee's reports and minutes of its meetings. WLF asked the District Court for the District of Columbia to declare the ABA Committee an "advisory committee" as FACA defines that term. WLF further sought an injunction ordering the Justice Department to cease utilizing the ABA Committee as an advisory committee until it complied with FACA. In particular, WLF contended that the ABA Committee must file a charter, afford notice of its meetings, open those meetings to the public, and make its minutes, records, and reports available for public inspection and copying.

. . . .

II

[discussion of standing omitted]

III

Section 3(2) of FACA, as set forth in 5 U.S.C. App. § 3(2), defines "advisory committee" as follows:

"For the purpose of this Act--

* * *

"(2) The term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as 'committee'), which is--

"(A) established by statute or reorganization plan, or

"(B) established or utilized by the President, or

"(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes ***452** (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government."

Appellants agree that the ABA Committee was not "established" by the President or the Justice Department. Equally plainly, the ABA Committee is a committee that furnishes "advice or recommendations" to the President via the Justice Department. Whether the ABA Committee constitutes an "advisory committee" for purposes of FACA therefore depends upon whether it is "utilized" by the President or the Justice Department as Congress intended that term to be understood.

There is no doubt that the Executive makes use of the ABA Committee, and thus "utilizes" it in one common sense of the term. As the District Court recognized, however, "reliance on the plain language of FACA alone is not entirely satisfactory." "Utilize" is a woolly verb, its contours left undefined by the statute itself. Read unqualifiedly, it would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice. [FN8] We are convinced that Congress did not intend that result. A nodding acquaintance with FACA's purposes, ***453** as manifested by its legislative history and as recited in § 2 of the Act, reveals that it cannot have been Congress' intention, for example, to require the filing of a charter, the presence of a controlling federal official, and detailed minutes any time the President seeks the views of the National Association for the Advancement of Colored People (NAACP) before nominating Commissioners to the Equal Employment Opportunity Commission, or asks the leaders of an American Legion Post he is visiting for the organization's opinion on some aspect of military policy.

> FN8. FACA provides exceptions for advisory committees established or utilized by the Central Intelligence Agency or the Federal Reserve System, § 4(b), as well as for "any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies." § 4(c). The presence of these exceptions does little to curtail the almost unfettered breadth of a dictionary reading of FACA's definition of "advisory committee."

Nor can Congress have meant--as a straightforward reading of "utilize" would appear to require--that all of FACA's restrictions apply if a President consults with his own political party before picking his Cabinet. It was unmistakably *not* Congress' intention to intrude on a political party's freedom to conduct its affairs as it chooses, or its ability to advise elected officials who belong to that party, by placing a federal employee in charge of each advisory group meeting and making its minutes public property. FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals; although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice. [FN9] As we ***454** said in *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459 (1892): "[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

> FN9. Justice KENNEDY agrees with our conclusion that an unreflective reading of the term "utilize" would include the President's occasional consultations with groups such as the NAACP and committees of the President's own political party. Having concluded that groups such as these are covered by the statute when they render advice, however, Justice KENNEDY refuses to consult FACA's legislative history--which he later denounces, with surprising hyperbole, as "unauthoritative materials," although countless opinions of this Court, including many written by the concurring Justices, have rested on just such materials--because this result would not, in his estimation, be "absurd," Although this Court has never adopted so strict a standard for reviewing committee reports, floor debates, and other nonstatutory indications of congressional intent, *and we explicitly reject that standard today,* even if "absurdity" were the test, one would think it was met here. The idea that Members of Congress would vote for a bill subjecting their own political parties to bureaucratic intrusion and public oversight when a President or Cabinet officer consults with party committees concerning political appointments is outlandish. Nor does it strike us as in any way "unhealthy," or undemocratic, to use all available materials in ascertaining the intent of our elected representatives, rather than read their enactments as requiring what may seem a disturbingly unlikely result, provided only that the result

is not "absurd." Indeed, the sounder and more democratic course, the course that strives for allegiance to Congress' desires in all cases, not just those where Congress' statutory directive is plainly sensible or borders on the lunatic, is the traditional approach we reaffirm today.

Where the literal reading of a statutory term would "compel an odd result," *Green v. Bock Laundry Machine Co.,* 490 U.S. 504, 509, 109 S.Ct. 1981, 1984 (1989), we must search for other evidence of congressional intent to lend the term its proper scope. See also, *e.g., Church of the Holy Trinity, supra,* 143 U.S., at 472, 12 S.Ct., at 516; *FDIC v. Philadelphia Gear Corp.,* 476 U.S. 426, 432, 106 S.Ct. 1931, 1935, 90 L.Ed.2d 428 (1986). "The circumstances of the enactment of particular legislation," for example, "may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Watt v. Alaska,* 451 U.S. 259, 266, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981). Even though, as Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; ***455** but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham,* 148 F.2d 737, 739 (CA2), aff'd, 326 U.S. 404 (1945). Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States,* 278 U.S. 41, 48, 49 S.Ct. 52, 53 (1928) (Holmes, J.). See also *United States v. American Trucking Assns., Inc.,* 310 U.S. 534, 543-544, 60 S.Ct. 1059, 1063-64 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination' ") (citations omitted).

Consideration of FACA's purposes and origins in determining whether the term "utilized" was meant to apply to the Justice Department's use of the ABA Committee is particularly appropriate here, given the importance we have consistently attached to interpreting statutes to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction. It is therefore imperative that we consider indicators of congressional intent in addition to the statutory language before concluding that FACA was meant to cover the ABA Committee's provision of advice to the Justice Department in connection with judicial nominations.

B

Close attention to FACA's history is helpful, for FACA did not flare on the legislative scene with the suddenness of a meteor. Similar attempts to regulate the Federal Government's use of advisory committees were common during the 20 years preceding FACA's enactment.An understanding of those efforts is essential to ascertain the intended scope of the term "utilize."

In 1950, the Justice Department issued guidelines for the operation of federal advisory committees in order to forestall their facilitation of anticompetitive behavior by bringing industry leaders together with Government approval. Several years later, after the House Committee on Government Operations found that the Justice Department's guidelines were frequently ignored, Representative Fascell sponsored a bill that would have accorded the guidelines legal status. Although the bill would have required agencies to report to Congress on their use of advisory committees and would have subjected advisory committees to various controls, it apparently would not have imposed any requirements on private groups, not established by the Federal Government, whose advice was sought by the Executive.

Despite Congress' failure to enact the bill, the Bureau of the Budget issued a directive in 1962 incorporating the bulk of the guidelines. Later that year, President Kennedy issued Executive Order No. 11007, which governed the functioning of advisory committees until

FACA's passage. Executive Order No. 11007 is the probable source of the term "utilize" as later employed in FACA.

The Order applied to advisory committees "formed by a ***457** department or agency of the Government in the interest of obtaining advice or recommendations," or "not formed by a department or agency, but only during any period when it is being *utilized* by a department or agency in the same manner as a Government-formed advisory committee."To a large extent, FACA adopted wholesale the provisions of Executive Order No. 11007. For example, like FACA, Executive Order No. 11007 stipulated that no advisory committee be formed or utilized unless authorized by law or determined as a matter of formal record by an agency head to be in the public interest; that all advisory committee meetings be held in the presence of a Government employee empowered to adjourn the meetings whenever he or she considered adjournment to be in the public interest; that meetings only occur at the call of, or with the advance approval of, a federal employee; that minutes be kept of the meetings; and that committees terminate after two years unless a statute or an agency head decreed otherwise.

There is no indication, however, that Executive Order No. 11007 was intended to apply to the Justice Department's consultations with the ABA Committee. Neither President Kennedy, who issued the Order, nor President Johnson, nor President Nixon apparently deemed the ABA Committee to be "utilized" by the Department of Justice in the relevant sense of that term. Notwithstanding the ABA Committee's highly visible role in advising the Justice Department regarding potential judicial nominees, and notwithstanding the fact that the Order's requirements were established by the Executive itself rather than Congress, no President or Justice Department official applied them to the ABA Committee. As an entity formed privately, rather than at the Federal Government's prompting, to render confidential advice with respect to the President's constitutionally specified power to nominate federal judges--an entity in receipt of no federal funds and not amenable to the strict management by ***458** agency officials envisaged by Executive Order No. 11007--the ABA Committee cannot easily be said to have been "utilized by a department or agency in the same manner as a Government-formed advisory committee." That the Executive apparently did not consider the ABA Committee's activity within the terms of its own Executive Order is therefore unsurprising.

Although FACA's legislative history evinces an intent to widen the scope of Executive Order No. 11007's definition of "advisory committee" by including "Presidential ****2569** advisory committees," which lay beyond the reach of Executive Order No. 11007 as well as to augment the restrictions applicable ***459** to advisory committees covered by the statute, there is scant reason to believe that Congress desired to bring the ABA Committee within FACA's net. FACA's principal purpose was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them. That purpose could be accomplished, however, without expanding the coverage of Executive Order No. 11007 to include privately organized committees that received no federal funds. Indeed, there is considerable evidence that Congress sought nothing more than stricter compliance with reporting and other requirements--which *were* made more stringent--by advisory committees already covered by the Order and similar treatment of a small class of publicly funded groups created by the President.

The House bill which in its amended form became FACA applied exclusively to advisory committees "established" by statute or by the Executive, whether by a federal agency or by the President himself. Although the House Committee Report stated that the class of advisory committees was to include "committees which may have been organized before their advice was sought by the President or any agency, but which are used by the President or any agency in the same way as an advisory committee formed by the President himself or the agency itself," it is questionable whether the Report's authors believed that the Justice Department used the ABA Committee in the same way as it used advisory committees it established. The phrase "used ... in the same way" is reminiscent of Executive Order No. 11007's reference to advisory committees "utilized ... in the same manner" as a committee established by the Federal Government, and the practice of three administrations demonstrates that Executive Order No. 11007 did not encompass the ABA Committee.

***460** This inference draws support from the earlier House Report which instigated the legislative efforts that culminated in FACA. That Report complained that committees "utilized" by an agency--as opposed to those established directly by an agency--rarely complied with the requirements of Executive Order No. 11007. But it did not cite the ABA Committee or similar advisory committees as willful evaders of the Order. Rather, the Report's paradigmatic ****2570** example of a committee "utilized" by an agency for purposes of Executive Order No. 11007 was an advisory committee established by a quasi-public organization in receipt of public funds, such as the National Academy of Sciences. [FN11] There is no indication in the Report that a purely private group like the ABA Committee that was not formed by the Executive, accepted no public funds, and assisted the Executive in performing a constitutionally specified task committed to the Executive was within the terms of Executive Order No. 11007 or was the type of advisory entity that legislation was urgently needed to address.

> FN11. The relevant paragraph the Report reads in full:
>
> "The definition, further, states 'the term also includes any committee, board, ... that is not formed by a department or agency, when it is being utilized by a department or agency in the same manner as a Government- formed advisory committee.' Rarely were such committees reported. A great number of the approximately 500 advisory committees of the National Academy of Sciences (NAS) and its affiliates possibly should be added to the above 1800 advisory committees as the NAS committees fall within the intent and literal definition of advisory committees under Executive Order 11007. The National Academy of Sciences was created by Congress as a semi-private organization for the explicit purpose of furnishing advice to the Government. This is done by the use of advisory committees. The Government meets the expense of investigations and reports prepared by the Academy committees at the request of the Government. Yet, very few of the Academy committees were reported by the agencies and departments of the Government."

***461** Paralleling the initial House bill, the Senate bill that grew into FACA defined "advisory committee" as one "established or organized" by statute, the President, or an Executive agency. Like the House Report, the accompanying Senate Report stated that the phrase "established or organized" was to be understood in its "most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions of this bill. While the Report manifested a clear intent not to restrict FACA's coverage to advisory committees funded by the Federal Government, it did not indicate any desire to bring all private advisory committees within FACA's terms. Indeed, the examples the Senate Report offers--"the Advisory Council on Federal Reports, the National Industrial Pollution Control Council, the National Petroleum Council, advisory councils to the National Institutes of Health, and committees of the national academies where they are utilized and officially recognized as advisory to the President, to an agency, or to a Government official,"--are limited to groups organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status. Given the prominence of the ABA Committee's role and its familiarity to Members of Congress, its omission from the list of groups formed and maintained by private initiative to offer advice with respect to the President's nomination of Government officials is telling. If the examples offered by the Senate Committee on Government Operations are representative, as seems fair to surmise, then there is little reason to think that there was any support, at least at the committee stage, for going beyond the terms of Executive Order No. 11007 to regulate comprehensively the workings of the ABA Committee.

It is true that the final version of FACA approved by both Houses employed the phrase "established or utilized," ***462** and that this phrase is more capacious than the word "established" or the phrase "established or organized." But its genesis suggests that it was not intended to go much beyond those narrower formulations. The words "or utilized" were added by the Conference Committee to the definition included in the House bill. The Joint Explanatory Statement, however, said simply that the definition contained in the House bill was adopted "with modification." ****2571** The Conference Report offered no indication that

the modification was significant, let alone that it would substantially broaden FACA's application by sweeping within its terms a vast number of private groups, such as the Republican National Committee, not formed at the behest of the Executive or by quasi-public organizations whose opinions the Federal Government sometimes solicits. Indeed, it appears that the House bill's initial restricted focus on advisory committees established by the Federal Government, in an expanded sense of the word "established," was retained rather than enlarged by the Conference Committee. In the section dealing with FACA's range of application, the Conference Report stated: "The Act does not apply to persons or organizations which have contractual relationships with Federal agencies *nor to advisory committees not directly established by or for such agencies.*" (emphasis added). The phrase "or utilized" therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences "for" public agencies as well as "by" such agencies themselves.

Read in this way, the term "utilized" would meet the concerns of the authors of the House Report that advisory committees covered by Executive Order No. 11007, because they were "utilized by a department or agency in the same manner as a Government-formed advisory committee" ***463** such as the groups organized by the National Academy of Sciences and its affiliates which the Report discussed--would be subject to FACA's requirements. And it comports well with the initial House and Senate bills' limited extension to advisory groups "established," on a broad understanding of that word, by the Federal Government, whether those groups were established by the Executive Branch or by statute or whether they were the offspring of some organization created or permeated by the Federal Government. Read in this way, however, the word "utilized" does not describe the Justice Department's use of the ABA Committee. Consultations between the Justice Department and the ABA Committee were not within the purview of Executive Order No. 11007, nor can the ABA Committee be said to have been formed by the Justice Department or by some semiprivate entity the Federal Government helped bring into being.

In sum, a literalistic reading of § 3(2) would bring the Justice Department's advisory relationship with the ABA Committee within FACA's terms, particularly given FACA's objective of opening many advisory relationships to public scrutiny except in certain narrowly defined situations. [FN12] A ***464 **2572** literalistic reading, however, would catch far more groups and consulting arrangements than Congress could conceivably have intended. And the careful review which this interpretive difficulty warrants of earlier efforts to regulate ***465** federal advisory committees and the circumstances surrounding FACA's adoption strongly suggests that FACA's definition of "advisory committee" was not meant to encompass the ABA Committee's relationship with the Justice Department. That relationship seems not to have been within the contemplation of Executive Order No. 11007. And FACA's legislative history does not display an intent to widen the Order's application to encircle it. Weighing the deliberately inclusive statutory language against other evidence of congressional intent, it seems to us a close question whether FACA should be construed to apply to the ABA Committee, although on the whole we are fairly confident it should not. There is, however, one additional consideration which, in our view, tips the balance decisively against FACA's application.

FN12. [Discussion of deference to administrative agency omitted]

C

"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 ***466** by which the question may be avoided." *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932) (footnote collecting citations omitted). It has long been an axiom of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to ****2573** avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v.*

Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988). See also *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772, 780, 101 S.Ct. 2142, 2147, 68 L.Ed.2d 612 (1981); *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500-501, 99 S.Ct. 1313, 1318-1319, 59 L.Ed.2d 533 (1979); *Machinists v. Street,* 367 U.S. 740, 749-750, 81 S.Ct. 1784, 1789-90, 6 L.Ed.2d 1141 (1961). This approach, we said recently, "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Edward J. DeBartolo Corp., supra,* 485 U.S., at 575, 108 S.Ct., at 1397. Our reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government. See *American Foreign Service Assn. v. Garfinkel,* 490 U.S. 153, 161, 109 S.Ct. 1693, 1697-1698, 104 L.Ed.2d 139 (1989) (*per curiam*). Hence, we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.

That construing FACA to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties is undeniable. The District Court declared FACA unconstitutional insofar as it applied to those consultations, because it concluded that FACA, so applied, infringed unduly on the President's Article II power to nominate federal judges and violated the doctrine of separation of powers. Whether or not the court's conclusion ***467** was correct, there is no gainsaying the seriousness of these constitutional challenges.

To be sure, "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke,* 471 U.S. 84, 96, 105 S.Ct. 1785, 1793, 85 L.Ed.2d 64 (1985), quoting *Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379, 53 S.Ct. 620, 622, 77 L.Ed. 1265 (1933). But unlike in *Locke,* where "nothing in the legislative history remotely suggest[ed] a congressional intent contrary to Congress' chosen words," 471 U.S., at 96, 105 S.Ct., at 1793, our review of the regulatory scheme prior to FACA's enactment and the likely origin of the phrase "or utilized" in FACA's definition of "advisory committee" reveals that Congress probably did not intend to subject the ABA Committee to FACA's requirements when the ABA Committee offers confidential advice regarding Presidential appointments to the federal bench. Where the competing arguments based on FACA's text and legislative history, though both plausible, tend to show that Congress did not desire FACA to apply to the Justice Department's confidential solicitation of the ABA Committee's views on prospective judicial nominees, sound sense counsels adherence to our rule of caution. Our unwillingness to resolve important constitutional questions unnecessarily thus solidifies our conviction that FACA is inapplicable.

The judgment of the District Court is

Affirmed.

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

Justice KENNEDY, with whom THE CHIEF JUSTICE and Justice O'CONNOR join, concurring in the judgment.

> "In a government, where the liberties of the people are to be preserved ..., the executive, legislative and judicial, should ever be separate and distinct, and consist ***468** of parts, mutually forming a check ****2574** upon each other." C. Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787, reprinted in 3 M. Farrand, Records of the Federal Convention of 1787, p. 108 (rev. ed. 1966).

The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers. See, *e.g.,* The Federalist Nos. 47-51 (J. Madison). Indeed, the Framers devoted almost the

whole of their attention at the Constitutional Convention to the creation of a secure and enduring structure for the new Government. It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when, as is the case here, no immediate threat to liberty is apparent. When structure fails, liberty is always in peril. As Justice Frankfurter stated:

> "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 594, 72 S.Ct. 863, 889, 96 L.Ed. 1153 (1952) (concurring opinion).

Although one is perhaps more obvious than the other, this suit presents two distinct issues of the separation of powers. The first concerns the rules this Court must follow in interpreting a statute passed by Congress and signed by the President. On this subject, I cannot join the Court's conclusion that the Federal Advisory Committee Act (FACA) does not cover the activities of the American Bar Association's Standing Committee on Federal Judiciary in advising the Department of Justice regarding potential nominees for federal judgeships. The result seems sensible in the abstract; but I cannot accept the method by which the Court ***469** arrives at its interpretation of FACA, which does not accord proper respect to the finality and binding effect of legislative enactments. The second question in the case is the extent to which Congress may interfere with the President's constitutional prerogative to nominate federal judges. On this issue, which the Court does not reach because of its conclusion on the statutory question, I think it quite plain that the application of FACA to the Government's use of the ABA Committee is unconstitutional.

I

The statutory question in this suit is simple enough to formulate. FACA applies to "any committee" that is "established or utilized" by the President or one or more agencies, and which furnishes "advice or recommendations" to the President or one or more agencies. All concede that the ABA Committee furnishes advice and recommendations to the Department of Justice and through it to the President. The only question we face, therefore, is whether the ABA Committee is "utilized" by the Department of Justice or the President.

There is a ready starting point, which ought to serve also as a sufficient stopping point, for this kind of analysis: the plain language of the statute. Yet the Court is unwilling to rest on this foundation, for several reasons. One is an evident unwillingness to define the application of the statute in terms of the ordinary meaning of its language. We are told that "utilize" is "a woolly verb," and therefore we cannot be content to rely on what is described, with varying levels of animus, as a "literal reading," a "literalistic reading," and "a dictionary reading" of this word. We also are told in no uncertain terms that we cannot rely on (what I happen to regard as a more accurate description) "a straightforward reading of 'utilize.' " Reluctance to working with the basic meaning of words in a normal manner undermines the legal process. These cases demonstrate that reluctance of this ***470** sort leads instead ****2575** to woolly judicial construction that mars the plain face of legislative enactments.

The Court concedes that the Executive Branch "utilizes" the ABA Committee in the common sense of that word. Indeed, this point cannot be contested. As the Court's own recitation of the facts makes clear, the Department of Justice has, over the last four decades, made regular use of the ABA Committee to investigate the background of potential nominees and to make critical recommendations regarding their qualifications. This should end the matter. The Court nevertheless goes through several more steps to conclude that, although "it seems to us a close question," Congress did not intend that FACA would apply to the ABA Committee.

Although I believe the Court's result is quite sensible, I cannot go along with the unhealthy process of amending the statute by judicial interpretation. Where the language of a statute is clear in its application, the normal rule is that we are bound by it. There is, of course, a legitimate exception to this rule, which the Court invokes, see *ante,* at 2566, citing *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892),

and with which I have no quarrel. Where the plain language of the statute would lead to "patently absurd consequences," *United States v. Brown,* 333 U.S. 18, 27, 68 S.Ct. 376, 380, 92 L.Ed. 442 (1948), that "Congress could not *possibly* have intended," *FBI v. Abramson,* 456 U.S. 615, 640, 102 S.Ct. 2054, 2069, 72 L.Ed.2d 376 (1982) (O'CONNOR, J., dissenting) (emphasis added), we need not apply the language in such a fashion. When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way.

This exception remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, ***471** *i.e.,* where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone. A few examples of true absurdity are given in the *Holy Trinity* decision cited by the Court, such as where a sheriff was prosecuted for obstructing the mails even though he was executing a warrant to arrest the mail carrier for murder, or where a medieval law against drawing blood in the streets was to be applied against a physician who came to the aid of a man who had fallen down in a fit. In today's opinion, however, the Court disregards the plain language of the statute not because its application would be patently absurd, but rather because, on the basis of its view of the legislative history, the Court is "fairly confident" that "FACA should [not] be construed to apply to the ABA Committee." I believe the Court's loose invocation of the "absurd result" canon of statutory construction creates too great a risk that the Court is exercising its own "WILL instead of JUDGMENT," with the consequence of "substituti[ng] [its own] pleasure to that of the legislative body." The Federalist No. 78, p. 469 (C. Rossiter ed. 1961) (A. Hamilton).

The Court makes only a passing effort to show that it would be absurd to apply the term "utilize" to the ABA Committee according to its commonsense meaning. It offers three examples that we can assume are meant to demonstrate this point: the application of FACA to an American Legion Post should the President visit that organization and happen to ask its opinion on some aspect of military policy; the application of FACA to the meetings of the National Association for the Advancement of Colored People (NAACP) should the President seek its views in nominating Commissioners to the Equal Employment ****2576** Opportunity Commission; and the application of FACA to the national committee of the President's political party should he consult it for advice and ***472** recommendations before picking his Cabinet.

None of these examples demonstrate the kind of absurd consequences that would justify departure from the plain language of the statute. A commonsense interpretation of the term "utilize" would not necessarily reach the kind of ad hoc contact with a private group that is contemplated by the Court's American Legion hypothetical. Such an interpretation would be consistent, moreover, with the regulation of the General Services Administration (GSA) regulation interpreting the word "utilize," which the Court in effect ignores. As for the more regular use contemplated by the Court's examples concerning the NAACP and the national committee of the President's political party, it would not be at all absurd to say that, under the Court's hypothetical, these groups would be "utilized" by the President to obtain "advice or recommendations" on appointments, and therefore would fall within the coverage of the statute. Rather, what is troublesome about these examples is that they raise the very same serious constitutional questions that confront us here (and perhaps others as well). The Court confuses the two points. The fact that a particular application of the clear terms of a statute might be unconstitutional does not, in and of itself, render a straightforward application of the language absurd, so as to allow us to conclude that the statute does not apply.

Unable to show that an application of FACA according the plain meaning of its terms would be absurd, the Court turns instead to the task of demonstrating that a straightforward reading of the statute would be inconsistent with the congressional purposes that lay behind its passage. To the student of statutory construction, this move is a familiar one. It is, as the Court identifies it, the classic *Holy Trinity* argument. "[A] thing may be within the letter of the statute and ***473** yet not within the statute, because not within its spirit, nor within the

intention of its makers." *Holy Trinity*. I cannot embrace this principle. Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable. It comes as a surprise to no one that the result of the Court's lengthy journey through the legislative history is the discovery of a congressional intent not to include the activities of the ABA Committee within the coverage of FACA. The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.

Lest anyone think that my objection to the use of the *Holy Trinity* doctrine is a mere point of interpretive purity divorced from more practical considerations, I should pause for a moment to recall the unhappy genesis of that doctrine and its unwelcome potential. In *Holy Trinity,* the Court was faced with the interpretation of a statute which made it unlawful for

> "any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States ..., under contract or agreement ... made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States."

The Church of the Holy Trinity entered into a contract with an alien residing in ****2577** England to come to the United States to serve as the director and pastor of the church. Notwithstanding the fact that this agreement fell within the plain language ***474** of the statute, which was conceded to be the case, see *ibid.,* the Court overrode the plain language, drawing instead on the background and purposes of the statute to conclude that Congress did not intend its broad prohibition to cover the importation of Christian ministers. The central support for the Court's ultimate conclusion that Congress did not intend the law to cover Christian ministers is its lengthy review of the "mass of organic utterances" establishing that "this is a Christian nation," and which were taken to prove that it could not "be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation." I should think the potential of this doctrine to allow judges to substitute their personal predelictions for the will of the Congress is so self-evident from the case which spawned it as to require no further discussion of its susceptibility to abuse.

Even if I were inclined to disregard the unambiguous language of FACA, I could not join the Court's conclusions with regard to Congress' purposes. I find the Court's treatment of the legislative history one sided and offer a few observations on the difficulties of perceiving the true contours of a spirit.

The first problem with the Court's use of legislative history is the questionable relevance of its detailed account of Executive practice before the enactment of FACA. This background is interesting but not instructive, for as the Court acknowledges, even the legislative history as presented by the Court "evinces an intent to widen the scope of" the coverage of prior Executive Orders, and in any event the language of the statute is "more capacious" than any of the previous "narrower formulations." Indeed, Congress would have had little reason to legislate at all in this area if it had intended FACA to be nothing more than a reflection of the provisions of Executive Order No. 11007, which was already the settled ***475** and governing law at the time this bill was introduced, considered, and enacted. In other words, the background to FACA cannot be taken to illuminate its breadth precisely because FACA altered the landscape to address the many concerns Congress had about the increasing growth and use of advisory committees.

Another problem with the Court's approach lies in its narrow preoccupation with the ABA Committee against the background of a bill that was intended to provide comprehensive legislation covering a widespread problem in the organization and operation of the Federal Government. The Court's discussion takes portentous note of the fact that Congress did not mention or discuss the ABA Committee by name in the materials that preceded the

enactment of FACA. But that is hardly a remarkable fact. The legislation was passed at a time when somewhere between 1,800 and 3,200 target committees were thought to be in existence, and the congressional Reports mentioned few committees by name. More to the point, its argument reflects an incorrect understanding of the kinds of laws Congress passes: it usually does not legislate by specifying examples, but by identifying broad and general principles that must be applied to particular factual instances. And that is true of FACA.

Finally, though the stated objective of the Court's inquiry into legislative history is the identification of Congress' purposes in passing FACA, the inquiry does not focus on the most obvious place for finding those purposes, which is the section of the Conference Committee Report entitled "Findings and Purposes." That section lists six findings and purposes that underlie FACA:

> "(1) the need for many existing advisory committees has not been adequately reviewed;
>
> "(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;
>
> "(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;
>
> "(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;
>
> "(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and
>
> "(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved."

The most pertinent conclusion to be drawn from this list of purposes is that all of them are implicated by the Justice Department's use of the ABA Committee. In addition, it shows that Congress' stated purposes for addressing the use of advisory committees went well beyond the amount of public funds devoted to their operations, which in any event is not the sole component in the cost of their use; thus the Court errs in focusing on this point.

It is most striking that this section of the Conference Committee Report, which contains Congress' own explicit statement of its purposes in adopting FACA, receives no mention by the Court on its amble through the legislative history. The one statement the Court does quote from this Report, that FACA does not apply " 'to advisory committees not directly established by or for [federal] agencies,' " (emphasis deleted), is of uncertain value. It is not clear that this passage would exclude the ABA Committee, which was established in 1946 and began almost at once to advise the Government on judicial nominees. It also is not clear why the reasons a committee was formed should determine whether and how they are "utilized by" the Government, or how this consideration ***477** can be squared with the plain language of the statute. The Court professes puzzlement because the Report says only that the Conference Committee modified the definition of "advisory committee" to include the phrase "or utilized," but does not explain the extent of the modification in any detail. One would have thought at least that the Court would have been led to consider how the specific purposes Congress identified for this legislation might shed light on the reasons for the change.

Not only does the Court's decision today give inadequate respect to the statute passed by Congress, it also gives inadequate deference to the GSA's regulations interpreting FACA. [discussion of deference to GSA omitted]

In sum, it is quite desirable not to apply FACA to the ABA Committee. I cannot, however, reach this conclusion as a matter of fair statutory construction. The plain and ordinary meaning of the language passed by Congress governs, and its application does not lead to any absurd results. An unnecessary recourse to the legislative history only confirms this

conclusion. And the reasonable and controlling interpretation of the statute adopted by the agency charged with its implementation is also in accord.

The Court's final step is to summon up the traditional principle that statutes should be construed to avoid constitutional questions. Although I agree that we should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided," *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932), this principle cannot be stretched beyond the point at which such a construction remains "*fairly* possible." And it should not be given too broad a scope lest a whole new range of Government action be proscribed by interpretive shadows cast by constitutional provisions that might or might not invalidate it. The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute. If that were permissible, then the power of judicial review ****2581** of legislation could be made unnecessary, for whenever the application of a statute would have potential inconsistency with the Constitution, we could merely opine that the statute did not cover the conduct in question because it would be discomforting or even absurd to think that Congress intended to act in an unconstitutional manner. The utter circularity of this approach explains why it has never been our rule.

***482** The Court's ultimate interpretation of FACA is never clearly stated, except for the conclusion that the ABA Committee is not covered. It seems to read the "utilized by" portion of the statute as encompassing only a committee "established by a quasi-public organization in receipt of public funds," or encompassing "groups formed indirectly by quasi-public organizations such as the National Academy of Sciences." This is not a "fairly possible" construction of the statutory language even to a generous reader. I would find the ABA Committee to be covered by FACA. It is, therefore, necessary for me to reach and decide the constitutional issue presented.

II

[discussion of constitutional issue omitted]

For these reasons, I concur in the judgment.

2024 WL 3208360
Supreme Court of the United States.

LOPER BRIGHT ENTERPRISES, et al., Petitioners
v.
Gina RAIMONDO, Secretary of Commerce, et al.
Relentless, Inc., et al., Petitioners
v.
Department of Commerce, et al.
No. 22-451, No. 22-1219
|
Decided June 28, 2024

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

[The Court granted certiorari in these cases limited to the question whether *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, should be overruled or clarified. Under the *Chevron* doctrine, courts have sometimes been required to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. In each case below, the reviewing courts applied *Chevron*'s framework to resolve in favor of the Government challenges by petitioners to a rule promulgated by the National Marine Fisheries Service pursuant to the Magnuson-Stevens Act, 16 U.S.C. § 1801 *et seq.*, which incorporates the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*]

I

Our *Chevron* doctrine requires courts to use a two-step framework to interpret statutes administered by federal agencies. After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." If, and only if, congressional intent is "clear," that is the end of the inquiry. But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at *Chevron*'s second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute." The reviewing courts in each of the cases before us applied *Chevron*'s framework to resolve in favor of the Government challenges to the same agency rule. . . .

II

A

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. Cognizant of the limits of human language and foresight, they anticipated that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation," would be "more or less obscure and equivocal, until their meaning" was settled "by a series of particular discussions and adjudications." The Federalist No. 37 (J. Madison).

The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." *Id.*, No. 78 (A. Hamilton). Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." *Id.* To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. *Id.*

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

And in the following decades, the Court understood "interpret[ing] the laws, in the last resort," to be a "solemn duty" of the Judiciary. *United States v. Dickson*, 15 Pet. 141, 162, 10 L.Ed. 689 (1841) (Story, J., for the Court). When the meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur v. Paulding*, 14 Pet. 497, 515, 10 L.Ed. 559 (1840).

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, in *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 6 L.Ed. 603 (1827), the Court explained that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id.*, at 210; see also *United States v. Vowell*, 5 Cranch 368, 372, 3 L.Ed. 128 (1809) (Marshall, C. J., for the Court).

Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. That is because "the longstanding 'practice of the government' "—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.' " *NLRB v. Noel Canning*, 573 U.S. 513, 525, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (first quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401, 4 L.Ed. 579 (1819); then quoting *Marbury*, 1 Cranch at 177). The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently ... the draftsmen of the laws they [were] afterwards called upon to interpret."

"Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given by the head of a department." Otherwise, judicial judgment would not be independent at all. As Justice Story put it, "in cases where [a court's] own judgment ... differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it."

B

The New Deal ushered in a "rapid expansion of the administrative process." But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment.

During this period, the Court often treated agency determinations of *fact* as binding on the courts, provided that there was "evidence to support the findings." "When the legislature itself acts within the broad field of legislative discretion," the Court reasoned, "its determinations are conclusive." Congress could therefore "appoint[ ] an agent to act within that sphere of legislative authority" and "endow the agent with power to make *findings of fact* which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily."

But the Court did not extend similar deference to agency resolutions of questions of *law*. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." The Court understood, in the words of Justice Brandeis, that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." It also continued to note, as it long had, that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to "great weight."

Perhaps most notably along those lines, in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon ... specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. *Id.* "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to

control." *Id.*

On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. . . . Such deferential review, though, was cabined to factbound determinations. . . .

In any event, the Court was far from consistent in reviewing deferentially even such factbound statutory determinations. . . . Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. Instead, j Congress codified the opposite rule: the traditional understanding that *courts* must "decide all relevant questions of law." 5 U.S.C. § 706.

C

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." It was the culmination of a "comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers."

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law." § 706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, § 706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See § 706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); § 706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence"). . . .

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. According to both the House and Senate Reports on the legislation, Section 706 "provide[d] that questions of law are for courts *rather than agencies* to decide in the last analysis." Some of the legislation's most prominent supporters articulated the same view. Even the Department of Justice—an agency with every incentive to endorse a view of the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." That "present law," as we have described, adhered to the traditional conception of the judicial function. . . .

The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning. See *ibid.*

In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. . . .

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. . . . By doing so, a court upholds the traditional conception of

the judicial function that the APA adopts.

III

The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.

A

. . . . *Chevron*, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. . . . To answer [the] question of statutory interpretation [at issue], the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action.

The first step was to discern "whether Congress ha[d] directly spoken to the precise question at issue." The Court explained that "[i]f the intent of Congress is clear, that is the end of the matter," and courts were therefore to "reject administrative constructions which are contrary to clear congressional intent," To discern such intent, the Court noted, a reviewing court was to "employ[ ] traditional tools of statutory construction."

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding.". . . .

Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that [the agency]'s interpretation was "entitled to deference." It did not matter *why* Congress, as the Court saw it, had not squarely addressed the question, see or that "the agency ha[d] from time to time changed its interpretation," The latest [agency] interpretation was a permissible reading of the Clean Air Act, so under the Court's new rule, that reading controlled.

Initially, *Chevron* "seemed destined to obscurity." The Court did not at first treat it as the watershed decision it was fated to become; it was hardly cited in cases involving statutory questions of agency authority. But within a few years, both this Court and the courts of appeals were routinely invoking its two-step framework as the governing standard in such cases. As the Court did so, it revisited the doctrine's justifications. Eventually, the Court decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."

B

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The "law of deference" that this Court has built on the foundation laid in *Chevron* has instead been "[h]eedless of the original design" of the APA.

1

Chevron defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide *all* relevant questions of law" and "interpret ... statutory provisions." § 706 (emphasis added). It requires a court to *ignore*, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, see, *e.g.*, *Edwards' Lessee*, 12 Wheat. at 210; *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161, *Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing

judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of "allow[ing]" a judicial interpretation of a statute "to override an agency's" in a dispute before a court. *Chevron* turns the statutory scheme for judicial review of agency action upside down.

Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. . . . As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. As the Framers recognized, ambiguities will inevitably follow from "the complexity of objects, ... the imperfection of the human faculties," and the simple fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist No. 37.

Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. Courts in that situation do not throw up their hands because "Congress's instructions have" supposedly "run out," leaving a statutory "gap." Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.

In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate.

2

The Government responds that Congress must generally intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent. . . .

[E]ven when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. . . . Courts, after all, do not decide such questions blindly. The parties and *amici* in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives. In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise."

Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161.

For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

. . . . [T]here is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back on.". . .

3

In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction. So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.' "

Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality. . . . The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret ... statutory provisions." § 706 (emphasis added).

IV

The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. *Stare decisis* is not an "inexorable command," and the *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, ... and reliance on the decision,"—all weigh in favor of letting *Chevron* go.

Chevron has proved to be fundamentally misguided. . . . Experience has shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, which requires deference at the doctrine's second step. But the concept of ambiguity has always evaded meaningful definition. As Justice Scalia put the dilemma just five years after *Chevron* was decided: "How clear is clear?" 1989 Duke L. J., at 521. We are no closer to an answer to that question than we were four decades ago. " '[A]mbiguity' is a term that may have different meanings for different judges." One judge might see ambiguity everywhere; another might never encounter it. A rule of law that is so wholly "in the eye of the beholder," invites different results in like cases and is therefore "arbitrary in practice." . . .

The dissent proves the point. It tells us that a court should reach *Chevron*'s second step when it finds, "at the end of its interpretive work," that "Congress has left an ambiguity or gap." That is no guide at all. Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit. So for the dissent's test to have any meaning, it must think that in an agency case

(unlike in any other), a court should give up on its "interpretive work" before it has identified that best meaning. But how does a court know when to do so? On that point, the dissent leaves a gap of its own. It protests only that some other interpretive tools—all with pedigrees more robust than *Chevron*'s, and all designed to help courts identify the meaning of a text rather than allow the Executive Branch to displace it—also apply to ambiguous texts. That this is all the dissent can come up with, after four decades of judicial experience attempting to identify ambiguity under *Chevron*, reveals the futility of the exercise. . . .

Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes . . . . *Chevron* thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.

Chevron accordingly has undermined the very "rule of law" values that *stare decisis* exists to secure. . . . *Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" is for us to leave *Chevron* behind.

By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology.. Mere reliance on *Chevron* cannot constitute a " 'special justification' " for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." That is not enough to justify overruling a statutory precedent. . . .

Chevron is overruled. . . .

Justice THOMAS, concurring.

I join the Court's opinion in full because it correctly concludes that *Chevron* must finally be overruled. . . .

I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers, as I have previously explained at length. And, I agree with Justice GORSUCH that we should not overlook *Chevron*'s constitutional defects in overruling it.* To provide "practical and real protections for individual liberty," the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits. . . .

* There is much to be commended in Justice GORSUCH's careful consideration from first principles of the weight we should afford to our precedent. I agree with the lion's share of his concurrence.

Justice GORSUCH, concurring.

In disputes between individuals and the government about the meaning of a federal law, federal courts have traditionally sought to offer independent judgments about "what the law is" without favor to either side. *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). Beginning in the mid-1980s, however, this Court experimented with a radically different approach. Applying *Chevron* deference, judges began deferring to the views of executive agency officials about the meaning of federal statutes. With time, the error of this approach became widely appreciated. So much so that this Court has refused to apply *Chevron* deference since 2016. Today, the Court places a tombstone on *Chevron* no one can miss. In doing so, the Court returns judges to interpretive rules that have guided federal courts since the Nation's founding. I write separately to address why the proper application of the doctrine of *stare decisis* supports that course.

[detailed historical analysis of the doctrine of *stare decisis* omitted]

Justice KAGAN, with whom Justice SOTOMAYOR and Justice JACKSON join, dissenting.

For 40 years, *Chevron* has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress has done so, that is the end of the matter; the agency's views make no difference. But if the court finds, at the end of its interpretive work, that Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.

And the rule is right. This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority. We defer, the Court has explained, "because of a presumption that Congress" would have "desired the agency (rather than the courts)" to exercise "whatever degree of discretion" the statute allows.

Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. . . .

And the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second. (If opinions had titles, a good candidate for today's would be Hubris Squared.) *Stare decisis* is, among other things, a way to remind judges that wisdom often lies in what prior judges have done. It is a brake on the urge to convert "every new judge's opinion" into a new legal rule or regime. *Chevron* is entrenched precedent, entitled to the protection of *stare decisis*, as even the majority acknowledges. In fact, *Chevron* is entitled to the supercharged version of that doctrine because Congress could always overrule the decision, and because so many governmental and private actors have relied on it for so long. Because that is so, the majority needs a "particularly special justification" for its action. But the majority has nothing that would qualify. It barely tries to advance the usual factors this Court invokes for overruling precedent. Its justification comes down, in the end, to this: Courts must have more say over regulation—over the provision of health care, the protection of the environment, the safety of consumer products, the efficacy of transportation systems, and so on. A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power. . . .

I

Begin with the problem that gave rise to *Chevron* (and also to its older precursors): The regulatory statutes Congress passes often contain ambiguities and gaps. Sometimes they are intentional. Perhaps Congress "consciously desired" the administering agency to fill in aspects of the legislative scheme, believing that regulatory experts would be "in a better position" than legislators to do so. Or "perhaps Congress was unable to forge a coalition on either side" of a question, and the contending parties "decided to take their chances with" the agency's resolution. Sometimes, though, the gaps or ambiguities are what might be thought of as predictable accidents. They may be the result of sloppy drafting, a not infrequent legislative

occurrence. Or they may arise from the well-known limits of language or foresight. "The subject matter" of a statutory provision may be too "specialized and varying" to "capture in its every detail." Or the provision may give rise, years or decades down the road, to an issue the enacting Congress could not have anticipated. Whichever the case—whatever the reason—the result is to create uncertainty about some aspect of a provision's meaning.

Consider a few examples from the caselaw. . . .

[*Chevron*'s] rule, the Court has long explained, rests on a presumption about legislative intent—about what Congress wants when a statute it has charged an agency with implementing contains an ambiguity or a gap. An enacting Congress, as noted above, knows those uncertainties will arise, even if it does not know what they will turn out to be. . . . This Court has long thought Congress would choose an agency, with courts serving only as a backstop to make sure the agency makes a reasonable choice among the possible readings. . . . The next question is why.

For one, because agencies often know things about a statute's subject matter that courts could not hope to. The point is especially stark when the statute is of a "scientific or technical nature." Agencies are staffed with "experts in the field" who can bring their training and knowledge to bear on open statutory questions. . . .

A second idea is that Congress would value the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective. . . .

Still more, *Chevron*'s presumption reflects that resolving statutory ambiguities, as Congress well knows, is "often more a question of policy than of law." The task is less one of construing a text than of balancing competing goals and values. Consider the statutory directive to achieve "substantial restoration of the [Grand Canyon's] natural quiet." Someone is going to have to decide exactly what that statute means for air traffic over the canyon. How many flights, in what places and at what times, are consistent with restoring enough natural quiet on the ground? That is a policy trade-off of a kind familiar to agencies—but peculiarly unsuited to judges. . . .

None of this is to say that deference to agencies is always appropriate. The Court over time has fine-tuned the *Chevron* regime to deny deference in classes of cases in which Congress has no reason to prefer an agency to a court. The majority treats those "refinements" as a flaw in the scheme, but they are anything but. . . .

That carefully calibrated framework "reflects a sensitivity to the proper roles of the political and judicial branches." Where Congress has spoken, Congress has spoken; only its judgments matter. And courts alone determine when that has happened: Using all their normal interpretive tools, they decide whether Congress has addressed a given issue. But when courts have decided that Congress has not done so, a choice arises. Absent a legislative directive, either the administering agency or a court must take the lead. And the matter is more fit for the agency. . . .

The majority makes two points in reply, neither convincing. First, it insists that "agencies have no special competence" in filling gaps or resolving ambiguities in regulatory statutes; rather, "[c]ourts do." Score one for self-confidence; maybe not so high for self-reflection or -knowledge. Of course courts often construe legal texts, hopefully well. And *Chevron*'s first step takes full advantage of that talent: There, a court tries to divine what Congress meant, even in the most complicated or abstruse statutory schemes. The deference comes in only if the court cannot do so—if the court must admit that standard legal tools will not avail to fill a statutory silence or give content to an ambiguous term. . . .

Second, the majority complains that an ambiguity or gap does not "necessarily reflect a congressional intent that an agency" should have primary interpretive authority. On that score, I'll agree with the premise: It doesn't "necessarily" do so. *Chevron* is built on a *presumption*. . . . Congress may not have deliberately introduced a gap or ambiguity into the statute; but it knows that pretty much everything it drafts will someday be found to contain such a "flaw." Given that knowledge, *Chevron* asks, what would Congress want? The presumed answer is again the same (for the same reasons): The agency. And as with any default rule, if Congress decides otherwise, all it need do is say.

In that respect, the proof really is in the pudding: Congress basically never says otherwise, suggesting that

Chevron chose the presumption aligning with legislative intent (or, in the majority's words, "approximat[ing] reality." Over the last four decades, Congress has authorized or reauthorized hundreds of statutes. The drafters of those statutes knew all about *Chevron*. So if they had wanted a different assignment of interpretive responsibility, they would have inserted a provision to that effect. With just a pair of exceptions I know of, they did not. Similarly, Congress has declined to enact proposed legislation that would abolish *Chevron* across the board. So to the extent the majority is worried that the *Chevron* presumption is "fiction[al]," as all legal presumptions in some sense are—it has gotten less and less so every day for 40 years. The congressional reaction shows as well as anything could that the *Chevron* Court read Congress right.

II

The majority's principal arguments are in a different vein. Around 80 years after the APA was enacted and 40 years after *Chevron*, the majority has decided that the former precludes the latter. The APA's Section 706, the majority says, "makes clear" that agency interpretations of statutes "are *not* entitled to deference." And that provision, the majority continues, codified the contemporaneous law, which likewise did not allow for deference. But neither the APA nor the pre-APA state of the law does the work that the majority claims. Both are perfectly compatible with *Chevron* deference.

Section 706, enacted with the rest of the APA in 1946, provides for judicial review of agency action. It states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." . . .

The majority highlights the phrase "decide all relevant questions of law" (italicizing the "all"), and notes that the provision "prescribes no deferential standard" for answering those questions. But just as the provision does not prescribe a deferential standard of review, so too it does not prescribe a *de novo* standard of review (in which the court starts from scratch, without giving deference). In point of fact, Section 706 does not specify *any* standard of review for construing statutes. And when a court uses a deferential standard—here, by deciding whether an agency reading is reasonable—it just as much "decide[s]" a "relevant question[ ] of law" as when it uses a *de novo* standard. . . .

The majority's view of Section 706 likewise gets no support from how judicial review operated in the years leading up to the APA. That prior history matters: As the majority recognizes, Section 706 was generally understood to "restate[ ] the present law as to the scope of judicial review."The problem for the majority is that in the years preceding the APA, courts became ever more deferential to agencies. . . .

The majority's whole argument for overturning *Chevron* relies on Section 706. But the text of Section 706 does not support that result. And neither does the contemporaneous practice, which that text was supposed to reflect. So today's decision has no basis in the only law the majority deems relevant. It is grounded on air.

III

And still there is worse, because abandoning *Chevron* subverts every known principle of *stare decisis*. Of course, respecting precedent is not an "inexorable command." . . .

Adherence to precedent is "a foundation stone of the rule of law." . . . And *Chevron* is entitled to a particularly strong form of *stare decisis*, for two separate reasons. First, it matters that "Congress remains free to alter what we have done." In a constitutional case, the Court alone can correct an error. But that is not so here. "Our deference decisions are balls tossed into Congress's court, for acceptance or not as that branch elects." And for generations now, Congress has chosen acceptance. . . . Second, *Chevron* is by now much more than a single decision. This Court alone, acting as *Chevron* allows, has upheld an agency's reasonable interpretation of a statute at least 70 times. Lower courts have applied the *Chevron* framework on thousands upon thousands of occasions. . . . *Chevron* is as embedded as embedded gets in the law.

The majority says differently, because this Court has ignored *Chevron* lately; all that is left of the decision is a "decaying husk with bold pretensions." Tell that to the D. C. Circuit, the court that reviews a large share of agency interpretations, where *Chevron* remains alive and well. But more to the point: The majority's argument is a bootstrap. This Court has "avoided deferring under *Chevron* since 2016" because

it has been preparing to overrule *Chevron* since around that time. That kind of self-help on the way to reversing precedent has become almost routine at this Court. Stop applying a decision where one should; "throw some gratuitous criticisms into a couple of opinions"; issue a few separate writings "question[ing the decision's] premises"; give the whole process a few years ... and voila!—you have a justification for overruling the decision. . . . I once remarked that this overruling-through-enfeeblement technique "mock[ed] *stare decisis*." I have seen no reason to change my mind.

The majority does no better in its main justification for overruling *Chevron*—that the decision is "unworkable." The majority's first theory on that score is that there is no single "answer" about what "ambiguity" means: Some judges turn out to see more of it than others do, leading to "different results." But even if so, the legal system has for many years, in many contexts, dealt perfectly well with that variation. . . . There are ambiguity triggers all over the law. Somehow everyone seems to get by. . . .

The majority's second theory on workability is likewise a makeweight. *Chevron*, the majority complains, has some exceptions, which (so the majority says) are "difficult" and "complicate[d]" to apply. . . . For the most part, the exceptions that so upset the majority require merely a rote, check-the-box inquiry. If that is the majority's idea of a "dizzying breakdance," the majority needs to get out more. . . .

On the other side of the balance, the most important *stare decisis* factor—call it the "jolt to the legal system" issue—weighs heavily against overruling *Chevron*. . . . The majority tries to alleviate concerns about a piece of that problem: It states that judicial decisions that have upheld agency action as reasonable under *Chevron* should not be overruled on that account alone. That is all to the good: There are thousands of such decisions, many settled for decades. . . . [But c]ourts motivated to overrule an old *Chevron*-based decision can always come up with something to label a "special justification." Maybe a court will say "the quality of [the precedent's] reasoning" was poor. Or maybe the court will discover something "unworkable" in the decision—like some exception that has to be applied. All a court need do is look to today's opinion to see how it is done. . . .

[W]ith respect, I dissent.

2024 WL 3208034
Supreme Court of the United States.

Joseph W. FISCHER, Petitioner
v.
UNITED STATES
No. 23-5572
|
Decided June 28, 2024

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Sarbanes-Oxley Act of 2002 imposes criminal liability on anyone who corruptly "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding."18 U.S.C. § 1512(c)(1). The next subsection extends that prohibition to anyone who "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." § 1512(c)(2). We consider whether this "otherwise" clause should be read in light of the limited reach of the specific provision that precedes it.

I

This case concerns the prosecution of petitioner Joseph Fischer for his conduct on January 6, 2021. That day, both Houses of Congress convened in a joint session to certify the votes in the 2020 Presidential election. While they did so, a crowd of supporters of then-President Donald Trump gathered outside the Capitol. As set forth in the criminal complaint against Fischer, some of the crowd eventually "forced entry" into the building, "breaking windows," and "assaulting members of the U. S. Capitol Police." This breach of the Capitol caused Members of Congress to evacuate the Chambers and delayed the certification process. The complaint alleges that Fischer was one of those who invaded the building.

According to the complaint, about an hour after the Houses recessed, Fischer trespassed into the Capitol and was involved in a physical confrontation with law enforcement. Fischer claimed in Facebook posts that he "pushed police back about 25 feet," and that he "was inside the [Capitol] talking to police." Body camera footage shows Fischer near a scrum between the crowd and police who were trying to eject trespassers from the building.

A grand jury returned a seven-count superseding indictment against Fischer. Six of those counts allege that Fischer forcibly assaulted a federal officer, entered and remained in a restricted building, and engaged in disorderly and disruptive conduct in the Capitol, among other crimes. 18 U.S.C. §§ 111(a), 231(a)(3), 1752(a)(1), (a)(2); 40 U.S.C. §§ 5104(e)(2)(D), (G). Those six counts carry maximum penalties ranging from six months' to eight years' imprisonment.

In Count Three, the only count now before us, the Government charged Fischer with violating 18 U.S.C. § 1512(c)(2). Fischer moved to dismiss that count, arguing that the provision criminalizes only attempts to impair the availability or integrity of evidence. . . .

II

The controversy before us is about the scope of the residual "otherwise" clause in Section 1512(c)(2). On the one hand, Fischer contends that (c)(2) "applies only to acts that affect the integrity or availability of evidence." On the other, the Government argues that (c)(2) "capture[s] all forms of obstructive conduct *beyond* Section 1512(c)(1)'s focus on evidence impairment."

Resolving such a dispute requires us to determine how the residual clause is linked to its "surrounding words." In doing so, "we must 'give effect, if possible, to every clause and word of [the] statute.' " To that end, we consider both "the specific context" in which (c)(2) appears "and the broader context of the statute as a whole."

A

1

Section 1512 provides:

"(c) Whoever corruptly—

"(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

"(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

"shall be fined ... or imprisoned not more than 20 years, or both."

Subsection (c)(1) describes particular types of criminal conduct in specific terms. To ensure the statute would not be read as excluding substantially similar activity not mentioned, (c)(2) says it is also illegal to engage in some broader range of unenumerated conduct.

The purpose of the "otherwise" clause is therefore, as the parties agree, to cover some set of "matters not specifically contemplated" by (c)(1). The problem is defining what exactly Congress left for (c)(2). Perhaps Congress sought to criminalize *all* obstructive acts in Section 1512(c), and having named a few examples in (c)(1), devised (c)(2) to prohibit the rest in one go. The point of (c)(1) would then be to illustrate just one type of conduct among many (c)(2) prohibits; it would be subsidiary to the overarching prohibition in (c)(2). But (c)(2) could well have a narrower scope if Congress designed it with the focused language of (c)(1) in mind. Subsection (c)(1) would then prohibit particular types of obstructive conduct and (c)(2) would fill any inadvertent gaps that might exist.

One way to discern the reach of an "otherwise" clause is to look for guidance from whatever examples come before it. Two general principles are relevant. First, the canon of *noscitur a sociis* teaches that a word is "given more precise content by the neighboring words with which it is associated." That " avoid[s] ascribing to one word a meaning so broad that it is inconsistent with" "the company it keeps." And under the related canon of *ejusdem generis*, "a 'general or collective term' at the end of a list of specific items" is typically " 'controlled and defined by reference to' the specific classes ... that precede it." These approaches to statutory interpretation track the common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it.

To see why, consider a straightforward example. A zoo might post a sign that reads, "do not pet, feed, yell or throw objects at the animals, or otherwise disturb them." If a visitor eats lunch in front of a hungry gorilla, or talks to a friend near its enclosure, has he obeyed the regulation? Surely yes. Although the smell of human food or the sound of voices might well disturb gorillas, the specific examples of impermissible conduct all involve direct interaction with and harassment of the zoo animals. Merely eating or talking is so unlike the examples that the zoo provided that it would be implausible to assume those activities were prohibited, even if literally covered by the language.

The idea is simply that a general phrase can be given a more focused meaning by the terms linked to it. That principle ensures—regardless of how complicated a sentence might appear—that none of its specific parts are made redundant by a clause literally broad enough to include them. For instance, a football league might adopt a rule that players must not "grab, twist, or pull a facemask, helmet, or other equipment with the intent to injure a player, or otherwise attack, assault, or harm any player." If a linebacker shouts insults at the quarterback and hurts his feelings, has the linebacker nonetheless followed the rule? Of course he has. The examples of prohibited actions all concern dangerous physical conduct that might inflict bodily harm; trash talk is simply not of that kind. See 64 F.4th at 365–366 (Katsas, J., dissenting [in the court below]).

Similarly improbable consequences can result from untethering an "otherwise" provision from the rest of a criminal statute. Take *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (abrogated on other grounds by *Johnson v. United States*, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569

(2015)). The question there was whether driving under the influence qualified as a "violent felony" under the Armed Career Criminal Act (ACCA). A "violent felony" was defined in relevant part by ACCA as a crime, punishable by more than a year's imprisonment, that " 'is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.' " 553 U.S., at 139–140, 128 S.Ct. 1581 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2000 ed.)). We recognized that, depending on the context, "the word 'otherwise' can"—though not "must"—"refer to a crime that is similar to the listed examples in some respects but different in others." 553 U.S., at 144, 128 S.Ct. 1581 (emphasis deleted). And we held that while driving under the influence certainly may present a serious risk of physical injury, such an offense was so dissimilar from the previously enumerated examples that it could not be classified as a "violent felony" under the statute. *Id.*, at 142–146, 128 S.Ct. 1581. The list of crimes that preceded the residual clause—burglary, arson, extortion, and the use of explosives—focused on "purposeful, violent, and aggressive conduct." *Id.*, at 144–145, 128 S.Ct. 1581 (internal quotation marks omitted). And if that focus did not extend to the residual clause, ACCA's 15-year mandatory minimum sentence would apply to a host of offenses "not typically committed by those whom one normally labels 'armed career criminals' " and that were "far removed ... from the deliberate kind of behavior associated with violent criminal use of firearms."[1] *Id.*, at 146–147, 128 S.Ct. 1581.

1 The dissent explains that we subsequently held the ACCA residual clause void for vagueness. That our answer to the narrow question presented in *Begay* did not resolve a broader constitutional defect in the statute says little about whether the reasoning of *Begay* is relevant here.

The "otherwise" provision of Section 1512(c)(2) is similarly limited by the preceding list of criminal violations. The offenses enumerated in subsection (c)(1) cover someone who "alters, destroys, mutilates, or conceals a record, document, or other object ... with the intent to impair the object's integrity or availability for use in an official proceeding." Complex as subsection (c)(1) may look, it simply consists of many specific examples of prohibited actions undertaken with the intent to impair an object's integrity or availability for use in an official proceeding: altering a record, altering a document, concealing a record, concealing a document, and so on. That list is followed immediately by a residual clause in (c)(2). Guided by the basic logic that Congress would not go to the trouble of spelling out the list in (c)(1) if a neighboring term swallowed it up, the most sensible inference is that the scope of (c)(2) is defined by reference to (c)(1).

If, as the Government asserts, (c)(2) covers "all forms of obstructive conduct *beyond* Section 1512(c)(1)'s focus on evidence impairment," there would have been scant reason for Congress to provide any specific examples at all. The sweep of subsection (c)(2) would consume (c)(1), leaving that narrower provision with no work to do. Indeed, subsection (c)(1) would be an elaborate pumpfake: a list of four types of highly particularized conduct, performed with respect to a record, document, or object and "with the intent to impair the object's integrity or availability for use in an official proceeding," followed in the very next subsection—in the same sentence, no less—by a superseding prohibition on *all* means of obstructing, influencing, or impeding any official proceeding. Construing Section 1512 in such a way gets the familiar analysis we apply to these types of statutes exactly backwards, eliminating specific terms because of broad language that follows them, rather than limiting the broad language in light of narrower terms that precede it.

Tethering subsection (c)(2) to the context of (c)(1) recognizes the distinct purpose of each provision. See A. Scalia & B. Garner, Reading Law 208 (2012) ("evident purpose" helps define scope of catchall provision). As we have explained, subsection (c)(1) refers to a defined set of offense conduct—four types of actions that, by their nature, impair the integrity or availability of records, documents, or objects for use in an official proceeding. When the phrase "otherwise obstructs, influences, or impedes any official proceeding" is read as having been given more precise content by that narrower list of conduct, subsection (c)(2) makes it a crime to impair the availability or integrity of records, documents, or objects used in an official proceeding in ways other than those specified in (c)(1). For example, it is possible to violate (c)(2) by creating false evidence—rather than altering incriminating evidence. Subsection (c)(2) also ensures that liability is still imposed for impairing the availability or integrity of *other* things used in an official proceeding beyond the "record[s], document[s], or other object[s]" enumerated in (c)(1), such as witness testimony or intangible information.

The dissent supposes that because the word "otherwise" in (c)(2) can mean "in a different manner," "by other means," or "in other respects," (c)(1) and (c)(2) are "distinct and independent prohibitions." But the word "otherwise" is not by itself "sufficient to demonstrate that the examples do not limit the scope of the

clause." "Otherwise" *can* link a set of examples to a general phrase and give it more definite meaning—even in statutory sentences that rival the complexity of Section 1512(c). See *Finnegan v. Leu*, 456 U.S. 431, 437–438, 102 S.Ct. 1867, 72 L.Ed.2d 239 (1982); *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 91–92, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989).

2

It makes sense to read subsection (c)(2) as limited by (c)(1) in light of the history of the provision.

Prior to the Sarbanes-Oxley Act, Section 1512 imposed criminal liability on anyone who "knowingly uses intimidation or physical force, threatens, or corruptly persuades another person" to, among other things, shred documents. 18 U.S.C. § 1512(b)(2)(B). But the Enron accounting scandal revealed a loophole: Although Enron's "outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents," the statute curiously failed to "impos[e] liability on a person who destroys records himself." *Yates*, 574 U.S., at 535–536, 135 S.Ct. 1074 (plurality opinion). As a result, prosecutors had to prove that higher-ups at Enron and Arthur Andersen persuaded someone else to shred documents rather than the more obvious theory that someone who shreds documents is liable for doing so. See S. Rep. No. 107–146, p. 7 (2002).

The parties agree that to plug this loophole, Congress enacted Section 1512(c)—the provision at issue here—as part of the broader Sarbanes-Oxley Act. It would be peculiar to conclude that in closing the Enron gap, Congress actually hid away in the second part of the third subsection of Section 1512 a catchall provision that reaches far beyond the document shredding and similar scenarios that prompted the legislation in the first place. The better conclusion is that subsection (c)(2) was designed by Congress to capture other forms of evidence and other means of impairing its integrity or availability beyond those Congress specified in (c)(1).

B

1

The broader context of Section 1512 in the criminal code confirms that (c)(2) is limited by the scope of (c)(1). Federal obstruction law consists of numerous provisions that target specific criminal acts and settings. See 18 U.S.C. ch. 73. Much of that particularized legislation would be unnecessary if (c)(2) criminalized essentially all obstructive conduct, as the Government contends. Section 1503(a), for example, makes it a crime to "corruptly, or by threats or force, or by any threatening ... communication, endeavor[ ] to influence, intimidate, or impede" any juror or court officer. Section 1504 covers attempting to influence jurors through written communications. Section 1505 covers anyone who corruptly obstructs congressional inquiries or investigations. Section 1507 covers picketing or parading in certain locations "with the intent of interfering with, obstructing, or impeding the administration of justice." Section 1509 covers the obstruction of the exercise of rights or performance of duties under court orders. Section 1510(a) covers obstruction of federal criminal investigations through bribery. Section 1511(a) covers certain obstruction of state or local law enforcement with the intent to facilitate illegal gambling. And Sections 1516, 1517, and 1518 address obstructive acts in specific contexts, including federal audits, examinations of financial institutions, and inquiries into healthcare-related offenses.

If the Government were correct, then the "otherwise obstructs, influences, or impedes any official proceeding" provision—which is buried in subsection (c)(2) of Section 1512—would largely obviate the need for that broad array of other obstruction statutes. In light of our obligation to give meaning where possible to each word and provision in the Code, our narrower interpretation of subsection (c)(2) is the superior one.

2

*8 An unbounded interpretation of subsection (c)(2) would also render superfluous the careful delineation of different types of obstructive conduct in Section 1512 itself. That section provides a reticulated list of nearly two dozen means of committing obstruction, with varying degrees of culpability and penalties ranging from three years to life in prison, or even death. Section 1512(a)(2)(B)(iv), for example, authorizes up to 30 years' imprisonment for someone who uses or attempts to use physical force against another person with the intent of causing him to be absent from an official proceeding. See § 1512(a)(3)(B)(ii)

(specifying punishment). Section 1512(d)(1), by contrast, authorizes only three years' imprisonment for someone who harasses another person and thereby dissuades him from attending an official proceeding.

Reading (c)(2) to cover all forms of obstructive conduct would override Congress's careful delineation of which penalties were appropriate for which offenses. Most instances of those prohibited acts would instead fall under subsection (c)(2)'s sweeping reach, which provides a 20-year maximum term of imprisonment. Such a reading of subsection (c)(2) would lump together disparate types of conduct for which Congress had assigned proportionate penalties in (a)(2) and (d)(1).[2]

[2] The dissent maintains we have " 'glosse[d] over the absence of any prescribed minimum.' " Congress might have thought (c)(2) prohibited conduct of varying severity. But it does not follow that it designed (c)(2) to reach forms of conduct already covered in Chapter 73 with far lower maximum sentences. It would be improper to substitute for those fine-grained statutory distinctions the charging discretion of prosecutors and the sentencing discretion of district courts.

. . . The dissent tries to solve this surplusage problem by arguing that conduct only violates (c)(2) if it has a " 'relationship in time, causation, or logic' " with an official proceeding. Assuming there is such a requirement, it would simply mean that the defendant's actions "must have the natural and probable effect" of interfering with the proceeding. *Gustafson* at 599, 115 S.Ct. 2357 (internal quotation marks omitted). Such a bar on prosecutions based on "speculative" theories of obstruction, *id.*, at 601, 115 S.Ct. 2357, would hardly cabin the reach of (c)(2).

The dissent points out that our reading creates some surplusage, too. In a wide-ranging scheme like Chapter 73, it is true that some provisions will inevitably cover some of the same conduct. But "surplusage is nonetheless disfavored," and our "construction that creates substantially less of it is better than a construction that creates substantially more." 64 F.4th at 374 (Katsas, J., dissenting [in the court below]).

III

On the Government's theory, Section 1512(c) consists of a granular subsection (c)(1) focused on obstructive acts that impair evidence and an overarching subsection (c)(2) that reaches all other obstruction. Even setting surplusage aside, that novel interpretation would criminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison. As the Solicitor General acknowledged at oral argument, under the Government's interpretation, a peaceful protester could conceivably be charged under § 1512(c)(2) and face a 20-year sentence. And the Government would likewise have no apparent obstacle to prosecuting under (c)(2) any lobbying activity that "influences" an official proceeding and is undertaken "corruptly." Those peculiar results "underscore[ ] the implausibility of the Government's interpretation." *Van Buren v. United States*, 593 U.S. 374, 394, 141 S.Ct. 1648, 210 L.Ed.2d 26 (2021).

Our usual approach in obstruction cases has been to "resist reading" particular sub-provisions "to create a coverall" statute, as the Government would have us do here. *Yates*, 574 U.S., at 549, 135 S.Ct. 1074 (plurality opinion). And there is no reason to depart from that practice today. Nothing in the text or statutory history suggests that subsection (c)(2) is designed to impose up to 20 years' imprisonment on essentially all defendants who commit obstruction of justice in any way and who might be subject to lesser penalties under more specific obstruction statutes. See, *e.g.*, §§ 1503(b)(3), 1505. If Congress had wanted to authorize such penalties for *any* conduct that delays or influences a proceeding in *any* way, it would have said so. Instead, Section 1512 mentions "record," "document," or other "object" 26 times.

Rather than transforming this evidence-focused statute into a one-size-fits-all solution to obstruction of justice, we cabin our reading of subsection (c)(2) in light of the context of subsection (c)(1). Doing so affords proper respect to the prerogatives of Congress in carrying out the quintessentially legislative act of defining crimes and setting the penalties for them. We have long recognized that "the power of punishment is vested in the legislative, not in the judicial department," *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 95, 5 L.Ed. 37 (1820), and we have as a result " 'traditionally exercised restraint in assessing the reach of a federal criminal statute,' " The Government's reading of Section 1512 would intrude on that deliberate arrangement of constitutional authority over federal crimes, giving prosecutors broad discretion to seek a 20-year maximum sentence for acts Congress saw fit to punish only with far

shorter terms of imprisonment—for example, three years for harassment under § 1512(d)(1), or ten years for threatening a juror under § 1503.

*10 For all these reasons, subsection (c)(2)'s "surrounding words" suggest that we should not give this "otherwise" provision the broadest possible meaning. *Yates*, 574 U.S., at 536, 135 S.Ct. 1074 (plurality opinion). Although the Government's all-encompassing interpretation may be literally permissible, it defies the most plausible understanding of why (c)(1) and (c)(2) are conjoined, and it renders an unnerving amount of statutory text mere surplusage. Given that subsection (c)(2) was enacted to address the Enron disaster, not some further flung set of dangers, it is unlikely that Congress responded with such an unfocused and "grossly incommensurate patch." 64 F.4th at 376 (Katsas, J., dissenting [in the court below]). We therefore decline to adopt the Government's interpretation, which is inconsistent with "the context from which the statute arose." *Bond v. United States*, 572 U.S. 844, 860, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014).

* * *

To prove a violation of Section 1512(c)(2), the Government must establish that the defendant impaired the availability or integrity for use in an official proceeding of records, documents, objects, or as we earlier explained, other things used in the proceeding, or attempted to do so. The judgment of the D. C. Circuit is therefore vacated, and the case is remanded for further proceedings consistent with this opinion. On remand, the D. C. Circuit may assess the sufficiency of Count Three of Fischer's indictment in light of our interpretation of Section 1512(c)(2).

It is so ordered.

Justice JACKSON, concurring.

[opinion omitted]

Justice BARRETT, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

Joseph Fischer allegedly joined a mob of rioters that breached the Capitol on January 6, 2021. At the time, Congress was meeting in a joint session to certify the Electoral College results. The riot forced Congress to suspend the proceeding, delaying it for several hours.

The Court does not dispute that Congress's joint session qualifies as an "official proceeding"; that rioters delayed the proceeding; or even that Fischer's alleged conduct (which includes trespassing and a physical confrontation with law enforcement) was part of a successful effort to forcibly halt the certification of the election results. Given these premises, the case that Fischer can be tried for "obstructing, influencing, or impeding an official proceeding" seems open and shut. So why does the Court hold otherwise?

Because it simply cannot believe that Congress meant what it said. Section 1512(c)(2) is a very broad provision, and admittedly, events like January 6th were not its target. (Who could blame Congress for that failure of imagination?) But statutes often go further than the problem that inspired them, and under the rules of statutory interpretation, we stick to the text anyway. The Court, abandoning that approach, does textual backflips to find some way—*any* way—to narrow the reach of subsection (c)(2). I respectfully dissent.

I

The case for the Government's interpretation is straightforward. It can be accomplished in three paragraphs, as compared to the Court's many, many more.

Start with the verbs: To "obstruct" and to "impede" mean to "hinder" or "retard" something's "passage" or "progress." 10 Oxford English Dictionary 668 (2d ed. 1989); 7 *id*., at 705. We have previously explained that these words are "broad." *Marinello v. United States*, 584 U.S. 1, 7, 138 S.Ct. 1101, 200 L.Ed.2d 356 (2018). To "influence" is similarly expansive, meaning "[t]o affect the condition of" or "to have an effect on" something. 7 Oxford English Dictionary, at 940. The object of these verbs is an "official proceeding,"

defined to include "a proceeding before the Congress." 18 U.S.C. § 1515(a)(1)(B). So (c)(2) covers all sorts of actions that affect or interfere with official proceedings.

"[O]therwise," which introduces 18 U.S.C. § 1512(c)(2), does not narrow its scope. "Otherwise" means "in a different manner," "by other means," or "in other respects." 10 Oxford English Dictionary, at 984; Webster's Third New International Dictionary 1598 (2002). It is often used to introduce a "catchall phras[e]." Here, "otherwise" tells the reader how (c)(1) and (c)(2) fit together. Subsection (c)(1) prohibits "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object" with "intent to impair [its] integrity or availability for use in an official proceeding." In other words, (c)(1) targets document and object spoliation—classic means of obstruction. Subsection (c)(2) then prohibits obstructing, influencing, or impeding an official proceeding by means *different* from those specified in (c)(1), thereby serving as a catchall. The "enumerated" crimes in (c)(1) and the "unenumerated crimes" in (c)(2) are similar "on one specific dimension": "the *particular* similarity specified after the 'otherwise.' " *Begay v. United States*, 553 U.S. 137, 150–151, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (Scalia, J., concurring in judgment). Here, that means that each crime represents one means through which to obstruct, influence, or impede an official proceeding.

*15 Joseph Fischer allegedly participated in a riot at the Capitol that forced the delay of Congress's joint session on January 6th. Blocking an official proceeding from moving forward surely qualifies as obstructing or impeding the proceeding by means *other than* document destruction. Fischer's alleged conduct thus falls within (c)(2)'s scope.

II

A

Opting for a narrower approach, the Court declines to take (c)(2) on its own terms. Instead, it borrows the evidentiary focus of (c)(1) to hold that a defendant violates (c)(2) only by "impair[ing] the availability or integrity for use in an official proceeding of records, documents, objects, or ... other things used in the proceeding." Other means of obstructing a proceeding—say, by shutting it down—are out.

This interpretation might sound faithful to the statute, because the limit comes from a related provision rather than thin air. But snipping words from one subsection and grafting them onto another violates our normal interpretive principles. " '[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.' " *Dean v. United States*, 556 U.S. 568, 572, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009) (quoting *Bates v. United States*, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997)). And " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act,' " we generally presume that Congress did so intentionally. *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972) (*per curiam*)). The Court's reasons for departing from these rules are thin.

1

The Court begins with the *noscitur a sociis* and *ejusdem generis* canons. The *noscitur* canon counsels that "words grouped in a list should be given related meanings." A. Scalia & B. Garner, Reading Law § 31, p. 195 (2012) (internal quotation marks omitted). It is particularly useful when interpreting " 'a word [that] is capable of many meanings.' " *McDonnell v. United States*, 579 U.S. 550, 569, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961)). See, *e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 573–575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (employing the canon to interpret "communication" in the statutory list " 'prospectus, notice, circular, advertisement, letter, or communication' "). The *ejusdem* canon applies when "a catchall phrase" follows "an enumeration of specifics, as in *dogs*, *cats*, *horses*, *cattle*, and *other animals*." Scalia & Garner § 32, at 199. We often interpret the catchall phrase to "embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001). See, *e.g.*, *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 375, 385, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003) (employing the canon to construe the general term in the statutory list " 'execution, levy, attachment, garnishment, or other legal process' ").

These canons are valuable tools. But applying either to (c)(2) is like using a hammer to pound in a screw—it looks like it might work, but using it botches the job. Unlike the pattern to which the *noscitur* canon applies, § 1512(c) is not a list of terms that includes an ambiguous word. So the Court does not do what it does when applying *noscitur*: select between multiple accepted meanings of the words "obstructs," "influences," and "impedes." Instead, it modifies those words by adding an adverbial phrase: obstructs, influences or impedes by "*impair[ing] the availability or integrity for use in an official proceeding of records, documents, or objects*." (emphasis added). The *ejusdem* canon is an equally poor fit. Unlike the pattern to which *ejusdem* applies, (c)(2) is "*not* a general or collective term following a list of specific items to which a particular statutory command is applicable." *United States v. Aguilar*, 515 U.S. 593, 615, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995) (Scalia, J., concurring in part and dissenting in part). Instead, (c)(1) and (c)(2) are "distinct and independent prohibitions." *Ibid.* Though they share a subject and an adverb—"[w]hoever corruptly"—the two clauses contain different verbs that take different objects. § 1512(c). Moreover, (c)(1) has a separate *mens rea* provision that further disrupts the connection between the clauses.

*16 To my knowledge, we have never applied either of these canons to a statute resembling § 1512(c). Rather than identify such a case, the Court invents examples of a sign at the zoo and a football league rule. The zoo example ("do not pet, feed, yell or throw objects at the animals, or otherwise disturb them") does not help, because it mimics the typical *ejusdem* format of specific words followed by a catchall. The list of specific verbs makes clear that the cleanup phrase ("otherwise disturb") is limited to conduct that involves direct interaction with the animals. But in the absence of a laundry list followed by a catchall, it is hard to see why the *ejusdem* canon fits. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 225, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) ("The absence of a list of specific items undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase"). And § 1512(c) does not follow the laundry-list-plus-catchall pattern.

The Court's football example is only slightly better. As a refresher:

> "[A] football league might adopt a rule that players must not 'grab, twist, or pull a facemask, helmet, or other equipment with the intent to injure a player, or otherwise attack, assault, or harm any player.' If a linebacker shouts insults at the quarterback and hurts his feelings, has the linebacker nonetheless followed the rule? Of course he has. The examples of prohibited actions all concern dangerous physical conduct that might inflict bodily harm; trash talk is simply not of that kind."

Put aside that it is hard to imagine anyone describing "trash talk" as inflicting an "injury" or "harming" a player in a football game. The league rule plainly forecloses the possibility. Consistent with the *noscitur* canon, "harm" takes its meaning from its companions "attack" and "assault." And while the Court tries to track § 1512(c)'s structure by adding an extra intent clause, the two clauses in its example are still tightly focused on actions directed at the *player*. (After all, who is wearing the facemask, helmet, or other equipment?) Given that shared theme, it is easy to understand that the first clause's focus on physical conduct limits the (only slightly) more general clause. But § 1512(c)'s subsections are not so closely related—(c)(1) focuses specifically on objects in a proceeding, and (c)(2) broadens the lens to the proceeding itself.

Consider a rule that actually mirrors § 1512(c):

> "Any player who:
>
> "(1) punches, chokes, or kicks an opposing player with the intent to remove him from the game; or
>
> "(2) otherwise interrupts, hinders, or interferes with the game,
>
> "shall be suspended."

While the specific verbs in the first clause involve actions directed at an opposing player, the second clause is a separate prohibition with an entirely different object. Imagine that, just before the opposing team's kicker attempts a field goal, players leave the sidelines and storm the field, some tackling referees in the process. Those players have surely "interrupt[ed], hinder[ed], or interfer[ed] with the game," even though they have not physically injured any opponent. *This* hypothetical, not the Court's, is analogous to § 1512(c)—and it supports the Government's interpretation.

2

The Court next recruits help from *Begay*, which interprets an "otherwise" clause in the Armed Career Criminal Act. 553 U.S., at 140, 128 S.Ct. 1581. The ACCA defines a "violent felony" as a felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury." 18 U.S.C. § 924(e)(2)(B)(ii). *Begay* holds that the example crimes limit the catchall clause to "crimes that are roughly similar ... to the examples themselves." 553 U.S., at 143, 128 S.Ct. 1581. So too here, the Court reasons, the list of crimes in (c)(1) limits the "otherwise" clause in (c)(2).

*17 But § 1512(c) is structured differently than the statute in *Begay*. While § 1512(c) contains two distinct criminal prohibitions—(c)(1) and (c)(2)—the statutory definition in *Begay* contained a list of examples followed immediately by a residual clause. The latter structure more readily supports interpreting the general clause in light of the specifics, much like a statute to which the *ejusdem* canon would apply. Moreover, the residual clause at issue in *Begay* called out for a limiting principle—what is a "serious potential risk of physical injury?" The breadth itself was a cue that the interpreter should read back to find some limit. See *id.*, at 142–143, 128 S.Ct. 1581. Subsection (c)(2)'s "otherwise" clause, by contrast, stands on its own.

Postscript: Seven years after *Begay* was decided, we held ACCA's residual clause void for vagueness. *Johnson v. United States*, 576 U.S. 591, 597, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). So the clause is not only distinguishable, but also a poor model for statutory interpretation.

3

The Court argues that "there would have been scant reason for Congress to provide any specific examples" in (c)(1) if (c)(2) covered *all* forms of obstructive conduct. Conduct like destroying and concealing records "obstructs, influences, or impedes a[n] official proceeding," so Congress could have enacted just (c)(2) and been done with it. On the Government's interpretation, the Court asserts, the second prohibition swallows the first. If (c)(1) has any function, it must be to cast light (and impose limits) on (c)(2).

What the Court does *not* say is that its rewrite also eliminates the need for (c)(1)'s examples. The Court's interpretation assumes that Congress used a convoluted, two-step approach to enact a prohibition on "impair[ing] the integrity or availability of records, documents, or other objects for use in an official proceeding." So why didn't Congress just say that? And if the Court is right about what (c)(2) means, why do we need the specific examples in (c)(1)? Those acts are already covered. The problem of (c)(2) subsuming (c)(1) is therefore not unique to my theory.

It bears emphasis, though, that the broad overlap makes sense, given the statute's backstory. When the Enron scandal occurred, Congress (along with the general public) was taken aback to discover that seemingly criminal conduct was actually not a federal crime. As it then existed, § 1512 had a loophole: It imposed liability on those who persuaded *others* to destroy documents, but not on the people who *themselves* destroyed documents. Congress enacted § 1512(c) to close this "Enron gap." Subsection (c)(1) deals with the particular problem at hand—document destruction. Subsection (c)(2) reflects Congress's desire to avoid future surprises: It is "a catchall for matters not specifically contemplated—known unknowns." *Republic of Iraq v. Beaty*, 556 U.S. 848, 860, 129 S.Ct. 2183, 173 L.Ed.2d 1193 (2009).

So contrary to the Court's suggestion, it would not be "peculiar" for (c)(2) to cover conduct "far beyond the document shredding and similar scenarios that prompted the legislation in the first place." Enron exposed more than the need to prohibit evidence spoliation—it also exposed the need to close statutory gaps. And in any event, statutes often reach beyond the "principal evil" that animated them. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). That is not grounds for narrowing them, because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Ibid.*

4

While the Court insists that (c)(1) limits (c)(2), it cannot seem to settle on the "common attribute" in the

first subsection that cabins the second. On one hand, the Court says that "(c)(2) makes it a crime to impair the availability or integrity of *records, documents, or objects* used in an official proceeding.". . . On the other hand, the Court says that (c)(2) prohibits "impairing the availability or integrity of *other* things used in an official proceeding," such as "witness testimony" or "intangible information." This broader "evidence impairment" theory resembles Judge Katsas's interpretation. 64 F.4th 329, 363 (CADC 2023) (dissenting opinion [in the court below]).

*18 Both formulations are problematic—and not only because both are atextual. The first, focused solely on physical items, would leave (c)(2) with almost no work to do. Subsection (c)(1) already prohibits "alter[ing], destroy[ing], mutilat[ing], or conceal[ing]" documents, records, or objects. This essentially covers the waterfront of acts that impair the integrity or availability of objects. True, (c)(2) could also encompass "cover[ing] up, falsif[ying], or mak[ing] a false entry in" a record or document. See 18 U.S.C. § 1519. But it seems "unlikely" that Congress used the "expansive" language of (c)(2) "to address such narrow concerns." 64 F.4th at 344 [opinion below]. The somewhat amorphous "other things" limitation has the benefit of giving (c)(2) a wider berth, but it is unclear how the Court landed on it. The term does not appear in (c)(1) or in § 1512's surrounding subsections, which refer specifically to records, documents, objects, and testimony. The "other things" formulation comes from the Court, not Congress.

The Court's uncertainty about the relevant "common attribute" is a tell that Congress did not intend to define (c)(2) by reference to (c)(1). Indeed, "[h]ad Congress intended to limit [§ 1512(c)(2)]'s reach" as the Court asserts, it "easily could have written" the catchall to say "otherwise impair the integrity or availability of records, documents, objects, or other things for use in an official proceeding." *Ali*, 552 U.S., at 227, 128 S.Ct. 831.[2] It did not, and we should not pretend that it did.

[2] Indeed, Congress could have looked to 18 U.S.C. § 1505 as a model. That statute makes it a crime to "willfully withhol[d], misrepresen[t], remov[e] from any place, concea[l], cove[r] up, destro[y], mutilat[e], alte[r], *or by other means falsif[y]* any documentary material, answers to written interrogatories, or oral testimony" with the intent to obstruct "any civil investigative demand." § 1505 (emphasis added).

B

The Court relies on statutory context to "confir[m] that (c)(2) is limited by the scope of (c)(1)." As the Court sees it, interpreting (c)(2) according to its plain text would render other obstruction provisions, within § 1512 and throughout Chapter 73, superfluous.

The Court exaggerates. Subsection (c)(2) applies only to conduct that obstructs an "official proceeding." The Court highlights several provisions that cover obstruction of *investigations*. See, *e.g.*, 18 U.S.C. §§ 1510(a), 1511(a), 1516, 1517, 1518, 1519. The circuits have held that criminal investigations do not qualify as "official proceedings." Likewise, not every provision in § 1512 relates to an official proceeding; instead, several target the obstruction of communications to judges and law enforcement about the commission of federal offenses. 18 U.S.C. §§ 1512(a)(1)(C), (a)(2)(C), (b)(3), (d)(1)(2). . . .

This is not to deny that (c)(2)—if allowed its broad, ordinary meaning—overlaps with several offenses in Chapter 73. Even so, (c)(2) still leaves a healthy amount of work for other obstruction offenses. And besides, "substantial" overlap "is not uncommon in criminal statutes." "The mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Pasquantino v. United States*, 544 U.S. 349, 358, n. 4, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005). That is especially true here, because Congress enacted (c)(2) *after* it had already enacted other subsections of § 1512, as well as obstruction offenses like §§ 1503 and 1505. The redundancy argument would have more force if (c)(2) "render[ed] superfluous an entire provision passed in proximity as part of the *same Act*." *Yates v. United States*, 574 U.S. 528, 543, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (plurality opinion) (emphasis added). As it stands, the canon against surplusage does not provide any reason to artificially narrow (c)(2)'s scope.

In any event, the Court's formulation does not begin to cure the statutory overlap. Killing a person with the intent to prevent the production of a record in an official proceeding constitutes conduct that impairs the availability of a record for an official proceeding. 18 U.S.C. § 1512(a)(1)(B). Using physical force against a person to influence testimony in an official proceeding counts as impairing the integrity of "other things" used in an official proceeding. § 1512(a)(2)(A). And impairing the availability or integrity of documents for use in an official proceeding will often "influenc[e], obstruc[t], or imped[e] ... the due administration

of justice." § 1503(a); see also § 1515(a)(1)(A) (" 'official proceeding' " includes "a proceeding before a judge or court of the United States"). Examples abound. See, *e.g.*, §§ 1505, 1512(a)(1)(A), (a)(2)(B), (b)(1), (b)(2), (d)(1). "[T]he canon against surplusage merely favors that interpretation which *avoids* surplusage"—and on that score, the Court's interpretation fares no better than mine. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635, 132 S.Ct. 2034, 182 L.Ed.2d 955 (2012).

In fact, the broader statutory context works *against* the Court's interpretation. Congress did not select the verbs "obstruct," "influence," and "impede" at random. Those words were already in § 1503, which prohibits "corruptly or by threats or force, or by any threatening letter or communication, influenc[ing], obstruct[ing], or imped[ing] ... the due administration of justice." We have described this " 'Omnibus Clause' " as a "catchall," because it follows several specific proscriptions against coercive behavior toward jurors and court officers. Courts have routinely declined to "rea[d] the omnibus clause" as limited to "acts similar in manner to those prescribed by the statute's specific language." And Justice Scalia agreed that *ejusdem generis* did not apply to limit the Omnibus Clause, "one of the several distinct and independent prohibitions contained in § 1503 that share only the word 'Whoever,' which begins the statute, and the penalty provision which ends it." *Aguilar*, 515 U.S., at 615, 115 S.Ct. 2357 (opinion concurring in part and dissenting in part). Section 1512(c) follows the very same pattern.

C

*20 The Court concludes with an appeal to consequences: Construing (c)(2) broadly would "expos[e] activists and lobbyists alike to decades in prison." This fear is overstated.

To begin with, the Court ignores that (c)(2) requires proof that a defendant acted "corruptly." The meaning of this term is unsettled, but all of its possible definitions limit the scope of liability. On one proposed interpretation, a defendant acts corruptly by " 'us[ing] unlawful means, or act[ing] with an unlawful purpose, or both.' " *United States v. Robertson*, 103 F.4th 1, 8 (CADC 2023) (approving jury instructions for (c)(2)). On another, a defendant acts "corruptly" if he "act[s] 'with an intent to procure an unlawful benefit either for himself or for some other person.' " 64 F.4th at 352 (Walker, J., concurring in part and concurring in judgment) [in the court below] (quoting *Marinello*, 584 U.S., at 21, 138 S.Ct. 1101; alterations omitted). Under either, the "corruptly" element should screen out innocent activists and lobbyists who engage in lawful activity. And if not, those defendants can bring as-applied First Amendment challenges.

The Court also emphasizes (c)(2)'s 20-year maximum penalty. But it simultaneously "glosses over the absence of any prescribed minimum." *Yates*, 574 U.S., at 569, 135 S.Ct. 1074 (KAGAN, J., dissenting). "Congress presumably enacts laws with high maximums and no minimums when it thinks the prohibited conduct may run the gamut from major to minor." *Ibid.* Indeed, given the breadth of its terms, (c)(2) naturally encompasses actions that range in severity. Congress presumably trusted District Courts to impose sentences commensurate with the defendant's particular conduct.

* * *

There is no getting around it: Section 1512(c)(2) is an expansive statute. Yet Congress, not this Court, weighs the "pros and cons of whether a statute should sweep broadly or narrowly." Once Congress has set the outer bounds of liability, the Executive Branch has the discretion to select particular cases to prosecute within those boundaries. By atextually narrowing § 1512(c)(2), the Court has failed to respect the prerogatives of the political branches. I respectfully dissent.

Later Cases Involving Criminal Statutes

Kelly v. United States, 140 S. Ct. 1565 (2020)

During former New Jersey Governor Chris Christie's 2013 reelection campaign, his Deputy Chief of Staff, Bridget Anne Kelly, avidly courted Democratic mayors for their endorsements, but Fort Lee's mayor refused to back the Governor's campaign. Determined to punish the mayor, Kelly, Port Authority Deputy Executive Director William Baroni, and another Port Authority official, David Wildstein, decided to reduce from three to one the number of lanes long reserved at the George Washington Bridge's toll plaza for Fort Lee's morning commuters. To disguise their efforts at political retribution, Wildstein devised a cover story: The lane realignment was for a traffic study. As part of that cover story, the defendants asked Port Authority traffic engineers to collect some numbers about the effect of the changes. At the suggestion of a Port Authority manager, they also agreed to pay an extra toll collector overtime so that Fort Lee's one remaining lane would not be shut down if the collector on duty needed a break. The lane realignment caused four days of gridlock in Fort Lee, and only ended when the Port Authority's Executive Director learned of the scheme. Baroni and Kelly were convicted in federal court of wire fraud, fraud on a federally funded program or entity (the Port Authority), and conspiracy to commit each of those crimes. The Third Circuit affirmed.

In a unanimous opinion by Justice Kagan, the Court held:

Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws.

The federal wire fraud statute makes it a crime to effect (with the use of the wires) "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. Similarly, the federal-program fraud statute bars "obtain[ing] by fraud" the "property" (including money) of a federally funded program or entity. § 666(a)(1)(A). These statutes are "limited in scope to the protection of property rights," and do not authorize federal prosecutors to "set[ ] standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292. So under either provision, the Government had to show not only that Baroni and Kelly engaged in deception, but that an object of their fraud was money or property. *Cleveland v. United States*, 531 U.S. 12, 26, 121 S.Ct. 365, 148 L.Ed.2d 221.

The Government argued that the scheme had the object of obtaining the Port Authority's money or property in two ways. First, the Government claimed that Baroni and Kelly sought to commandeer part of the Bridge itself by taking control of its physical lanes. Second, the Government asserted that the defendants aimed to deprive the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors. For different reasons, neither of these theories can sustain the verdicts.

Baroni's and Kelly's realignment of the access lanes was an exercise of regulatory power—a reallocation of the lanes between different groups of drivers. This Court has already held that a scheme to alter such a regulatory choice is not one to take the government's property. *Id.*, at 23, 121 S.Ct. 365. And while a government's right to its employees' time and labor is a property interest, the prosecution must also show that it is an "object of the fraud." *Pasquantino v. United States*, 544 U.S. 349, 355, 125 S.Ct. 1766, 161 L.Ed.2d 619. Here, the time and labor of the Port Authority employees were just the implementation costs of the defendants' scheme to reallocate the Bridge's lanes—an incidental (even if foreseen) byproduct of their regulatory object. Neither defendant sought to obtain the services that the employees provided.

Ciminelli v. United States, 143 S. Ct. 1121 (2023)

Louis Ciminelli was convicted of federal wire fraud for his involvement in a scheme to rig the

bid process for obtaining state-funded development projects associated with then-New York Governor Andrew Cuomo's Buffalo Billion initiative. The Buffalo Billion initiative was administered by the nonprofit Fort Schuyler Management Corporation. Investigations uncovered that Fort Schuyler board member Alain Kaloyeros paid lobbyist Todd Howe $25,000 in state funds each month to ensure that the Cuomo administration gave Kaloyeros a prominent role in administering projects for Buffalo Billion. Ciminelli's construction company, LPCiminelli, paid Howe $100,000 to $180,000 each year to help it obtain state-funded jobs. In 2013, Howe and Kaloyeros devised a scheme whereby Kaloyeros would tailor Fort Schuyler's bid process to smooth the way for LPCiminelli to receive major Buffalo Billion contracts by designating LPCiminelli as a "preferred developer" with priority status to negotiate for specific projects. Kaloyeros, Howe, and Ciminelli jointly developed a set of requests for proposal (RFPs) that effectively guaranteed LPCiminelli's selection as a preferred developer by treating unique aspects of LPCiminelli as qualifications for preferred-developer status. With that status in hand, LPCiminelli secured the marquee $750 million "Riverbend project" in Buffalo. After the scheme was uncovered, Ciminelli, Kaloyeros, Howe, and others were indicted for, as relevant here, wire fraud in violation of 18 U.S.C. § 1343 and conspiracy to commit the same under § 1349.

In the operative indictment and at trial, the Government relied solely on the Second Circuit's right-to-control theory of wire fraud, under which the Government can establish wire fraud by showing that the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions. Consistent with that theory, the District Court instructed the jury that the term "property" in § 1343 "includes intangible interests such as the right to control the use of one's assets," which could be harmed by depriving Fort Schuyler of "potentially valuable economic information." The jury convicted Ciminelli of wire fraud and conspiracy to commit wire fraud. On appeal, Ciminelli argued that the right to control one's assets is not "property" for purposes of § 1343. The Second Circuit affirmed the convictions on the basis of its longstanding right-to-control precedents.

In a unanimous opinion by Justice Thomas, the Court held: Because the right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest, the Second Circuit's right-to-control theory cannot form the basis for a conviction under the federal fraud statutes.

(a) The federal wire fraud statute criminalizes the use of interstate wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. When the federal wire fraud statute was enacted, the "common understanding" of the words "to defraud" referred "to wronging one in his property rights." *Cleveland v. United States*, 531 U.S. 12, 19, 121 S.Ct. 365, 148 L.Ed.2d 221. This Court has therefore consistently understood the statute's "money or property" requirement as limiting the "scheme or artifice to defraud" element. *Ibid.* Even so, lower federal courts for decades interpreted the mail and wire fraud statutes to protect intangible interests unconnected to traditional property rights. See *Skilling v. United States*, 561 U.S. 358, 400, 130 S.Ct. 2896, 177 L.Ed.2d 619. This Court halted that trend in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292, which confined the statutes to the "protect[ion of] individual property rights." *Id.*, at 359, n. 8, 107 S.Ct. 2875.

The right-to-control theory cannot be squared with the text of the federal fraud statutes, which are "limited in scope to the protection of property rights." *Id.*, at 360, 107 S.Ct. 2875. The so-called right to control is not an interest that had "long been recognized as property" when the wire fraud statute was enacted. *Carpenter v. United States*, 484 U.S. 19, 26, 108 S.Ct. 316, 98 L.Ed.2d 275. From the theory's inception, the Second Circuit has not grounded the right to control in traditional property notions. The theory is also inconsistent with the structure and history of the federal fraud statutes. Congress responded to this Court's decision in *McNally* by enacting § 1346, which revived only the intangible right of honest services, one of many intangible rights protected by courts under the fraud statutes pre-*McNally*. Congress' silence regarding other such intangible interests forecloses the judicial expansion of the wire fraud statute to cover the intangible right to control. Finally, by treating mere information as the protected interest, the right-to-control theory vastly

expands federal jurisdiction to an almost limitless variety of deceptive actions traditionally left to State law.

(b) Despite relying exclusively on the right-to-control theory before the grand jury, District Court, and Second Circuit, the Government now concedes that the theory as articulated below is erroneous. Yet, the Government insists that the Court can affirm Ciminelli's convictions by applying facts presented to the jury below to the elements of a different wire fraud theory. The Court declines the Government's request, which would require the Court to assume not only the function of a court of first view, but also of a jury. See *McCormick v. United States*, 500 U.S. 257, 270–271, n. 8, 111 S.Ct. 1807, 114 L.Ed.2d 307.

***McDonnell v. United States*, 579 U.S. 550 (2016)**

Former Virginia Governor Robert McDonnell, and his wife, Maureen McDonnell, were indicted by the Federal Government on honest services fraud and Hobbs Act extortion charges related to their acceptance of $175,000 in loans, gifts, and other benefits from Virginia businessman Jonnie Williams, while Governor McDonnell was in office. Williams was the chief executive officer of Star Scientific, a Virginia-based company that had developed Anatabloc, a nutritional supplement made from anatabine, a compound found in tobacco. Star Scientific hoped that Virginia's public universities would perform research studies on anatabine, and Williams wanted Governor McDonnell's assistance in obtaining those studies.

To convict the McDonnells, the Government was required to show that Governor McDonnell committed (or agreed to commit) an "official act" in exchange for the loans and gifts. An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). According to the Government, Governor McDonnell committed at least five "official acts," including "arranging meetings" for Williams with other Virginia officials to discuss Star Scientific's product, "hosting" events for Star Scientific at the Governor's Mansion, and "contacting other government officials" concerning the research studies.

The District Court instructed the jury that "official act" encompasses "acts that a public official customarily performs," including acts "in furtherance of longer-term goals" or "in a series of steps to exercise influence or achieve an end." Governor McDonnell requested that the court further instruct the jury that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts,' " but the District Court declined to give that instruction. The jury convicted Governor McDonnell.

Governor McDonnell moved to vacate his convictions on the ground that the definition of "official act" in the jury instructions was erroneous. The District Court denied the motions, and the Fourth Circuit affirmed.

In a unanimous opinion by Chief Justice Roberts, the Court held:

1. An "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." That question or matter must involve a formal exercise of governmental power, and must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that question or matter, or agree to do so. Setting up a meeting, talking to another official, or organizing an event—without more—does not fit that definition of "official act."

(a) The Government argues that the term "official act" encompasses nearly any activity by a public official concerning any subject, including a broad policy issue such as Virginia economic development. Governor McDonnell, in contrast, contends that statutory context

compels a more circumscribed reading. Taking into account text, precedent, and constitutional concerns, the Court rejects the Government's reading and adopts a more bounded interpretation of "official act."

(b) Section 201(a)(3) sets forth two requirements for an "official act." First, the Government must identify a "question, matter, cause, suit, proceeding or controversy" that "may at any time be pending" or "may by law be brought" before a public official. Second, the Government must prove that the public official made a decision or took an action "on" that "question, matter, cause, suit, proceeding or controversy," or agreed to do so.

(1) The first inquiry is whether a typical meeting, call, or event is itself a "question, matter, cause, suit, proceeding or controversy." The terms "cause," "suit," "proceeding," and "controversy" connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination. Although it may be difficult to define the precise reach of those terms, a typical meeting, call, or event does not qualify. "Question" and "matter" could be defined more broadly, but under the familiar interpretive canon *noscitur a sociis,* a "word is known by the company it keeps." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859. Because a typical meeting, call, or event is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not count as a "question" or "matter" under § 201(a)(3). That more limited reading also comports with the presumption "that statutory language is not superfluous." *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299, n. 1, 126 S.Ct. 2455, 165 L.Ed.2d 526.

(2) Because a typical meeting, call, or event is not itself a question or matter, the next step is to determine whether arranging a meeting, contacting another official, or hosting an event may qualify as a "decision or action" *on* a different question or matter. That first requires the Court to establish what counts as a question or matter in this case.

Section 201(a)(3) states that the question or matter must be "pending" or "may by law be brought" before "any public official." "Pending" and "may by law be brought" suggest something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete. "May *by law* be brought" conveys something within the specific duties of an official's position. Although the District Court determined that the relevant matter in this case could be considered at a much higher level of generality as "Virginia business and economic development," the pertinent matter must instead be more focused and concrete.

The Fourth Circuit identified at least three such questions or matters: (1) whether researchers at Virginia's state universities would initiate a study of Anatabloc; (2) whether Virginia's Tobacco Commission would allocate grant money for studying anatabine; and (3) whether Virginia's health plan for state employees would cover Anatabloc. The Court agrees that those qualify as questions or matters under § 201(a)(3).

(3) The question remains whether merely setting up a meeting, hosting an event, or calling another official qualifies as a decision or action on any of those three questions or matters. It is apparent from *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576, that the answer is no. Something more is required: Section 201(a)(3) specifies that the public official must make a decision or take an action *on* the question or matter, or agree to do so.

For example, a decision or action to initiate a research study would qualify as an "official act." A public official may also make a decision or take an action by using his official position to exert pressure on *another* official to perform an "official act," or by using his official position to provide advice to another official, knowing or intending that such advice will form the basis for an "official act" by another official. A public official is not required to actually make a decision or take an action on a "question, matter, cause, suit, proceeding or controversy"; it is enough that he agree to do so. Setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information, however, does not qualify as a decision or action on the pending

question whether to initiate the study.

(c) The Government's expansive interpretation of "official act" would raise significant constitutional concerns. Conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. Representative government assumes that public officials will hear from their constituents and act appropriately on their concerns. The Government's position could cast a pall of potential prosecution over these relationships. This concern is substantial, as recognized by White House counsel from every administration from that of President Reagan to President Obama, as well as two bipartisan groups of former state attorneys general. The Government's interpretation also raises due process and federalism concerns.

2. Given the Court's interpretation of "official act," the District Court's jury instructions were erroneous, and the jury may have convicted Governor McDonnell for conduct that is not unlawful. Because the errors in the jury instructions are not harmless beyond a reasonable doubt, the Court vacates Governor McDonnell's convictions.

Supreme Court of the United States.

James E. SNYDER
v.
UNITED STATES

Decided June 26, 2024

Justice KAVANAUGH delivered the opinion of the Court.

Section 666 of Title 18 makes it a crime for state and local officials to "corruptly" solicit, accept, or agree to accept "anything of value from any person, intending to be influenced or rewarded" for an official act. § 666(a)(1)(B). That law prohibits state and local officials from accepting *bribes* that are promised or given before the official act. Those bribes are punishable by up to 10 years' imprisonment.

The question in this case is whether § 666 also makes it a crime for state and local officials to accept *gratuities*—for example, gift cards, lunches, plaques, books, framed photos, or the like—that may be given as a token of appreciation after the official act. The answer is no. State and local governments often regulate the gifts that state and local officials may accept. Section 666 does not supplement those state and local rules by subjecting 19 million state and local officials to up to 10 years in federal prison for accepting even commonplace gratuities. Rather, § 666 leaves it to state and local governments to regulate gratuities to state and local officials.

I

A

Federal and state law distinguish between two kinds of payments to public officials—bribes and gratuities. As a general matter, bribes are payments made or agreed to *before* an official act in order to influence the official with respect to that future official act. American law generally treats bribes as inherently corrupt and unlawful.

But the law's treatment of gratuities is more nuanced. Gratuities are typically payments made to an official *after* an official act as a token of appreciation. Some gratuities can be problematic. Others are commonplace and might be innocuous. A family gives a holiday tip to the mail carrier. Parents send an end-of-year gift basket to their child's public school teacher. A college dean gives a college sweatshirt to a city council member who comes to speak at an event. A state legislator's neighbor drops off a bottle of wine to congratulate her for her work on a new law.

As those examples suggest, gratuities after the official act are not the same as bribes before the official act. After all, unlike gratuities, bribes can corrupt the official act—meaning that the official takes the act for private gain, not for the public good. That said, gratuities can sometimes also raise ethical and appearance concerns. For that reason, Congress, States, and local governments have long regulated gratuities to public officials.

Not surprisingly, different governments draw lines in different places. . . .

C

This case involves the former mayor of Portage, Indiana. Portage is a city in northwest Indiana with a population of about 38,000.

Like other States, Indiana criminalizes bribery committed by state and local officials. See Ind. Code § 35–44.1–1–2(a)(2) (2023). Indiana also prescribes civil penalties such as fines, reprimands, and disqualification from state employment if state officials accept gratuities

in violation of the State's Code of Ethics. See Ind. Code § 4–2–6–12 (2021); 42 Ind. Admin. Code § 1–5–1 (2024).

But Indiana does not impose general criminal or civil prohibitions on local officials who accept gratuities, leaving such regulation to the local governments themselves. As relevant here, the City of Portage sets limits on the gifts that local officials can accept from contractors doing business with the City. See Portage, Ind., Municipal Code of Ordinances §§ 2–178(e)–(f) (2024).

In 2013, the City of Portage awarded two contracts to a local truck company, Great Lakes Peterbilt, to purchase trash trucks. In total, the City paid about $1.1 million for five trucks.

In 2014, Peterbilt cut a $13,000 check to James Snyder, who was the mayor of Portage (and had been at the time of the contracts). The FBI and federal prosecutors suspected that the payment was a gratuity for the City's trash truck contracts. But Snyder said that he had also agreed to be a contractor for Peterbilt, providing consulting services. (Like many jurisdictions around the country, neither Indiana nor Portage apparently prohibited local officials from obtaining outside employment.) Snyder said that the payment was for his consulting services.

Snyder has never been charged by state prosecutors for bribery. And he has never been charged or disciplined by Portage for violating the City's gift rules. The Federal Government charged and a federal jury convicted Snyder of accepting an illegal gratuity (the $13,000 check from Peterbilt) in violation of 18 U.S.C. § 666(a)(1)(B). . . .

II

A

The question in this case is whether 18 U.S.C. § 666(a)(1)(B) makes it a federal crime for state and local officials to accept gratuities for their past official acts. The answer is no. Six reasons, taken together, lead us to conclude that § 666 is a bribery statute and not a gratuities statute—text, statutory history, statutory structure, statutory punishments, federalism, and fair notice.

First is the text of § 666. Section 666(a)(1)(B) makes it a crime for state and local officials to "corruptly" accept a payment "intending to be influenced or rewarded" for an official act.[1] Congress modeled the text of § 666(a)(1)(B) for state and local officials on § 201(b), the bribery provision for federal officials. Section 201(b) similarly makes it a crime for federal officials to "corruptly" accept a payment "in return for" "being influenced" in an official act.[2] By contrast, § 666 bears little resemblance to § 201(c), the gratuities provision for federal officials, which contains no express *mens rea* requirements and simply makes it a crime for federal officials to accept a payment "for or because of any official act."[3]

1 Section 666(a)(1)(B) provides:

> "Whoever ... being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof [that receives more than $10,000 in federal funds annually] corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; ... shall be fined under this title, imprisoned not more than 10 years, or both."

2 Section 201(b)(2)(A) provides:
"Whoever ... being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: being influenced in the performance of any official act; ... shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States."

3 Section 201(c)(1)(B) provides:
> "Whoever otherwise than as provided by law for the proper discharge of official duty ... being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person ... shall be fined under this title or imprisoned for not more than two years, or both."

*7 Therefore, the dividing line between § 201(b)'s bribery provision and § 201(c)'s gratuities provision is that bribery requires that the official have a corrupt state of mind and accept (or agree to accept) the payment intending to be influenced in the official act. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–405, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999). Section 666 shares the defining characteristics of § 201(b)'s bribery provision: the corrupt state of mind and the intent to be influenced in the official act. The statutory text therefore strongly suggests that § 666—like § 201(b)—is a bribery statute, not a gratuities statute.

Second is the statutory history, which reinforces that textual analysis. In 1984, when first enacting § 666 for state and local officials, Congress borrowed language from the gratuities statute for federal officials, § 201(c). See 18 U.S.C. § 666(b) (1982 ed., Supp. II). But just two years later, in 1986, Congress overhauled § 666, eliminated the gratuities language, and instead enacted the current language that resembles the bribery provision for federal officials, § 201(b). Perhaps Congress in 1986 concluded that federally criminalizing state and local gratuities would significantly intrude on federalism. Whatever the impetus, we know that Congress decided in 1986 to change the law and to model § 666 on § 201(b), the bribery statute, and not on § 201(c), the gratuities statute. It therefore would be strange to interpret § 666, as the Government suggests, to mean the same thing now that it meant back in 1984, before the 1986 amendment. We must respect Congress's choice in 1986.

Third is the statutory structure. The Government posits that Congress prohibited bribes and gratuities to state and local officials in a single statutory provision, § 666(a)(1)(B). Such a statute would be highly unusual, if not unique. The Government identifies no other provision in the U. S. Code that prohibits bribes and gratuities in the same provision.[4] That is because bribery and gratuities are "two separate crimes" with "two different sets of elements." *Sun-Diamond*, 526 U.S., at 404, 119 S.Ct. 1402. Therefore, § 201(b) makes it a crime for federal officials to accept bribes, while a separate provision, § 201(c), makes it a crime for federal officials to accept certain gratuities. The absence of a separate gratuities provision in § 666 reinforces that § 666 is a bribery statute for state and local officials, not a two-for-one bribery-and-gratuities statute.

4 At most, the Government points to 18 U.S.C. § 215(a)(2), which bars employees of financial institutions from "corruptly" soliciting or accepting "anything of value ... intending to be influenced or rewarded in connection with any business or transaction of such institution." That language simply mirrors § 666's language. But because this Court has never interpreted § 215 (and therefore has never said whether § 215 covers only bribery), that statute is a null data point.

Fourth are the statutory punishments. For federal officials, Congress has separated bribery and gratuities into two distinct provisions of § 201 for good reason: The crimes receive different punishments that "reflect their relative seriousness." *Sun-Diamond*, 526 U.S., at 405, 119 S.Ct. 1402. For example, accepting a bribe as a federal official is punishable by up to 15 years in prison, while accepting an illegal gratuity as a federal official is punishable by only up to 2 years. Compare § 201(b) with § 201(c).

If the Government were correct that § 666 also covered gratuities, Congress would have created an entirely inexplicable regime for state and local officials. For one, even though bribery has been treated as a far more serious offense, Congress would have authorized the same 10-year maximum sentences for (i) gratuities to state and local officials and (ii) bribes to state and local officials. See *Sun-Diamond*, 526 U.S., at 405, 119 S.Ct. 1402. In addition, Congress would have authorized punishing gratuities to state and local officials five times more severely than gratuities to federal officials—10 years for state and local officials compared to 2 years for federal officials.

*8 The Government cannot explain why Congress would have created such substantial sentencing disparities. We cannot readily assume that Congress authorized a 2-year sentence for, say, a Cabinet Secretary who accepts an unlawful gratuity while authorizing a 10-year sentence on a local school board member who accepts an identical gratuity. What sense would that make? In short, the inexplicable anomalies ushered in by the Government's approach powerfully demonstrate that § 666 is a bribery statute.

Fifth is federalism. Interpreting § 666 as a gratuities statute would significantly infringe on bedrock federalism principles. As this Court has long recognized, a State "defines itself as a sovereign through the structure of its government, and the character of those who exercise government authority." *McDonnell v. United States*, 579 U.S. 550, 576, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016) (quotation marks omitted). Therefore, as a general matter, States have the "prerogative to regulate the permissible scope of interactions between state officials and their constituents." *Ibid.*; see *United States v. Bass*, 404 U.S. 336, 350, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

As noted above, state and local governments have adopted a variety of approaches to regulating state and local officials' acceptance of gratuities. Those differing approaches reflect nuanced state and local policy judgments about when gifts expressing appreciation to public officials for their past acts cross the line from the innocuous to the problematic.

The carefully calibrated policy decisions that the States and local governments have made about gratuities would be gutted if we were to accept the Government's interpretation of § 666. After all, § 666 covers virtually all state and local officials—about 19 million nationwide. So reading § 666 to create a federal prohibition on gratuities would suddenly subject 19 million state and local officials to a new and different regulatory regime for gratuities. In other words, a county official could meticulously comply with her county's local gratuities rules—say, by declining a $200 gift card but accepting a $100 gift card from a neighbor as thanks for her diligent work on a new park—but still face up to 10 years in federal prison because she accepted a thing of value in connection with an official act.

We should hesitate before concluding that Congress prohibited gratuities that state and local governments have allowed for their officials. After all, Congress does not lightly override state and local governments on such core matters of state and local governance. And the principle articulated by this Court in *Sun-Diamond* fits this case as well: A "narrow, rather than a sweeping, prohibition is more compatible with the fact that" this statute "is merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." 526 U.S., at 409, 119 S.Ct. 1402.

In short, federalism principles weigh heavily in favor of reading § 666 as a bribery statute and not as a gratuities law.

Sixth is fair notice. The Government's interpretation of the statute would create traps for unwary state and local officials. *Sun-Diamond*, 526 U.S., at 411, 119 S.Ct. 1402.

The Government had to choose between two options for how to read § 666. The Government could read § 666 to ban all gratuities, no matter how trivial, in connection with covered official acts. That option might be clear enough. But that draconian approach would border on the absurd and exacerbate the already serious federalism problems with the Government's reading of § 666.

*9 Alternatively, the Government could recognize the irrationality of reading § 666 to criminalize all such gratuities. And to deal with the overbreadth problems, the Government could make atextual exceptions on the fly.

The Government opted for the second approach, seeking to soothe concerns about overbreadth by saying that the statute, even under its view, would not cover "innocuous" or "obviously benign" gratuities.

But that effort to address those overbreadth concerns has simply moved the Government from one sinkhole to another. The flaw in the Government's approach—and it is a very serious real-world problem—is that the Government does not identify any remotely clear lines separating an innocuous or obviously benign gratuity from a criminal gratuity. The Government simply opines that state and local officials may not accept "wrongful" gratuities.

That is no guidance at all. Is a $100 Dunkin' Donuts gift card for a trash collector wrongful? What about a $200 Nike gift card for a county commissioner who voted to fund new school athletic facilities? Could students take their college professor out to Chipotle for an end-of-term celebration? And if so, would it somehow become criminal to take the professor for a steak dinner? Or to treat her to a Hoosiers game?

The Government offers no clear federal rules for state and local officials. So how are state legislators, city council members, school board officials, building code inspectors, probation officers, human resource directors, police officers, librarians, snow plow drivers, court clerks, prison guards, high school basketball coaches, mayors, zoning board members, animal control officers, social workers, firefighters, city planners, and the entire army of 19 million state and local officials to know what is acceptable and what is criminalized by the Federal Government? They cannot. The Government's so-called guidance would leave state and local officials entirely at sea to guess about what gifts they are allowed to accept under federal law, with the threat of up to 10 years in federal prison if they happen to guess wrong. That is not how federal criminal law works.[5]

5 The Government's interpretation seems all the more unbelievable because § 666 applies to the gift-givers as well as the state and local officials accepting the gifts. Specifically, § 666(a)(2) makes it a crime punishable by 10 years' imprisonment for someone to "corruptly" offer or give "anything of value" to state and local officials "with intent to influence or reward." So under the Government's approach, families, students, constituents, and other members of the public would be forced to guess whether they could even offer (much less actually give) thank-you gift cards, steak dinners, or Fever tickets to their garbage collectors, professors, or school board members, for example.

Responding to the legitimate concern that the federal lines are unknown and unknowable to state and local officials, the Government advances the familiar plea that federal prosecutors can be trusted not to enforce this statute against small-time violators. But as this Court has said time and again, the Court "cannot construe a criminal statute on the assumption that the Government will use it responsibly." *McDonnell*, 579 U.S., at 576, 136 S.Ct. 2355 (quotation marks omitted); see *Percoco v. United States*, 598 U.S. 319, 143 S.Ct. 1130, 215 L.Ed.2d 305 (2023); *Ciminelli v. United States*, 598 U.S. 306, 143 S.Ct. 1121, 215 L.Ed.2d 294 (2023); *Kelly v. United States*, 590 U.S. 391, 140 S.Ct. 1565, 206 L.Ed.2d 882 (2020); *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010).

*10 The lack of fair notice for state and local officials is highlighted by comparing the non-existent federal gratuities guidance given to state and local officials with the extensive

federal gratuities guidance given to federal workers. The Office of Government Ethics has promulgated comprehensive and detailed regulatory guidelines specifying what gifts are allowed and prohibited for federal workers. For instance, the guidelines for federal officials set forth cost thresholds, exempt certain gifts from friends or family, clarify what discounts are acceptable, and explain which social invitations an official may accept—all with multiple examples to guide federal officials' conduct. See 5 C.F.R. § 2635.204.

Nothing for state and local officials. It is unfathomable that Congress would authorize a 10-year criminal sentence for gifts to 19 million state and local officials without any coherent federal guidance (or any federal guidance at all) about how an official can distinguish the innocuous from the criminal.

When construing a statute like this that regulates state and local officials, this Court's precedents caution against leaving the statute's "outer boundaries ambiguous" and involving the "Federal Government in setting standards of good government for local and state officials." *McDonnell*, 579 U.S., at 577, 136 S.Ct. 2355 (quotation marks omitted). And the Court has emphasized that a "statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Sun-Diamond*, 526 U.S., at 412, 119 S.Ct. 1402. So it is here.

B

Faced with that phalanx of difficulties with its interpretation of § 666, the Government offers little. The Government's argument boils down to one main point—that § 666 uses the term "rewarded" as well as "influenced." And that, too, is the dissent's main point. The Government (echoed by the dissent) says that Congress would not have added the term "rewarded" to "influenced" in § 666 if the statute were meant to cover only bribes and not also gratuities. That argument is misconceived.

In isolation, the word "rewarded" could be part of a gratuities statute or a bribery statute—either (i) a reward given after the act with no agreement beforehand (gratuity) or (ii) a reward given after the act pursuant to an agreement beforehand (bribe). But as noted above, the word "corruptly" in the text of § 666 helps resolve the issue here. The bribery statute for federal officials, § 201(b), uses the term "corruptly." But the gratuities statute for federal officials, § 201(c), does not. The term "corruptly" therefore signals that § 666 is a bribery statute. And statutory history, statutory structure, statutory punishments, federalism, and fair notice strongly reinforce that textual signal and together establish that § 666 is a bribery statute.

Contrary to the premise of the Government's argument, moreover, bribery statutes sometimes use the term "reward." See, *e.g.*, 18 U.S.C. § 600; 33 U.S.C. § 447. The term "rewarded" closes off certain defenses that otherwise might be raised in bribery cases. Consider a bribe where the agreement was made before the act but the payment was made after the act. An official might try to defend against the bribery charge by saying that the payment was received only after the official act and therefore could not have "influenced" the act. By including the term "rewarded," Congress made clear that the timing of the agreement is the key, not the timing of the payment, and thereby precluded such a potential defense.

And think about the official who took a bribe before the official act but asserts as a defense that he would have taken the same act anyway and therefore was not "influenced" by the payment. To shut the door on that potential defense to a § 666 bribery charge, Congress sensibly added the term "rewarded."

*11 So even if "influenced" alone might have covered the waterfront of bribes, adding "rewarded" made good sense to avoid potential ambiguities, gaps, or loopholes. Congress commonly writes federal statutes, including bribery statutes, in such a belt and suspenders manner. Here, the term "rewarded" does not transform § 666 into a gratuities statute. . .

It is so ordered.

Justice GORSUCH, concurring.

Call it what you will. The Court today speaks of inferences from the word "corruptly," the statute's history and structure, and associated punishments. It discusses concerns of fair notice and federalism. *Ibid.* But the bottom line is that, for all those reasons, any fair reader of this statute would be left with a reasonable doubt about whether it covers the defendant's charged conduct. And when that happens, judges are bound by the ancient rule of lenity to decide the case as the Court does today, not for the prosecutor but for the presumptively free individual.

Lenity may sometimes, as it does today, go unnamed. It may be deployed under other guises, too. . . .

But make no mistake: Whatever the label, lenity is what's at work behind today's decision, just as it is in so many others. Rightly so. I am pleased to join.

Justice JACKSON, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

Officials who use their public positions for private gain threaten the integrity of our most important institutions. Greed makes governments—at every level—less responsive, less efficient, and less trustworthy from the perspective of the communities they serve. Perhaps realizing this, Congress used "expansive, unqualified language" in 18 U.S.C. § 666 to criminalize graft involving state, local, and tribal entities, as well as other organizations receiving federal funds. *Salinas v. United States*, 522 U.S. 52, 56, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). Section 666 imposes federal criminal penalties on agents of those entities who "corruptly" solicit, accept, or agree to accept payments "intending to be influenced or rewarded." § 666(a)(1)(B).

Today's case involves one such person. James Snyder, a former Indiana mayor, was convicted by a jury of violating § 666 after he steered more than $1 million in city contracts to a local truck dealership, which turned around and cut him a $13,000 check. He asks us to decide whether the language of § 666 criminalizes both bribes and gratuities, or just bribes. And he says the answer matters because bribes require an upfront *agreement* to take official actions for payment, and he never agreed beforehand to be paid the $13,000 from the dealership.

Snyder's absurd and atextual reading of the statute is one only today's Court could love. Ignoring the plain text of § 666—which, again, expressly targets officials who "corruptly" solicit, accept, or agree to accept payments "intending to be influenced *or rewarded*"—the Court concludes that the statute does not criminalize gratuities at all. This is so, apparently, because "[s]tate and local governments often regulate the gifts that state and local officials may accept," which, according to the majority, means that § 666 cannot.

The Court's reasoning elevates nonexistent federalism concerns over the plain text of this statute and is a quintessential example of the tail wagging the dog. Section 666's regulation of state, local, and tribal governments reflects Congress's express choice to reach those and other entities receiving federal funds. . . .

Both the majority and Snyder suggest that interpreting § 666 to cover gratuities is problematic because it gives "federal prosecutors unwarranted power to allege crimes that *should* be handled at the State level." But woulds, coulds, and shoulds of this nature must be addressed across the street with Congress, not in the pages of the U. S. Reports. We have previously and wisely declined "to express [a] view as to [§ 666's] soundness as a policy matter." *Sabri*, 541 U.S., at 608, n., 124 S.Ct. 1941 But, today, the Court can stay silent no longer. Its decision overrides the intent of Congress—and the policy preferences of the constituents that body represents—as unequivocally expressed by the plain text of the statute. Respectfully, I dissent. . . .

II

A

To reach the right conclusion we need not march through various auxiliary analyses: We can begin—and end—with only the text. See *National Assn. of Mfrs. v. Department of Defense*, 583 U.S. 109, 127, 138 S.Ct. 617, 199 L.Ed.2d 501 (2018). We "understan[d] that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (internal quotation marks omitted).

1

By its plain terms, § 666 imposes criminal penalties on state, local, and tribal officials who "corruptly" solicit, accept, or agree to accept "anything of value from any person, intending to be influenced or rewarded." § 666(a)(1)(B). Use of the term "influenced" captures *quid pro quo* bargains struck before an official act is taken—and therefore bribes—as everyone agrees. The term "rewarded" easily covers the concept of gratuities paid to corrupt officials after the fact—no upfront agreement necessary.

*14 As a general matter (and setting aside for the moment that § 666 covers only officials who act "corruptly"), everyone knows what a reward is. It is a $20 bill pulled from a lost wallet at the time of its return to its grateful owner. A surprise ice cream outing after a report card with straight As. The bar tab picked up by a supervisor celebrating a job well done by her team. A reward often says "thank you" or "good job," rather than "please."

Dictionary definitions confirm what common sense tells us about what it means to be rewarded. A "reward" is "[t]hat which is given in return for good or evil done or received," including "that which is offered or given for some service or attainment." Webster's New International Dictionary 2136 (2d ed. 1957). The verb form of the word is no different. To "reward" means "to ... recompense." *Ibid.* (defining "to reward" as "[t]o make a return, or give a reward, to (a person) or for (a service, etc.); to requite; recompense; repay"). Both definitions thus encompass payment in recognition of an action that an official has already taken or committed to taking. And neither requires there to be some beforehand agreement about that exchange, *i.e.*, a *quid pro quo*. . . .

[B]ecause we typically seek to give effect to each word of a statute, see *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001), the majority must strain to make the word "rewarded" as it appears in § 666 relevant, rather than meaningless. It offers rank speculation as to why "rewarded" in § 666 might mean something other than what it ordinarily does, ultimately assigning the word some busy work relating to potential defenses to bribery charges. But whatever the merits of the majority's assertions involving waterfronts, belts, and suspenders, its interpretation of § 666 finds little grounding in the actual text of the statute. See *Luna Perez v. Sturgis Public Schools*, 598 U.S. 142, 150, 143 S.Ct. 859, 215 L.Ed.2d 95 (2023) (" '[W]e cannot replace the actual text with speculation as to Congress' intent' ").

2

Speaking of text: The language of other statutes demonstrates that Congress uses the word "reward" when it wants to criminalize gratuities. For example, in 18 U.S.C. § 1912, Congress imposed criminal penalties on any federal officer "engaged in inspection of vessels" who "receives any fee or *reward* for his services, except what is allowed to him by law." (Emphasis added.) And in 22 U.S.C. § 4202, Congress provided for the sanctioning of "any consular officer ... who demands or receives for any official services ... any fee or *reward* other than the fee provided by law for such service." (Emphasis added.) Snyder admits that these statutes target gratuities by virtue of Congress's use of the term "reward."

But rather than simply calling a statute that penalizes accepting a "reward" for public business what it is—a wrongful or illegal gratuities statute—the majority insists that, sometimes, when Congress uses "reward," it is still just criminalizing *quid pro quo* bribery, mustering up examples to show that "bribery statutes sometimes use the term 'reward.' "

However, none of the majority's examples use the term "reward" in a way that is relevantly similar to § 666. For one thing, the majority's examples do not use the phrase "influenced or rewarded" to delineate between bribes and gratuities, while covering both, as § 666 does. In addition, each of the statutes the majority points to explicitly links the forbidden "reward" to an agreement to take some specific action; in other words, the majority's examples specify, by their plain text, a *quid pro quo*. For example, 18 U.S.C. § 600 imposes federal criminal penalties on anyone who "promises," *inter alia*, jobs or benefits "provided for or made possible in whole or in part by any Act of Congress" to another person "as consideration, favor, or reward for" certain political activity. That statute identifies both a forbidden *quid* (a future job) and *quo* (political activity).

*15 In contrast with those statutes, when § 666 uses "rewarded," it never connects that term to some upfront exchange. What the majority's examples actually show, then, is that when Congress wants to use the term "reward" to encompass only bribes, it knows just how to do so. See *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86, 137 S.Ct. 1718, 198 L.Ed.2d 177 (2017) ("[W]e presume differences in language like this convey differences in meaning").

B

In an attempt to shore up its unnatural reading of § 666, the majority turns to statutory and legislative history Where appropriate, I, too, find statutory and legislative history to be useful tools that this Court can and should consult. See, *e.g.*, *Delaware v. Pennsylvania*, 598 U.S. 115, 138–139, 143 S.Ct. 696, 215 L.Ed.2d 24 (2023). But resort to these tools is questionable under certain circumstances. See *Milner v. Department of Navy*, 562 U.S. 562, 574, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011) ("When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language"). In any event, here, the statutory and legislative history only make matters worse for the majority's analysis.

Section 666 traces its lineage to 18 U.S.C. § 201, though the kinship is more attenuated than the majority lets on. Section 201 indeed "contains comprehensive prohibitions on bribes and gratuities to federal officials." But initially, it was not entirely clear *which* officials that federal statute covered. By its terms, § 201 applies broadly to "public officials," see § 201(a), and confusion arose among some lower courts as to "whether state and local employees could be considered 'public officials' " under the statute. *Salinas*, 522 U.S., at 58, 118 S.Ct. 469. Without awaiting our resolution of the issue, Congress enacted § 666 in 1984. *Ibid.*; see also 98 Stat. 2143.

In § 666, Congress expressly sought to reach state and local officials "to protect the integrity of the vast sums of money distributed through Federal programs." S. Rep. No. 98–225, p. 370 (1983). As originally enacted, § 666 barred those officials from soliciting, accepting, or agreeing to accept "anything of value ... for or because of the recipient's conduct," § 666(b) (1982 ed., Supp. II), using language similar to that in § 201(c), the federal-official gratuities provision. Crucially, no one disputes that when it was initially enacted, § 666 prohibited *both bribes and gratuities*. Similarly significant (though unmentioned by the majority), Congress imposed the same 10-year maximum term of imprisonment for a violation then as it does now. See § 666(b) (1982 ed., Supp. II).

Starting with this historical disadvantage regarding the scope of the statute, the majority must show that Congress made major changes to § 666 that might account for the sans-gratuity interpretation the majority adopts today. But several features of the statutory and legislative history convince me of the opposite.

For one, Congress said that it was *not* making major changes to the statute. The 1986 revisions to § 666 were part of a package of changes that Congress specifically deemed "technical and minor." H. R. Rep. No. 99–797, p. 16 (1986); see also Criminal Law and Procedure Technical Amendments Act of 1986, 100 Stat. 3592. And the revisions themselves are largely in keeping with this characterization. Relevant here, Congress teased out a "corruptly" *mens rea* requirement and swapped the previous "for or because of" language for

the current "intending to be influenced or rewarded" phrasing. *Id.*, at 3613. None of this, on its face, evinces clear congressional intent to extract an entire category of previously covered illicit payments from § 666.

*16 Undeterred, the majority says that when Congress amended § 666, it was attempting to fashion that provision after § 201(b)—the bribery statute that covers federal officials. Again, the statutory and legislative record suggests otherwise: In fact, history establishes that Congress had a different model statute in mind.

Congress had used a phrase identical to § 666's "intending to be influenced or rewarded" language just a few months before when it amended 18 U.S.C. § 215, an anticorruption statute that applies to bank employees.That provision imposes criminal penalties on any bank employee who "corruptly solicits or demands ... or corruptly accepts or agrees to accept, anything of value from any person, *intending to be influenced or rewarded* in connection with any business or transaction." And this similarity was no coincidence. The House Report the majority quotes as explicating § 666 confirms that § 666 *was meant to track § 215*—not § 201(b), as the majority claims. See H. R. Rep. No. 99–797, at 30, n. 9.

This means, of course, that if § 215 criminalizes gratuities, it is likely § 666 does as well. But the majority labels § 215 "a null data point," evidently because this Court has never interpreted that statute. Section 215's relevance to § 666 does not come from any interpretation, however—it is plain on the face of that statute, which uses the exact same "influenced or rewarded" phrase. And the history of that model provision indicates that Congress meant for § 215 to reach gratuities, too. For example, a House Report directly speaks of § 215 as a statute criminalizing gratuities: It says that, before 1986, § 215 made "it criminal for a bank official to accept any *gratuity*, no matter how trivial, after that official ha[d] taken official action on bank business." H. R. Rep. No. 99–335, p. 6, n. 25 (1985) (emphasis added). Congress amended § 215 in 1986 to "narro[w]" the statute, but not by carving out gratuities altogether. *Ibid.* Rather it narrowed the "law by requiring that the acceptance of the *gratuity* be done *corruptly*." *Ibid.* (emphasis added). Astute readers will recall that Congress made exactly this same narrowing edit to § 666.

In short, Congress tailored § 215 in an effort to stem " 'corruption in the bank industry,' " and it seemed to think that *both* bribes *and* gratuities contributed to that problem. H. R. Rep. No. 99–335, at 5. So, too, with § 666 and public corruption.

III

To recap what we know thus far: The question in this case is whether § 666 criminalizes gratuities in addition to bribes. The text and purpose of § 666 alone provide an easy answer. The word "rewarded" means to have been given a reward for some action taken. So gratuities are plainly covered. To be sure, if the Court had given that straightforward answer, we might eventually have confronted a followup question: Are *all* gratuities covered? Said differently: Even if gratuities generally are criminalized by § 666, are there circumstances in which certain gratuities are *not* criminalized?

*17 The case in front of us does not require us to reach that question. We have not been asked to settle, once and for all, which gratuities are corrupt and which are quotidian. . . .

A

If one simply accepts what the statute says it covers—local officials who corruptly solicit, accept, or agree to accept rewards in connection with official business worth over a certain amount—Snyder's case is an easy one. Perhaps that is why the majority spends so little time describing it.

Snyder took office as mayor of the city of Portage, Indiana, in January 2012. As mayor, Snyder and his appointees sat on the Portage Board of Works and Public Safety, the entity that managed public bidding on city contracts. Snyder put one of his friends, Randy Reeder, in charge of the bidding process, despite Reeder's lack of experience in administering public

bids. Evidence presented at Snyder's trial showed that Reeder tailored bid specifications for two different city contracts to favor Great Lakes Peterbilt, a truck dealership owned by brothers Robert Buha and Stephen Buha. Evidence also showed that during the bidding process, Snyder was in contact with the Buha brothers, but no other bidders.

Snyder had campaigned on a platform that included automating trash collection, and by December 2012, the city was looking to buy three garbage trucks. It issued an invitation to bid on the contract, listing specific requirements for the trucks. Reeder testified that he crafted some specifications, including delivery within 150 days, knowing they would favor Great Lakes Peterbilt. The board of works voted to award Great Lakes Peterbilt the contract. Evidence at trial showed that the city could have saved about $60,000 had it not prioritized expedited delivery.

*18 In January 2013, the manager of Great Lakes Peterbilt asked Reeder whether the city might want to buy another truck—an unused, 2012 model that had been sitting outside on the dealership's lot over two winters. Snyder first tried to buy the truck outright, but Portage's city attorney informed him he had to go through the public bidding process. So the board of works issued another invitation to bid in November 2013. This invitation sought two more garbage trucks. Reeder again tweaked certain specifications to favor Great Lakes Peterbilt—this time to help it move the older truck sitting on its lot. The board of works voted to award Great Lakes Peterbilt this contract too. Together, the two contracts that Great Lakes Peterbilt "won" totaled some $1.125 million.

Shortly after the second contract was awarded, Snyder paid the Buha brothers a visit at their dealership. "I need money," he said. He asked for $15,000; the dealership gave him $13,000. When federal investigators heard about the payment and came calling, Snyder told them the check was for information technology and health insurance consulting services that he had provided to the dealership. He gave different explanations for the money to Reeder and a different city employee.

Employees at Great Lakes Peterbilt testified that Snyder never performed any consulting work for the dealership. And during the federal investigation, no written agreements, work product, evidence of meetings, invoices, or other documentation was ever produced relating to any consulting work performed by Snyder. All of this confirmed testimony from the dealership's controller, who had cut the check to Snyder: Snyder had instead been paid for an " 'inside track.

A federal grand jury charged Snyder with violating 18 U.S.C. § 666(a)(1)(B). The indictment alleged that Snyder "did corruptly solicit, demand, accept, and agree to accept a bank check in the amount of $13,000, intending to be influenced and rewarded." A jury found him guilty of violating § 666 in connection with the garbage truck contracts. It is not difficult to see why the jury reached that conclusion, having been instructed that the Government needed to prove that Snyder "acted corruptly, with the intent to be influenced or rewarded."

B

One thing is clear from the Court's opinion in this case—the majority isn't much worried about what happens to Snyder under § 666. It pivots to the other 18,999,999 state, local, and tribal officials at work throughout the country and laments that there are "no clear federal rules" for them. But § 666 was not designed to apply to teachers accepting fruit baskets, soccer coaches getting gift cards, or newspaper delivery guys who get a tip at Christmas. See *ibid.* (reciting similar examples). We know this because, beyond requiring acceptance of a reward, § 666 weaves together multiple other elements (that the Government must prove beyond a reasonable doubt), which collectively do the nuanced work of sifting illegal gratuities from inoffensive ones.

*19 Those limits are clear on the face of the statute; when construed as a whole, the text of § 666 provides more than adequate notice to those this statute covers. Now, for a list of my own: *First*, § 666 applies only when a state, local, tribal, or private entity "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving" some "form of

Federal assistance." § 666(b). *Second*, the statute requires that the criminalized payment be "in connection with any business, transaction, or series of transactions" of the covered entity. §§ 666(a)(1)(B), (a)(2). *Third*, that "business, transaction, or series of transactions" must involve "[some]thing of value of $5,000 or more." *Ibid.* *Fourth*, § 666 expressly "does not apply to bona fide salary, wages, fees, or other compensation paid ... in the usual course of business." § 666(c). Nor does it apply to "expenses paid or reimbursed ... in the usual course of business." *Ibid.* *Last*, and perhaps most important, the statute specifically requires that the official who solicits, accepts, or agrees to accept the payment do so "corruptly" (the *mens rea*). § 666(a)(1)(B). This series of carefully delineated circumstances—all of which appear in the text of § 666—means that payments or gifts to officials will not always be captured by § 666 under any and all circumstances, but only if the violator acts in the ways described and with the required intent.

Notably, the majority takes the last statutory check I describe—the "corruptly" *mens rea* requirement—and transforms it into a reason to read the statute to cover only bribes. The majority maintains that "corruptly" signals that § 666 is a bribery statute because § 201(b), the federal-official bribery statute, uses that term. But, as I have already explained, the bribery statute for federal officials is not the blueprint the majority makes it out to be. And while the majority suggests that "corruptly" just means *quid pro quo*, it can give no reason why that must be so in *this* statute.

Instead, the majority gives a practical justification for its preferred interpretation. It suggests that if § 666 is read generally to apply to gratuities, and "corruptly" is read as a narrowing *mens rea* element, then the statute *still* might sweep in all sorts of innocuous gifts. Maybe. Maybe not. Again, the precise meaning of the term "corruptly" is not the question before us today. Nor does it really matter here because, whatever "corruptly" means, Snyder's behavior clearly fits the bill, making this case a poor one to explore the contours of that term.

In any event, any uncertainty we might have about "corruptly" seems unwarranted considering the Court's previous definitions of that word. In *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005), we wrote that the term " 'corruptly' " is "normally associated with wrongful, immoral, depraved, or evil" conduct. *Id.*, at 705, 125 S.Ct. 2129. We therefore related the term with "consciousness of wrongdoing." *Id.*, at 706, 125 S.Ct. 2129. Applying that standard definition to § 666's *mens rea* requirement appears to heave an imposing burden onto the Government. Prosecutors must prove not only that a state, local, or tribal official did, in fact, act wrongfully when accepting the gift or payment, but also that she *knew* that accepting the gift or payment was wrongful. The majority worries that it may be unclear to an official whether accepting a gift is, in fact, "wrongful." But if "corruptly" is read to require knowledge of wrongfulness, any lack of clarity benefits the official. In such circumstances, a prosecutor is almost certain to be unable to meet her burden of proof—as the Government acknowledges.

*20 The bottom line is that § 666 is not unique or special. Like other criminal statutes—and especially other anti-public-corruption statutes—§ 666 has various elements, some of which may benefit from further clarification. Down the road, this Court could have had that opportunity with respect to § 666 *if* it had chosen to engage in our usual method of parsing statutes. See, *e.g.*, *Fischer v. United States*, 529 U.S. 667, 677, 681, 120 S.Ct. 1780, 146 L.Ed.2d 707 (2000) (clarifying the meaning of federal "benefits" under § 666); *Sun-Diamond*, 526 U.S., at 414, 119 S.Ct. 1402 (holding that to establish a violation of § 201(c), "the Government must prove a link between a thing of value conferred upon a public official and a *specific* 'official act' for or because of which it was given" (emphasis added)); *McDonnell v. United States*, 579 U.S. 550, 571–572, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016) (clarifying the "official act" requirement in § 201(a)(3)). Instead, the majority washes its hands of this anticorruption provision, announcing that certain wrongful conduct the statute plainly covers just cannot be included. The majority throws in the towel too soon.

C

As I said earlier, § 666 already provides meaningful guardrails that protect against the

"overbreadth" that the majority decries. But you don't have to take my word for that. Other prosecutions of gratuities that the Government has brought under § 666—successfully or unsuccessfully—do not remotely resemble the holiday tips, gift baskets, and sweatshirts around which the majority crafts its decision. . . .

None of this means that courts should trust the Government when it says that it does and will continue to enforce a statute with care. That is not how we do statutory interpretation, and for good reason. See *Marinello v. United States*, 584 U.S. 1, 11, 138 S.Ct. 1101, 200 L.Ed.2d 356 (2018). But what these examples do show is that § 666's built-in bulwarks seem to be working. Thus, there is simply no reason to think that decades after the courts of appeals first interpreted § 666 to cover gratuities, reading the statute to do so now will "suddenly subject 19 million state and local officials to a new and different regulatory regime."

IV

Ultimately, it appears that the real bone the majority has to pick with § 666 is its concern about overregulation—a concern born of the relationship between federal and state governance. The majority's pages of citations to state and local gratuities laws thus belie its ranking so-called "federalism" interests merely "[f]ifth" on its list of reasons for construing § 666 as a bribery-only statute. More than anything, it seems that the majority itself harbors the belief it repeatedly ascribes to Congress: that regulation of gratuities is better left to state, local, and tribal governments, rather than the Federal Government. (No word on why the same could not be said for bribes.)

*22 If Congress shared those policy concerns, however, it chose not to act upon them in this statute. Instead, Congress reached out to regulate state, local, and tribal entities as well as other organizations that receive federal funds, despite the fact that those governments do have their own ethics regulations, as the majority is quick to point out. And, of course, if the majority is correct about Congress's commitment to federalism principles in this area, one wonders why Congress didn't just leave state, local, and tribal entities alone.

Quite to the contrary, Congress chose to enact § 666 "to ensure the integrity of organizations participating in federal assistance programs." *Fischer*, 529 U.S., at 678, 120 S.Ct. 1780. And that choice was intentional—Congress acted to "addres[s] a legitimate federal concern by licensing federal prosecution in an area historically of state concern." *Sabri*, 541 U.S. at 608, n., 124 S.Ct. 1941. . . .

* * *

State, local, and tribal governments have an important role to play in combating public corruption, and, of course, their regulations should reflect the values of the communities they serve. I wholeheartedly agree with the majority's suggestion that, because employees of those governments are our neighbors, friends, and hometown heroes, federal law ought not be read to subject them to prosecution when grateful members of the community show their thanks.

But nothing about the facts of this case implicates any of that kind of conduct. And the text of § 666 clearly covers the kind of corrupt (albeit perhaps non-*quid pro quo*) payment Snyder solicited after steering the city contracts to the dealership. Because reading § 666 to prohibit gratuities—just as it always has—poses no genuine threat to common gift giving, but does honor Congress's intent to punish rewards corruptly accepted by government officials in ways that are functionally indistinguishable from taking a bribe, I respectfully dissent.

Gregory v. Ashcroft (1991)

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

. . . . 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). 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.*

. . . .

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. 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 Discrimination in Employment Act (ADEA), 29 U.S.C. ss 621-634. I part company with Justice WHITE, however, in his determination that appointed state judges fall within the narrow exclusion from ADEA coverage that Congress created for an "appointee on the policymaking level." 29 U.S.C. s 630(f).

I

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, whether or not a plausible argument may be made for judges' being policymakers, I would defer to the EEOC's 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,' " ' " Dole v. Steelworkers, 494 U.S. 26, ----, 110 S.Ct. 929, 930, 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 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 the whole law, and to its object and policy.' " Morash, 490 U.S., at 115, 109 S.Ct., at 1673, quoting Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 51, 107 S.Ct. 1549, 1554-1555, 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 2413. See also Gregory v. Ashcroft, 898 F.2d 598, 601 (CA8 1990), 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

advisor with respect to the exercise of the constitutional or legal powers of the office." See 29 U.S.C. s 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. s 630(f). [FN2]

FN2. I disagree with Justice WHITE's suggestion that this reading of the policymaking exclusion renders it superfluous. Ante, at 2413-2414. 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.

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 s 630(f) itself to aid our interpretive endeavor. Because Title VII of the Civil Rights Act of 1964, s 701(f), as amended, 42 U.S.C. s 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 s 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 ADEA 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, 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 conclude 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. [FN3] 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 in 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). 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: "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, th[e]refore, 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, subpena 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." 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 these 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 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 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 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

[discussion of deference to agency omitted]

II

The Missouri constitutional provision mandating the retirement of a judge who reaches the age of 70 violates the ADEA and is, therefore, invalid. [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 permissible interpretation of the ADEA.

FN5. Because I conclude that the challenged Missouri constitutional provision violates the ADEA, I need not consider petitioners' alternative argument that the mandatory retirement provision violates the Fourteenth Amendment to the United States Constitution. See Carnival Cruise Lines, Inc. v. Shute, --- U.S. ----, ----, 111 S.Ct. 1522, ----, 113 L.Ed.2d 622 (1991).

I dissent.

Supreme Court of the United States

Carol Anne BOND, Petitioner
v.
UNITED STATES.
No. 12–158.

|
Argued Nov. 5, 2013.
|
Decided June 2, 2014.

[ROBERTS, C.J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, and in which ALITO, J., joined as to Part I. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, and in which ALITO, J., joined as to Parts I, II, and III. ALITO, J., filed an opinion concurring in the judgment.]

Chief Justice ROBERTS delivered the opinion of the Court.

[To implement the international Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Congress enacted the Chemical Weapons Convention Implementation Act of 1998. The statute forbids, among other things, any person knowingly to "possess[ ] or use ... any chemical weapon," 18 U.S.C. § 229(a)(1). A "chemical weapon" is "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter." § 229F(1)(A). A "toxic chemical" is "any chemical which through its chemical action on life processes can cause death, temporary **2081 incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." § 229F (8)(A). "[P]urposes not prohibited by this chapter" is defined as "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity," and other specific purposes. § 229F(7).

[Petitioner Bond sought revenge against Myrlinda Haynes—with whom her husband had carried on an affair—by spreading two toxic chemicals on Haynes's car, mailbox, and door knob in hopes that Haynes would develop an uncomfortable rash. On one occasion Haynes suffered a minor chemical burn that she treated by rinsing with water, but Bond's attempted assaults were otherwise entirely unsuccessful. Federal prosecutors charged Bond with violating, among other things, section 229(a). . . .

II

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a "police power." *United States v. Lopez*, 514 U.S. 549, 567, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The Federal Government, by contrast, has no such authority and "can exercise only the powers granted to it," *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819), including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers, U.S. Const., Art. I, § 8, cl. 18. For nearly two centuries it has been "clear" that, lacking a police power, "Congress cannot punish felonies generally." *Cohens v. Virginia*, 6 Wheat. 264, 428, 5 L.Ed. 257 (1821). A criminal act committed wholly within a State "cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *United States v. Fox*, 95 U.S. 670, 672, 24 L.Ed. 538 (1878).

**2087 The Government frequently defends federal criminal legislation on the ground that the legislation is authorized pursuant to Congress's power to regulate interstate commerce. In this case, however, the Court of Appeals held that the Government had explicitly disavowed that argument before *855 the District Court. 681 F.3d, at 151, n. 1. As a result, in this Court the parties have devoted significant effort to arguing whether section 229, as applied to Bond's offense, is a necessary and proper means of executing the National Government's power to make treaties. U.S. Const., Art. II, § 2, cl. 2. Bond argues that the lower court's reading of *Missouri v. Holland* would remove all limits on federal authority, so long as the Federal Government ratifies a treaty first. She insists that to effectively afford the Government a police power whenever it implements a treaty would be contrary to the Framers' careful decision to divide power between the States and the National Government as a means of preserving liberty. To the extent that *Holland* authorizes such usurpation of traditional state authority, Bond says, it must be either limited or overruled.

The Government replies that this Court has never held that a statute implementing a valid treaty exceeds Congress's enumerated powers. To do so here, the Government says, would contravene another deliberate choice of the Framers: to avoid placing subject matter limitations on the National Government's power to make treaties. And it might also undermine confidence in the United States as an international treaty partner.

Notwithstanding this debate, it 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*); see also *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Bond argues that section 229 does not cover her conduct. So we consider that argument first.

III

Section 229 exists to implement the Convention, so we begin with that international agreement. As explained, the Convention's drafters intended for it to be a comprehensive *856 ban on chemical weapons. But even with its broadly worded definitions, we have doubts that a treaty about *chemical weapons* has anything to do with Bond's conduct. The Convention, a product of years of worldwide study, analysis, and multinational negotiation, arose in response to war crimes and acts of terrorism. See Kenyon & Feakes 6. There is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault.

Even if the treaty does reach that far, nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to innumerable other matters—observing the Constitution's division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States. The Convention, after all, is agnostic between enforcement at the state versus federal level: It provides that "[e]ach State Party shall, *in accordance with its constitutional processes,* adopt the necessary measures to implement its obligations under this Convention." Art. VII(1), 1974 U.N.T.S. 331 (emphasis added); see also Tabassi, National Implementation: Article VII, in Kenyon & Feakes 205, 207 ("Since the creation of **2088 national law, the enforcement of it and the structure and administration of government are all sovereign acts reserved exclusively for [State Parties], it is not surprising that the Convention is so vague on the critical matter of national implementation.").

Fortunately, we have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure.

A

In the Government's view, the conclusion that Bond "knowingly" "use[d]" a "chemical

weapon" in violation of section 229(a) is simple: The chemicals that Bond placed on Haynes's home and car are "toxic chemical[s]" as defined by *857 the statute, and Bond's attempt to assault Haynes was not a "peaceful purpose." §§ 229F(1), (8), (7). The problem with this interpretation is that it would "dramatically intrude[ ] upon traditional state criminal jurisdiction," and we avoid reading statutes to have such reach in the absence of a clear indication that they do. *United States v. Bass*, 404 U.S. 336, 350, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

Part of a fair reading of statutory text is recognizing that "Congress legislates against the backdrop" of certain unexpressed presumptions. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). As Justice Frankfurter put it in his famous essay on statutory interpretation, correctly reading a statute "demands awareness of certain presuppositions." Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947). For example, we presume that a criminal statute derived from the common law carries with it the requirement of a culpable mental state—even if no such limitation appears in the text—unless it is clear that the Legislature intended to impose strict liability. *United States v. United States Gypsum Co.*, 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). To take another example, we presume, absent a clear statement from Congress, that federal statutes do not apply outside the United States. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010). So even though section 229, read on its face, would cover a chemical weapons crime if committed by a U.S. citizen in Australia, we would not apply the statute to such conduct absent a plain statement from Congress.[1] The notion that some things "go without saying" applies to legislation just as it does to everyday life.

1 Congress has in fact included just such a plain statement in section 229(c)(2): "Conduct prohibited by [section 229(a)] is within the jurisdiction of the United States if the prohibited conduct ... takes place outside of the United States and is committed by a national of the United States."

Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our *858 Constitution. It has long been settled, for example, that we presume federal statutes do not abrogate state sovereign immunity, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), impose obligations on the States pursuant to section 5 of the Fourteenth Amendment, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16–17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), or preempt state law, **2089 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

Closely related to these is the well-established principle that " 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' " the "usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (quoting *Atascadero, supra*, at 243, 105 S.Ct. 3142). To quote Frankfurter again, if the Federal Government would " 'radically readjust[ ] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit' " about it. *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (quoting Some Reflections, *supra*, at 539–540; second alteration in original). Or as explained by Justice Marshall, when legislation "affect[s] 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." *Bass, supra*, at 349, 92 S.Ct. 515.

We have applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility. See *Gregory, supra*, at 460, 111 S.Ct. 2395 (qualifications for state officers); *BFP, supra*, at 544, 114 S.Ct. 1757 (titles to real estate); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 174,

121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (land and water use). Perhaps the clearest example of traditional state authority is the punishment of local criminal activity. *United States v. Morrison*, 529 U.S. 598, 618, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). Thus, "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between *859 federal and state criminal jurisdiction." *Bass*, 404 U.S., at 349, 92 S.Ct. 515.

In *Bass,* we interpreted a statute that prohibited any convicted felon from " 'receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce ... any firearm.' " *Id.*, at 337, 92 S.Ct. 515. The Government argued that the statute barred felons from possessing *all* firearms and that it was not necessary to demonstrate a connection to interstate commerce. We rejected that reading, which would "render[ ] traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." *Id.*, at 350, 92 S.Ct. 515. We instead read the statute more narrowly to require proof of a connection to interstate commerce in every case, thereby "preserv[ing] as an element of all the offenses a requirement suited to federal criminal jurisdiction alone." *Id.*, at 351, 92 S.Ct. 515.

Similarly, in *Jones v. United States*, 529 U.S. 848, 850, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000), we confronted the question whether the federal arson statute, which prohibited burning " 'any ... property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce,' " reached an owner-occupied private residence. Once again we rejected the Government's "expansive interpretation," under which "hardly a building in the land would fall outside the federal statute's domain." *Id.*, at 857, 120 S.Ct. 1904. We instead held that the statute was "most sensibly read" more narrowly to reach only buildings used in "active employment for commercial purposes." *Id.*, at 855, 120 S.Ct. 1904. We noted that "arson is a paradigmatic common-law state crime," *id.*, at 858, 120 S.Ct. 1904, and that the Government's proposed broad reading would " 'significantly change [ ] the federal- **2090 state balance,' " *ibid.* (quoting *Bass*, 404 U.S., at 349, 92 S.Ct. 515), "mak[ing] virtually every arson in the country a federal offense," 529 U.S., at 859, 120 S.Ct. 1904.

These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute. In this case, the *860 ambiguity derives from the improbably broad reach of the key statutory definition given the term—"chemical weapon"—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States. See *Bass, supra*, at 349, 92 S.Ct. 515.[2]

[2] Justice SCALIA contends that the relevance of *Bass* and *Jones* to this case is "entirely made up," *post,* at 2095 (opinion concurring in judgment), but not because he disagrees with interpreting statutes in light of principles of federalism. Rather, he says that *Bass* was a case where the statute was unclear. We agree; we simply think the statute in this case is also subject to construction, for the reasons given. As for *Jones,* Justice SCALIA argues that the discussion of federalism in that case was beside the point. *Post,* at 2095. We do not read *Jones* that way; the Court adopted the "most sensibl[e] read[ing]" of the statute, 529 U.S., at 855, 120 S.Ct. 1904, which suggests that other sensible readings were possible. In arriving at its fair reading of the statute, the Court considered the dramatic extent to which the Government's broader interpretation would have expanded "the federal statute's domain." *Id.*, at 857, 120 S.Ct. 1904. We do the same here.

B

We do not find any such clear indication in section 229. "Chemical weapon" is the key term

that defines the statute's reach, and it is defined extremely broadly. But that general definition does not constitute a clear statement that Congress meant the statute to reach local criminal conduct.

In fact, a fair reading of section 229 suggests that it does not have as expansive a scope as might at first appear. To begin, as a matter of natural meaning, an educated user of English would not describe Bond's crime as involving a "chemical weapon." Saying that a person "used a chemical weapon" conveys a very different idea than saying the person "used a chemical in a way that caused some harm." The *861 natural meaning of "chemical weapon" takes account of both the particular chemicals that the defendant used and the circumstances in which she used them.

When used in the manner here, the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare. The substances that Bond used bear little resemblance to the deadly toxins that are "of particular danger to the objectives of the Convention." Why We Need a Chemical Weapons Convention and an OPCW, in Kenyon & Feakes 17 (describing the Convention's Annex on Chemicals, a nonexhaustive list of covered substances that are subject to special regulation). More to the point, the use of something as a "weapon" typically connotes "[a]n instrument of offensive or defensive combat," Webster's Third New International Dictionary 2589 (2002), or "[a]n instrument of attack or defense in combat, as a gun, missile, or sword," American Heritage Dictionary 2022 (3d ed. 1992). But no speaker in natural parlance would describe Bond's feud-driven act of spreading irritating chemicals on Haynes's door knob and mailbox as "combat." Nor do the other circumstances **2091 of Bond's offense—an act of revenge born of romantic jealousy, meant to cause discomfort, that produced nothing more than a minor thumb burn—suggest that a chemical weapon was deployed in Norristown, Pennsylvania. Potassium dichromate and 10–chloro–10H–phenoxarsine might be chemical weapons if used, say, to poison a city's water supply. But Bond's crime is worlds apart from such hypotheticals, and covering it would give the statute a reach exceeding the ordinary meaning of the words Congress wrote.

In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition. In *Johnson v. United States*, 559 U.S. 133, 136, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), for example, we considered the statutory term " 'violent felony,' " which the Armed Career Criminal *862 Act defined in relevant part as an offense that " 'has as an element the use ... of physical force against the person of another.' " Although "physical force against ... another" might have meant *any* force, however slight, we thought it "clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent*force—that is, force capable of causing physical pain or injury to another person." *Id.*, at 140, 130 S.Ct. 1265. The ordinary meaning of "chemical weapon" plays a similar limiting role here.

The Government would have us brush aside the ordinary meaning and adopt a reading of section 229 that would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room. Yet no one would ordinarily describe those substances as "chemical weapons." The Government responds that because Bond used "specialized, highly toxic" (though legal) chemicals, "this case presents no occasion to address whether Congress intended [section 229] to apply to common household substances." Brief for United States 13, n. 3. That the statute *would* apply so broadly, however, is the inescapable conclusion of the Government's position: Any parent would be guilty of a serious federal offense—possession of a chemical weapon—when, exasperated by the children's repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar. We are reluctant to ignore the ordinary meaning of "chemical weapon" when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish. That would not be a "realistic assessment[ ] of congressional intent." *Post,* at 2097 (SCALIA, J., concurring in judgment).

In light of all of this, it is fully appropriate to apply the background assumption that Congress normally preserves "the constitutional balance between the National Government and the

States." *Bond I*, 564 U.S., at ——, 131 S.Ct., at 2364. That assumption is grounded in the very structure of the Constitution. *863 And as we explained when this case was first before us, maintaining that constitutional balance is not merely an end unto itself. Rather, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Ibid.*

The Government's reading of section 229 would " 'alter sensitive federal-state relationships,' " convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." *Bass*, 404 U.S., at 349–350, 92 S.Ct. 515. It would transform the statute from one **2092 whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones*, 529 U.S., at 857, 120 S.Ct. 1904. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

In fact, with the exception of this unusual case, the Federal Government itself has not looked to section 229 to reach purely local crimes. The Government has identified only a handful of prosecutions that have been brought under this section. Brief in Opposition 27, n. 5. Most of those involved either terrorist plots or the possession of extremely dangerous substances with the potential to cause severe harm to many people. See *United States v. Ghane*, 673 F.3d 771 (C.A.8 2012) (defendant possessed enough potassium cyanide to kill 450 people); *United States v. Crocker*, 260 Fed.Appx. 794 (C.A.6 2008) (defendant attempted to acquire VX nerve gas and chlorine gas as part of a plot to attack a federal *864 courthouse); *United States v. Krar*, 134 Fed.Appx. 662 (C.A.5 2005) (*per curiam*) (defendant possessed sodium cyanide); *United States v. Fries*, 2012 WL 689157 (D.Ariz., Feb. 28, 2012) (defendant set off a homemade chlorine bomb in the victim's driveway, requiring evacuation of a residential neighborhood). The Federal Government undoubtedly has a substantial interest in enforcing criminal laws against assassination, terrorism, and acts with the potential to cause mass suffering. Those crimes have not traditionally been left predominantly to the States, and nothing we have said here will disrupt the Government's authority to prosecute such offenses.

It is also clear that the laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond. Pennsylvania has several statutes that would likely cover her assault. See 18 Pa. Cons.Stat. §§ 2701 (2012) (simple assault), 2705 (reckless endangerment), 2709 (harassment).[3] And state authorities regularly enforce these laws in poisoning cases. See, *e.g.*, Gamiz, Family Survives Poisoned Burritos, Allentown, Pa., Morning Call, May 18, 2013 (defendant charged with assault, reckless endangerment, and harassment for feeding burritos poisoned with prescription medication to her husband and daughter); Cops: Man Was Poisoned Over 3 Years, Harrisburg, Pa., Patriot News, Aug. 12, 2012, p. A11 (defendant charged with assault and reckless endangerment for poisoning a man with eye drops over three years so that "he would pay more attention to her").

[3] Pennsylvania also prohibits using "a weapon of mass destruction," including a "chemical agent." 18 Pa. Cons.Stat. §§ 2716(a), (i). Just as we conclude that Bond's offense cannot be fairly described as the use of a chemical weapon, Pennsylvania authorities apparently determined that her crime did not involve a "weapon of mass destruction."

The Government objects that Pennsylvania authorities charged Bond with only a minor offense based on her "harassing telephone calls and letters," *Bond I*, 564 U.S., at ——, 131 S.Ct., at 2359, and declined to prosecute her for assault. But we have traditionally *865 viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system. See **2093 *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). And nothing in the Convention shows a clear intent to abrogate that

feature. Prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State. Here, in its zeal to prosecute Bond, the Federal Government has "displaced" the "public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign," that Bond does not belong in prison for a chemical weapons offense. *Bond I, supra,* at ——, 131 S.Ct., at 2366; see also *Jones, supra,* at 859, 120 S.Ct. 1904 (Stevens, J., concurring) (federal prosecution of a traditionally local crime "illustrates how a criminal law like this may effectively displace a policy choice made by the State").

As we have explained, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Bass,* 404 U.S., at 349, 92 S.Ct. 515. There is no clear indication of a contrary approach here. Section 229 implements the Convention, but Bond's crime could hardly be more unlike the uses of mustard gas on the Western Front or nerve agents in the Iran–Iraq war that form the core concerns of that treaty. See Kenyon & Feakes 6. There are no life-sized paintings of Bond's rival washing her thumb. And there are no apparent interests of the United States Congress or the community of nations in seeing Bond end up in federal prison, rather than dealt with (like virtually all other criminals in Pennsylvania) by the State. The Solicitor General acknowledged as much at oral argument. See Tr. of Oral Arg. 47 ("I don't think anybody would say [that] whether or not Ms. Bond is prosecuted would give rise to an international incident").

This case is unusual, and our analysis is appropriately limited. Our disagreement with our colleagues reduces to whether section 229 is "utterly clear." *Post,* at 2094 (SCALIA, *866 J., concurring in judgment). We think it is not, given that the definition of "chemical weapon" in a particular case can reach beyond any normal notion of such a weapon, that the context from which the statute arose demonstrates a much more limited prohibition was intended, and that the most sweeping reading of the statute would fundamentally upset the Constitution's balance between national and local power. This exceptional convergence of factors gives us serious reason to doubt the Government's expansive reading of section 229, and calls for us to interpret the statute more narrowly.

In sum, the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon. There is no reason to suppose that Congress—in implementing the Convention on Chemical Weapons—thought otherwise.

* * *

The Convention provides for implementation by each ratifying nation "in accordance with its constitutional processes." Art. VII(1), 1974 U.N.T.S. 331. As James Madison explained, the constitutional process in our "compound republic" keeps power "divided between two distinct governments." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961). If section 229 reached Bond's conduct, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Absent a clear statement of that purpose, we will not presume Congress to **2094 have authorized such a stark intrusion into traditional state authority.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, and with whom Justice ALITO joins as to Part I, concurring in the judgment.

*867 Somewhere in Norristown, Pennsylvania, a husband's paramour suffered a minor thumb burn at the hands of a betrayed wife. The United States Congress—"every where extending the sphere of its activity, and drawing all power into its impetuous vortex"[1]—has made a

federal case out of it. What are we to do?

1 The Federalist No. 48, p. 333 (J. Cooke ed. 1961) (J. Madison) (hereinafter The Federalist).

It is the responsibility of "the legislature, not the Court, ... to define a crime, and ordain its punishment." *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J., for the Court). And it is "emphatically the province and duty of the judicial department to say what the law [including the Constitution] is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (same). Today, the Court shirks its job and performs Congress's. As sweeping and unsettling as the Chemical Weapons Convention Implementation Act of 1998 may be, it is clear beyond doubt that it covers what Bond did; and we have no authority to amend it. So we are forced to decide—there is no way around it—whether the Act's application to what Bond did was constitutional.

I would hold that it was not, and for that reason would reverse the judgment of the Court of Appeals for the Third Circuit.

I. The Statutory Question

A. Unavoidable Meaning of the Text

The meaning of the Act is plain. No person may knowingly "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1). A "chemical weapon" is "[a] toxic chemical and *868 its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." § 229F(1)(A). A "toxic chemical" is "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." § 229F(8)(A). A " purpose not prohibited" is "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." § 229F(7)(A).

Applying those provisions to this case is hardly complicated. Bond possessed and used "chemical[s] which through [their] chemical action on life processes can cause death, temporary incapacitation or permanent harm." Thus, she possessed "toxic chemicals." And, because they were not possessed or used only for a "purpose not prohibited," § 229F(1)(A), they were "chemical weapons." Ergo, Bond violated the Act. End of statutory analysis, I would have thought.[2]

2 Petitioner offers one textual argument that the Court does not consider. She argues that the exception for "peaceful purposes" is best understood as a term of art meaning roughly any purpose that is not "warlike." Brief for Petitioner 50–57. Though that reading is more defensible than the Court's, the Act will not bear it. If "peaceful" meant "nonwarlike," the statute's exception for "any individual self-defense device, including ... pepper spray or chemical mace," § 229C—the prosaic uses of which are surely nonwarlike—would have been unnecessary.

**2095 The Court does not think the interpretive exercise so simple. But that is only because its result-driven antitextualism befogs what is evident.

B. The Court's Interpretation

The Court's account of the clear-statement rule reads like a really good lawyer's brief for the wrong side, relying on cases that are *so close* to being on point that someone eager to reach the favored outcome might swallow them. The relevance *869 to this case of *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), and *Jones v. United States*, 529 U.S.

848, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000), is, in truth, entirely made up. In *Bass,* we had to decide whether a statute forbidding " 'receiv [ing], possess [ing], or transport[ing] in commerce or affecting commerce ... any firearm' " prohibited possessing a gun that lacked any connection to interstate commerce. 404 U.S., at 337–339, 92 S.Ct. 515. Though the Court relied in part on a federalism-inspired interpretive presumption, it did so only *after* it had found, in Part I of the opinion, applying traditional interpretive tools, that the text in question was ambiguous, *id.*, at 339–347, 92 S.Ct. 515. Adopting in Part II the narrower of the two possible readings, we said that "*unless Congress conveys its purpose clearly,* it will not be deemed to have significantly changed the federal-state balance." *Id.*, at 349, 92 S.Ct. 515 (emphasis added). Had Congress "convey[ed] its purpose clearly" by enacting a clear and even sweeping statute, the presumption would not have applied.

Jones is also irrelevant. To determine whether an owner-occupied private residence counted as a " 'property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce' " under the federal arson statute, 529 U.S., at 850–851, 120 S.Ct. 1904, our opinion examined *not* the federal-jurisdiction-expanding consequences of answering yes but rather the ordinary meaning of the words—and answered no, *id.*, at 855–857, 120 S.Ct. 1904. Then, in a separate part of the opinion, we observed that our reading was consistent with the principle that we should adopt a construction that avoids "grave and doubtful constitutional questions," *id.*, at 857, 120 S.Ct. 1904, and, quoting *Bass,* the principle that Congress must convey its purpose clearly before its laws will be " 'deemed to have significantly changed the federal-state balance,' " 529 U.S., at 858, 120 S.Ct. 1904. To say that the best reading of the text conformed to those principles is not to say that those principles can render clear text ambiguous.[3]

3 Other cases in the *Bass* line confirm that broad text "need only be plain to anyone reading [it]" in order to be given its obvious meaning. *Salinas v. United States*, 522 U.S. 52, 60, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (internal quotation marks omitted); see also *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 209, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998); cf. *United States v. Lopez*, 514 U.S. 549, 562, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

*870 The latter is what the Court says today. Inverting *Bass* and *Jones,* it *starts* with the federalism-related consequences of the statute's meaning and reasons backwards, holding that, if the statute has what the Court considers a disruptive effect on the "federal-state balance" of criminal jurisdiction, *ante,* at 2089, that effect causes the text, even if clear on its face, to be ambiguous. **2096 Just ponder what the Court says: " [The Act's] ambiguity *derives* from the improbably broad reach of the key statutory definition ... the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so...." *Ibid.* (emphasis added). Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences ... *is ambiguous*!

The same skillful use of oh-so-close-to-relevant cases characterizes the Court's *pro forma* attempt to find ambiguity in the text itself, specifically, in the term "[c]hemical weapon." The ordinary meaning of weapon, the Court says, is an instrument of combat, and "no speaker in natural parlance would describe Bond's feud-driven act of spreading irritating chemicals on Haynes's door knob and mailbox as 'combat.' " *Ante,* at 2090. Undoubtedly so, but undoubtedly beside the point, since the Act supplies its own definition of "chemical weapon," which unquestionably does bring Bond's action within the statutory prohibition. The Court retorts that "it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." *Ante,* at 2091. *So close* to true! What is "not unusual" is using the ordinary meaning of the term being defined for the purpose of resolving *an ambiguity in the definition*. When, for example, "draft," a word of many meanings, is one of the words used in a definition of "breeze," we know it has nothing to do with *871 military conscription or beer. The point is illustrated by the almost-relevant case the Court cites for its novel principle, *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). There the defined term was "violent felony," which the Act defined as an offense that " 'has as an element the use ... of physical force against the person of another.' " *Id.*, at 135, 130 S.Ct. 1265 (quoting §

924(e)(2)(B)(i)). We had to figure out what "physical force" meant, since the statute "*d[id] not define" it*. *Id.*, at 138, 130 S.Ct. 1265 (emphasis added). So we consulted (among other things) the general meaning of the term being defined, "violent felony." *Id.*, at 140, 130 S.Ct. 1265.

In this case, by contrast, the ordinary meaning of the term being defined is irrelevant, because the statute's own definition—however expansive—is utterly clear: any "chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals," § 229F(8)(A), unless the chemical is possessed or used for a "peaceful purpose," § 229F(1)(A), (7)(A). The statute parses itself. There is no opinion of ours, and none written by any court or put forward by any commentator since Aristotle, which says, or even suggests, that "dissonance" between ordinary meaning and the unambiguous words of a definition is to be resolved in favor of ordinary meaning. If that were the case, there would hardly be any use in providing a definition. No, the true rule is entirely clear: "When a statute includes an explicit definition, we must follow that definition, *even if it varies from that term's ordinary meaning*." *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (emphasis added). Once again, contemplate the judge-empowering consequences of the new interpretive rule the Court today announces: When there is "dissonance" between the statutory definition and the ordinary meaning of the defined word, the latter may prevail.

But even text clear on its face, the Court suggests, must be read against the backdrop of established interpretive presumptions. Thus, we presume "that a criminal **2097 statute *872 derived from the common law carries with it the requirement of a culpable mental state—even if no such limitation appears in the text." *Ante,* at 2088. And we presume that " federal statutes do not apply outside the United States." *Ibid.* Both of those are, indeed, established interpretive presumptions that are (1) based upon realistic assessments of congressional intent, and (2) well known to Congress—thus furthering rather than subverting genuine legislative intent. To apply these presumptions, then, is not to rewrite clear text; it is to interpret words fairly, in light of their statutory context. But there is nothing either (1) realistic or (2) well known about the presumption the Court shoves down the throat of a resisting statute today. Who in the world would have thought that a definition is inoperative if it contradicts ordinary meaning? When this statute was enacted, there was not yet a "*Bond* presumption" to that effect—though presumably Congress will have to take account of the *Bond* presumption in the future, perhaps by adding at the end of all its definitions that depart from ordinary connotation "and we really mean it."

C. The Statute as Judicially Amended

I suspect the Act will not survive today's gruesome surgery. A criminal statute must clearly define the conduct it proscribes. If it does not " 'give a person of ordinary intelligence fair notice' " of its scope, *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), it denies due process.

The *new* § 229(a)(1) fails that test. Henceforward, a person "shall be fined ..., imprisoned for any term of years, or both," § 229A(a)(1)—or, if he kills someone, "shall be punished by death or imprisoned for life," § 229A(a)(2)—whenever he "develop[s], produce[s], otherwise acquire[s], transfer [s] directly or indirectly, receive[s], stockpile[s], retain[s], own [s], possess[es], or use[s], or threaten[s] to use," § 229(a)(1), any chemical "*of the sort that an ordinary person would associate with instruments of chemical warfare,*" **873 ante,* at 2090 (emphasis added). Whether that test is satisfied, the Court unhelpfully (and also illogically) explains, depends not only on the "particular chemicals that the defendant used" but also on "the circumstances in which she used them." *Ibid.* The "detergent under the kitchen sink" and "the stain remover in the laundry room" are apparently out, *ante,* at 2091 —but what if they are deployed to poison a neighborhood water fountain? Poisoning a goldfish tank is also apparently out, *ante,* at 2091, but what if the fish belongs to a Congressman or Governor and the act is meant as a menacing message, a small-time equivalent of leaving a severed horse head in the bed? See *ibid.* (using the "concerns" driving the Convention—"acts of war, assassination, and terrorism"—as guideposts of statutory meaning). Moreover, the Court's illogical embellishment seems to apply only to the "use" of a chemical, *ante,* at 2090, but "use"

is only 1 of *11* kinds of activity that the statute prohibits. What, one wonders, makes something a "chemical weapon" when it is merely "stockpile[d]" or "possess[ed]?" To these questions and countless others, one guess is as bad as another.

No one should have to ponder the totality of the circumstances in order to determine whether his conduct is a felony. Yet that is what the Court will now require of all future handlers of harmful toxins—that is to say, all of us. Thanks to the Court's revisions, the Act, which before was merely broad, is now broad and unintelligible. "[N]o standard of conduct is specified at all." *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). Before long, I suspect, courts will be required to say so.

**2098 II. The Constitutional Question

[Omitted]

Justice THOMAS, with whom Justice SCALIA joins, and with whom Justice ALITO joins as to Parts I, II, and III, concurring in the judgment.

[Omitted]

Justice ALITO, concurring in the judgment.

[Omitted]

Supreme Court of the United States

LEO SHEEP COMPANY et al., Petitioners,
v.
UNITED STATES et al.
|
Argued Jan. 15, 16, 1979.
|
Decided March 27, 1979.

Mr. Justice REHNQUIST delivered the opinion of the Court.

This is one of those rare cases evoking episodes in this country's history that, if not forgotten, are remembered as dry facts and not as adventure. Admittedly the issue is mundane: Whether the Government has an implied easement to build a road across land that was originally granted to the Union Pacific Railroad under the Union Pacific Act of 1862—a grant that was part of a governmental scheme to subsidize the construction of the transcontinental railroad. But that issue is posed against the backdrop of a fascinating chapter in our history. As this Court noted in another case involving **1405 the Union Pacific Railroad, "courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." *United States v. Union Pacific R. Co.*, 91 U.S. 72, 79, 23 L.Ed. 224 (1875). In this spirit we relate the events underlying passage of the Union Pacific Act of 1862.

*670 I

The early 19th century—from the Louisiana Purchase in 1803 to the Gadsden Purchase in 1853—saw the acquisition of the territory we now regard as the American West.[1] During those years, however, the area remained a largely untapped resource, for the settlers on the eastern seaboard of the United States did not keep pace with the rapidly expanding western frontier. A vaguely delineated area forbiddingly referred to as the "Great American Desert" can be found on more than one map published before 1850, embracing much of the United States' territory west of the Missouri River. As late as 1860, for example, the entire population of the State of Nebraska was less than 30,000 persons, which represented one person for every five square miles of land area within the State.

1 Except as otherwise noted, this historical discussion draws on C. Ames, Pioneering the Union Pacific (1969); R. Athearn, Union Pacific Country (1971); R. Howard, The Great Iron Trail (1962); J. McMaster, A History of the People of the United States During Lincoln's Administration (1927); 2 A. Nevins, Ordeal of the Union (1947); H. White, History of the Union Pacific Railway (1895).

With the discovery of gold at Sutter's Mill in California in 1848, the California gold rush began and with it a sharp increase in settlement of the West. Those in the East with visions of instant wealth, however, confronted the unenviable choice among an arduous 4-month overland trek, risking yellow fever on a 35-day voyage via the Isthmus of Panama, and a better than 4-month voyage around Cape Horn. They obviously yearned for another alternative, and interest focused on the transcontinental railroad.

The idea of a transcontinental railroad predated the California gold rush. From the time that Asa Whitney had proposed a relatively practical plan for its construction in 1844, it had, in the words of one of this century's leading historians of the era, "engaged the eager attention of promoters and politicians *671 until dozens of schemes were in the air."[2] The building of the railroad was not to be the unalloyed product of the free-enterprise system. There was indeed the inspiration of men like Thomas Durant and Leland Stanford and the perspiration of a generation of immigrants, but animating it all was the desire of the Federal Government that the West be settled. This desire was intensified by the need to provide a logistical link

with California in the heat of the Civil War. That the venture was much too risky and much too expensive for private capital alone was evident in the years of fruitless exhortation; private investors would not move without tangible governmental inducement.[3]

2 2 Nevins, *supra* n. 1, at 82.

3 That exhortation came from some of the great visionaries of the 19th century. On the floor of the House, Thomas Hart Benton compared eastern Kansas to Egypt and extolled the wealth that would be shared by a private railroad to California. Athearn, *supra* n. 1, at 22–23. Senator William H. Seward of New York, a man not known for his timidity, proclaimed "that a railroad is necessary, and ought to be built; and I think it has been scientifically demonstrated . . . that not only one such road is feasible, but that at least three, four, or five routes offer the necessary facilities for the security of this great object." Cong.Globe, 35th Cong., 1st Sess., 1584 (1858). In his book An Overland Journey, Horace Greeley was equally enthusiastic. He went so far as to calculate the economic feasibility of the proposed railroad line by estimating potential revenue, based on the value of current shipments of gold from California, passenger fares that could be obtained, and the cost to the Government of transporting and maintaining an army in the West and providing mail services. H. Greeley, An Overland Journey 310–316 (C. Duncan ed. 1964).

But despite his enthusiasm Greeley appreciated that the effort was beyond private capital alone. "The amount is too vast; the enterprise too formidable; the returns too remote and uncertain." "[W]hat assurance could an association of private citizens have that, having devoted their means and energies to the construction of such a road, it would not be rivaled and destroyed by a similar work on some other route?" *Id.*, at 324.

**1406 In the mid-19th century there was serious disagreement as *672 to the forms that inducement could take. Mr. Justice Story, in his Commentaries on the Constitution, described one extant school of thought which argued that "internal improvements," such as railroads, were not within the enumerated constitutional powers of Congress.[4] Under such a theory, the direct subsidy of a transcontinental railroad was constitutionally suspect—an uneasiness aggravated by President Andrew Jackson's 1830 veto of a bill appropriating funds to construct a road from Maysville to Lexington within the State of Kentucky.[5]

4 2 J. Story, Commentaries on the Constitution 166–172 (5th ed. 1891). See Cong.Globe, 35th Cong., 2d Sess., 579–585 (1859) (Sen. Andrew Johnson).

5 2 J. Richardson, A Compilation of the Messages and Papers of the Presidents 1789–1897, pp. 483–493 (1896).

The response to this constitutional "gray" area, and source of political controversy, was the "checkerboard" land-grant scheme. The Union Pacific Act of 1862 granted public land to the Union Pacific Railroad for each mile of track that it laid.[6] Land surrounding the railway right-of-way was divided into "checkerboard" blocks. Odd-numbered lots were granted to the Union Pacific; even-numbered lots were reserved by the Government. As a result, Union Pacific land in the area of the right-of-way was usually surrounded by public land, and vice versa. The historical explanation for this peculiar disposition is that it was apparently an attempt to disarm the "internal improvement" opponents by establishing a grant scheme with "demonstrable" benefits. As one historian notes in describing an 1827 federal land grant intended to facilitate private construction of a road between Columbus and Sandusky, Ohio:

6 Act of July 1, 1862, 12 Stat. 489.

"Though awkwardly stated, and not fully developed in the Act of 1827, this was the beginning of a practice to be followed in most future instances of granting land for the *673 construction of specific internal improvements: donating alternate sections or one half of the land within a strip along the line of the project and reserving the other half for sale. . . . In later donations the price of the reserved sections was doubled so that it could be argued, as the *Congressional Globe* shows *ad infinitum*, that by giving half the land away and thereby making possible construction of the road, canal, or railroad, the government would recover from the reserved sections as much as it would have received from the whole." P. Gates, History of Public Land Law Development 345–346 (1968).[7]

7 Government grants to aid the development of transportation facilities gained momentum during the administration of John Quincy Adams, who did not share Madison's and Monroe's reservations about the constitutionality of the Government's involvement in such activities. Checkerboard land grants achieved currency during the canal era. Apparently the first such grant was to aid construction of the Wabash and Erie Canal in Indiana. See P. Gates, History of Public Land Law Development 341–356 (1968).

In 1850 this technique was first explicitly employed for the subsidization of a railroad when the Illinois delegation in Congress, which included Stephen A. Douglas, secured the enactment of a bill that granted public lands to aid the construction of the Illinois Central Railroad.[8] The Illinois Central and proposed connecting lines to the south were granted nearly three million acres along rights of way through Illinois, Mississippi, and Alabama, and by the end of 1854 the **1407 main line of the Illinois Central from Chicago to Cairo, Ill., had been put into operation. Before this line was constructed, public lands had gone begging at the Government's minimum price; within a few years after its completion, the railroad had disposed of more than one million acres and was rapidly *674 selling more at prices far above those at which land had been originally offered by the Government.

8 Act of Sept. 20, 1850, 9 Stat. 466. This was not, however, the first time land grants were used to subsidize a railroad. In 1833, Congress permitted a grant that had been intended for canal construction to be used instead for the building of a railroad. Gates, *supra* n. 7, at 357.

The "internal improvements" theory was not the only obstacle to a transcontinental railroad. In 1853 Congress had appropriated moneys and authorized Secretary of War Jefferson Davis to undertake surveys of various proposed routes for a transcontinental railroad. Congress was badly split along sectional lines on the appropriate location of the route—so badly split that Stephen A. Douglas, now a Senator from Illinois, in 1854 suggested the construction of a northern, central, and southern route, each with connecting branches in the East.[9] That proposal, however, did not break the impasse.

9 Asa Whitney's original proposal had contemplated an eastern terminus on the south shore of Lake Michigan, and a western terminus in northern California or Oregon. Senator Gwin of California, a Southern sympathizer, urged a route running from Memphis through Ft. Smith and Albuquerque to Los Angeles. Thomas Hart Benton of Missouri, eschewing both the extreme northern and extreme southern routes, advocated "a great central national highway"—beginning in St. Louis. 2 Nevins, *supra* n. 1, at 82–83.

The necessary impetus was provided by the Civil War. Senators and Representatives from those States which seceded from the Union were no longer present in Congress, and therefore the sectional overtones of the dispute as to routes largely disappeared. Although there were no major engagements during the Civil War in the area between the Missouri River and the west coast which would be covered by any transcontinental railroad, there were two minor engagements which doubtless made some impression upon Congress of the necessity for being able to transport readily men and materials into that area for military purposes.

Accounts of the major engagements of the Civil War do not generally include the Battle of Picacho Pass, because in the words of Edwin Corle, author of The Gila, "[i]t could be called nothing more than a minor skirmish today."[10] It was *675 fought 42 miles northwest of Tucson, Ariz., on April 15, 1862, between a small contingent of Confederate cavalry commanded by Captain Sherod Hunter and Union troops under Colonel James H. Carleton consisting of infantry, cavalry, and artillery components known as the "California Volunteers." The battle was a draw, with the Union forces losing three men and the badly outnumbered Confederates apparently suffering two men killed and two captured. Following the battle, the Confederate forces abandoned Tucson, which they had previously occupied, and Carleton's Union forces entered that city on May 20, 1862.

10 E. Corle, The Gila 232 (1951).

The Battle of Glorieta Pass has similarly endured anonymity. Also described as La Glorieta Pass or Apache Canyon, Glorieta Pass lies in the upper valley of the Pecos River, in the southern foothills of the Sangre de Cristo range of the Rocky Mountains near Sante Fe, N. M. Here in the early spring of 1862 a regiment of Colorado volunteers, having moved by forced marches from Denver to Ft. Union, turned back Confederate forces led by Brigadier

General Henry Sibley which, until this encounter, had marched triumphantly northward up the Rio Grande Valley from Ft. Bliss. As a result of the Battle of Glorieta Pass, New Mexico was saved for the Union, and Sibley's forces fell back in an easterly direction through Texas before the advance of Carleton's column of Californians.[11]

11 See generally M. Hall, Sibley's New Mexico Campaign (1960); W. Whitford, The Colorado Volunteers in the Civil War (1971). The Confederate forces in New Mexico have since been lauded for their courage, if not for their optimism. One Southern commander is reported to have responded to a Union demand for surrender: "We will fight first and surrender afterwards!" G. Harris, A Tale of Men Who Knew Not Fear 18 (1935).

**1408 These engagements gave some immediacy to the comments of Congressman Edwards of New Hampshire during the debate on the Pacific Railroad bill:
"If this Union is to be preserved, if we are successfully to combat the difficulties around us, if we are to crush out *676 this rebellion against the lawful authority of the Government, and are to have an entire restoration, it becomes us, with statesmanlike prudence and sagacity, to look carefully into the future, and to guard in advance against all possible considerations which may threaten the dismemberment of the country hereafter." Cong.Globe, 37th Cong., 2d Sess., 1703 (1862).

As is often the case, war spurs technological development, and Congress enacted the Union Pacific Act in May 1862. Perhaps not coincidentally, the Homestead Act was passed the same month.

The Union Pacific Act specified a route west from the 100th meridian, between a site in the Platte River Valley near the cities of Kearney and North Platte, Neb., to California. The original plan was for five eastern terminals located at various points on or near the Missouri River; but in fact Omaha was the only terminal built according to the plan.[12]

12 The choice of the 100th meridian as the eastern end of the rail line was not without significance. The 100th meridian has been traditionally thought of as the parallel west of which it was impossible to raise most crops without irrigation. Omaha, for example, 300 miles to the east, receives an average of 25 inches of rainfall per year, while Sidney, Neb., west of the meridian and near the Wyoming line, receives an average of only 16 inches of rainfall each year. Thus, in a sense the 100th meridian represented, not only to travelers but also to potential settlers, the eastern boundary of the amorphous "Great American Desert."

"In general, historians have been content to postulate that American institutions, orientations, and habits of thought which developed east of the 100th meridian maintained their form and retained their content after reaching the West, whereas in fact a good many important ones did not. In the second place, historians have generally been ignorant of or incurious about natural conditions that determine life in the West, differentiate it from other sections, and have given it different orientations." Introduction of Bernard DeVoto to W. Stegner, Beyond the Hundredth Meridian xviii-xix (1954).

The land grants made by the Union Pacific Act included all *677 the odd-numbered lots within 10 miles on either side of the track. When the Union Pacific's original subscription drive for private investment proved a failure, the land grant was doubled by extending the checkerboard grants to 20 miles on either side of the track. Private investment was still sluggish, and construction did not begin until July 1865, three months after the cessation of Civil War hostilities.[13] Thus began a race with the Central Pacific Railroad, which was laying track eastward from Sacramento, for the Government land **1409 grants which went with each mile of track laid. The race culminated in the driving of the golden spike at Promontory, Utah, on May 10, 1869.

13 Construction would not have begun then without the Crédit Mobilier, a limited-liability company that was essentially owned by the promoters and investors of the Union Pacific. One of these investors, Oakes Ames, a wealthy New England shovel maker, was a substantial investor in Crédit Mobilier and also a Member of Congress. Crédit Mobilier contracted with the Union Pacific to build portions of the road, and by 1866 several individuals were large investors in both corporations. Allegations of improper use of funds and bribery of Members of the House of Representatives led to the appointment of a special congressional investigatory committee that during 1872 and 1873 looked into the affairs of Crédit Mobilier. These investigations revealed improprieties on the part of more than one Member of Congress, and the committee recommended that Ames be expelled from Congress. The investigation also touched on the career of a future President. See M. Leech & H. Brown, The Garfield Orbit (1978).

In 1872 the House of Representatives enacted a resolution condemning the policy of granting subsidies of public lands to railroads. Cong.Globe, 42d Cong., 2d Sess., 1585 (1872); see *Great Northern R. Co. v. United States*, 315 U.S. 262, 273–274, 62 S.Ct. 529, 533–534, 86 L.Ed. 836 (1942). Of course, the reaction of the public or of Congress a decade after the enactment of the Union Pacific Act to the conduct of those associated with the Union Pacific cannot influence our interpretation of that Act today.

II

This case is the modern legacy of these early grants. Petitioners, the Leo Sheep Co. and the Palm Livestock Co., are the Union Pacific Railroad's successors in fee to specific odd-numbered *678 sections of land in Carbon County, Wyo. These sections lie to the east and south of the Seminoe Reservoir, an area that is used by the public for fishing and hunting. Because of the checkerboard configuration, it is physically impossible to enter the Seminoe Reservoir sector from this direction without some minimum physical intrusion upon private land. In the years immediately preceding this litigation, the Government had received complaints that private owners were denying access over their lands to the reservoir area or requiring the payment of access fees. After negotiation with these owners failed, the Government cleared a dirt road extending from a local county road to the reservoir across both public domain lands and fee lands of the Leo Sheep Co. It also erected signs inviting the public to use the road as a route to the reservoir.

Petitioners initiated this action pursuant to 28 U.S.C. § 2409a to quiet title against the United States. The District Court granted petitioners' motion for summary judgment, but was reversed on appeal by the Court of Appeals for the Tenth Circuit. 570 F.2d 881. The latter court concluded that when Congress granted land to the Union Pacific Railroad, it implicitly reserved an easement to pass over the odd-numbered sections in order to reach the even-numbered sections that were held by the Government. Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari, 439 U.S. 817, 99 S.Ct. 78, 58 L.Ed.2d 108, and now reverse.

The Government does not claim that there is any express reservation of an easement in the Union Pacific Act that would authorize the construction of a public road on the Leo Sheep Co.'s property. Section 3 of the 1862 Act sets out a few specific reservations to the "checkerboard" grant. The grant was not to include land "sold, reserved, or otherwise disposed of by the United States," such as land to which there were homestead claims. 12 Stat. 492. Mineral lands were also excepted from the operation of the Act. *Ibid.* *679 Given the existence of such explicit exceptions, this Court has in the past refused to add to this list by divining some "implicit" congressional intent. In *Missouri, K. & T. R. Co. v. Kansas Pacific R. Co.*, 97 U.S. 491, 497, 24 L.Ed. 1095 (1878), for example, this Court in an opinion by Mr. Justice Field noted that the intent of Congress in making the Union Pacific grants was clear: "It was to aid in the construction of the road by a gift of lands along its route, without reservation of rights, except such as were specifically mentioned . . . ." The Court held that, although a railroad right-of-way under the grant may not have been located until years after 1862, by the clear terms of the Act only claims established prior to 1862 overrode the railroad grant; conflicting claims arising after that time could not be given effect. To overcome the lack of support in the Act itself, the Government here argues that the implicit reservation of the asserted easement is established by "settled rules of property law" and by the Unlawful Inclosures of Public Lands Act of 1885.

Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property. These rights-of-way are referred to as "easements by necessity."[14] There are two

problems **1410 with the Government's reliance on that notion in this case. First of all, whatever right of passage a private landowner might have, it is not at all clear that it would include the right to construct a road for public access to a recreational area.[15] More importantly, the easement is not *680 actually a matter of necessity in this case because the Government has the power of eminent domain. Jurisdictions have generally seen eminent domain and easements by necessity as alternative ways to effect the same result. For example, the State of Wyoming no longer recognizes the common-law easement by necessity in cases involving landlocked estates. It provides instead for a procedure whereby the landlocked owner can have an access route condemned on his behalf upon payment of the necessary compensation to the owner of the servient estate.[16] For similar reasons other state courts have held that the "easement by necessity" doctrine is not available to the sovereign.[17]

14 See generally 3 R. Powell, Real Property ¶ 410 (1978). For a recent discussion and application of the "easement by necessity" doctrine, see *Hollywyle Assn., Inc. v. Hollister*, 164 Conn. 389, 324 A.2d 247 (1973).

15 It is very unlikely that Congress in 1862 contemplated this type of intrusion, and it could not reasonably be maintained that failure to provide access to the public at large would render the Seminoe Reservoir land useless. Yet these are precisely the considerations that define the scope of easements by necessity. As one commentator relied on by the Government notes:

> "As the name implies, these easements are the product of situations where the usefulness of land is at stake. The scope of the resultant easement embodies the best judgment of the court as to what is reasonably essential to the land's use. . . . Changes in the dominant parcel's use exert some, but not a great influence, in determining the scope of such easements." 3 Powell, *supra* n. 14, ¶ 416, pp. 34–203 to 34–204 (footnotes omitted). See, *e. g., Higbee Fishing Club v. Atlantic City Electric Co.*, 78 N.J.Eq. 434, 79 A. 326 (1911) (footpath, not roadway, proper scope of easement where use of dominant estate as clubhouse could not have been contemplated by parties to original grant).

16 Wyo.Stat. §§ 24–9–101 to 24–9–104 (1977); see *Snell v. Ruppert*, 541 P.2d 1042, 1046 (Wyo.1975) (statute "offers complete relief to the shut-in landowner and covers the whole subject matter"; "[i]f a statute covers a whole subject matter, the abrogation of the common law on the same subject will necessarily be implied"). See also, *e. g., Quinn v. Holly*, 244 Miss. 808, 146 So.2d 357 (1962). In light of the history of public land grants related in Part I of this opinion, it is not surprising that "private" eminent domain statutes like that of Wyoming are most prevalent in the Western United States.

17 *E. g., State v. Black Bros.*, 116 Tex. 615, 629–630, 297 S.W. 213, 218–219 (1927); see *Pearne v. Coal Creek Min. & Mfg. Co.*, 90 Tenn. 619, 627–628, 18 S.W. 402, 404 (1891).

The applicability of the doctrine of easement by necessity in this case is, therefore, somewhat strained, and ultimately of *681 little significance. The pertinent inquiry in this case is the intent of Congress when it granted land to the Union Pacific in 1862. The 1862 Act specifically listed reservations to the grant, and we do not find the tenuous relevance of the common-law doctrine of ways of necessity sufficient to overcome the inference prompted by the omission of any reference to the reserved right asserted by the Government in this case. It is possible that Congress gave the problem of access little thought; but it is at least as likely that the thought which was given focused on negotiation, reciprocity considerations, and the power of eminent domain as obvious devices for ameliorating disputes.[18] **1411 So both as matter of common-law *682 doctrine and as a matter of construing congressional intent, we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication than the Government makes here.

18 The intimations that can be found in the Congressional Globe are that there was no commonly understood reservation by the Government of the right to enter upon granted lands and construct a public road. Representative Cradlebaugh of Nevada offered an amendment to what became the Union Pacific Act of 1862 that would have reserved the right to the public to enter granted land and prospect for valuable minerals upon the payment of adequate compensation to the owner. The proposed amendment was defeated. The only Representative other than Cradlebaugh who spoke to it, Representative Sargent of California, stated:

> "The amendment of the gentleman proposes to allow the public to enter upon the lands of any man, whether they be mineral lands or not, and prospect for gold and silver, and as compensation proposes some loose method of payment for the injuries inflicted. Now, sir, it may turn out that the man who thus commits the injuries may be utterly insolvent, not able to pay a dollar, and how is the owner of the property to be compensated for tearing down his dwellings, rooting up his orchards, and destroying his crops?" Cong.Globe, 37th Cong., 2d Sess., 1910 (1862).

In debates on an earlier Pacific Railroad bill it was explicitly suggested that there be "a reservation in every grant of land that [the Government] shall have a right to go through it, and take it at proper prices to be paid hereafter." The author of this proposal, Senator Simmons of Rhode Island, lamented the lack of such a reservation in the bill under consideration. Cong.Globe, 35th Cong., 2d Sess., 579 (1859). Apparently the intended purpose of this proposed reservation was to permit railroads to obtain rights-of-way through granted property at the Government's behest. Senator Simmons' comments are somewhat confused, but they certainly do not evince any prevailing assumption that the Government implicitly reserved a right-of-way through granted lands.

The Government would have us decide this case on the basis of the familiar canon of construction that, when grants to federal lands are at issue, any doubts "are resolved for the Government not against it." *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617, 98 S.Ct. 2002, 2010, 56 L.Ed.2d 570 (1978). But this Court long ago declined to apply this canon in its full vigor to grants under the railroad Acts. In 1885 this Court observed:
"The solution of [ownership] questions [involving the railroad grants] depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." *Winona & St. Peter R. Co. v. Barney*, 113 U.S. 618, 625, 5 S.Ct. 606, 609, 28 L.Ed. 1109 (1885).

The Court harmonized the longstanding rule enunciated most recently in *Andrus, supra*, with the doctrine of *Winona* in *United States v. Denver & Rio Grande R. Co.*, 150 U.S. 1, 14, 14 S.Ct. 11, 15–16, 37 L.Ed. 975 (1893) when it said:

> "It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, *683 or to withhold what is given either expressly or by necessary or fair implication. . . .
>
> ". . . When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

Thus, invocation of the canon reiterated in *Andrus* does little to advance the Government's position in this case.

Nor do we find the Unlawful Inclosures of Public Lands Act of 1885 of any significance in this controversy. That Act was a response to the "range wars," the legendary struggle between cattlemen and farmers during the last half of the 19th century. Cattlemen had entered Kansas, Nebraska, and the Dakota Territory before other settlers, and they grazed their herds freely on public lands with the Federal Government's acquiescence.[19] To maintain their dominion **1412 over the ranges, cattlemen used homestead and pre-emption laws to gain

control of water sources in the range lands. With monopoly control of such sources, the cattlemen found that ownership over a relatively small area might yield effective control of thousands of acres of grassland. Another exclusionary technique was the illegal fencing of public lands which was often the product of the checkerboard pattern of railroad grants. By placing fences near the borders of their parts of the *684 checkerboard, cattlemen could fence in thousands of acres of public lands. Reports of the Secretary of the Interior indicated that vast areas of public grazing land had been pre-empted by such fencing patterns.[20] In response Congress passed the Unlawful Inclosures Act of 1885.[21]

19 M. Clawson & B. Held, The Federal Lands 57–58, 84–85 (1957).

20 H.R.Rep. No. 1325, 48th Cong., 1st Sess. (1884). For example, in a letter to the House of Representatives the Secretary related two instances in Colorado where cattle companies fenced in more than one million acres each. Congressional concern was heightened by the fact that these and other cattle corporations were foreign owned. *Id.*, at 2.

21 23 Stat. 321, as amended, 43 U.S.C. § 1061 *et seq.*

Section 1 of the Unlawful Inclosures Act states that "[a]ll inclosures of any public lands . . . constructed by any person . . . to any of which land included within the inclosure the person . . . had no claim or color of title made or acquired in good faith . . . are declared to be unlawful." 23 Stat. 321, 43 U.S.C. § 1061. Section 3 further provides:

> "No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided*, This section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith." 23 Stat. 322, 43 U.S.C. § 1063.

The Government argues that the prohibitions of this Act should somehow be read to include the Leo Sheep Co.'s refusal to acquiesce in a public road over its property, and that such a conclusion is supported by this Court's opinion in *685 *Camfield v. United States*, 167 U.S. 518, 17 S.Ct. 864, 42 L.Ed. 260 (1897). We find, however, that *Camfield* does not afford the support that the Government seeks. That case involved a fence that was constructed on odd-numbered lots so as to enclose 20,000 acres of public land, thereby appropriating it to the exclusive use of Camfield and his associates. This Court analyzed the fence from the perspective of nuisance law, and concluded that the Unlawful Inclosures Act was an appropriate exercise of the police power.

There is nothing, however, in the *Camfield* opinion to suggest that the Government has the authority asserted here. In fact, the Court affirmed the grantee's right to fence completely his own land.

> "So long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large." *Id.*, at 528, 17 S.Ct., at 868.

Obviously, if odd-numbered lots are individually fenced, the access to even-numbered lots is obstructed. Yet the *Camfield* Court found that this was not a violation of the Unlawful Inclosures Act. In that light we cannot see how the Leo Sheep Co.'s unwillingness to entertain a public road without compensation can be a violation of that Act. It is certainly true that the problem we **1413 confront today was not a matter of great concern during the time the 1862

railroad grants were made. The order of the day was the open range—barbed wire had not made its presence felt—and the type of incursions on *686 private property necessary to reach public land was not such an interference that litigation would serve any motive other than spite.[22] Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads.[23] The *Camfield* case expresses similar sentiments. After the passage quoted above conceding the authority of a private landowner to fence the entire perimeter of his odd-numbered lot, the Court opined that such authority was of little practical significance "since a separate enclosure of each section would only become desirable when the country had been settled, and roads had been built which would give access to each section." *Ibid.* It is some testament to common sense that the present case is virtually unprecedented, *687 and that in the 117 years since the grants were made, litigation over access questions generally has been rare.

22 There were exceptions, one of which, *Buford v. Houtz*, 133 U.S. 320, 10 S.Ct. 305, 33 L.Ed. 618 (1890), reached this Court. See n. 24, *infra.*

23 This expectation was fostered by the general land-grant scheme. Each block in the checkerboard was a square mile—640 acres. The public lots were open to homesteading, with 160 acres the maximum allowable claim under the Homestead Act. Act of May 20, 1862, 12 Stat. 392. The Union Pacific was required by the 1862 Act to sell or otherwise dispose of the land granted to it within three years after completion of the entire road, with lands not so disposed of within that period subject to homesteading and pre-emption. Thus, in 1862, the process of subdivision was perceived, to a great degree, as inevitable.

During the 1850 debates concerning the Illinois Central Railroad, Senator Cass of Michigan outlined the dynamics that were presumed to underlie the system of checkerboard grants: "In all the new portions of the United States this Government owns a large proportion of the property. They sell it. They offer it for sale. It is surveyed, thrown into market, and emigration is invited. Tract after tract is sold, roads are made, villages and towns are built up, and all the improvements that can be of value to a country go on and increase the value of the lands . . . ." Cong.Globe, 31st Cong., 1st Sess. 846 (1850).

Nonetheless, the present times are litigious ones and the 37th Congress did not anticipate our plight. Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before.[24] When the Secretary of the Interior has discussed access rights, his discussion has been colored by the assumption that those rights had to be purchased.[25] This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are **1414 unwilling to upset settled expectations to accommodate some ill-defined power to construct public *688 thoroughfares without compensation.[26] The judgment of the Court of Appeals for the Tenth Circuit is accordingly

24 This distinguishes the instant case from *Buford v. Houtz, supra.* The appellants there were a group of cattle ranchers seeking, *inter alia*, an injunction against sheep ranchers who moved their herds across odd-numbered lots held by the appellants in order to graze their sheep on even-numbered public lots. This Court denied the requested relief because it was contrary to a century-old grazing custom. The Court also was influenced by the sheep ranchers' lack of any alternative.

"Upon the whole, we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run at large over the lands of the United States and feed upon the grasses found in them, while, under pretence of owning a small proportion of the land which is the subject of controversy, they themselves obtain the monopoly of this valuable privilege." 133 U.S., at 332, 10 S.Ct. at 309.

Here neither custom nor necessity supports the Government.

25 In 1887 the Secretary of the Interior recommended that Congress enact legislation providing for a public road around each section of public land to provide access to the various public lots in the checkerboard scheme. The Secretary also recommended that to the extent building these roads required the taking of property that had passed to private individuals, "the bill should provide for necessary compensation." 1 Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887, p. 15 (1887); see also 1 Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1888, p. xvii (1888).

26 See, *e. g., Louisiana v. Garfield*, 211 U.S. 70, 76, 29 S.Ct. 31, 32, 53 L.Ed. 92 (1908); *Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U.S. 196, 207–208, 6 S.Ct. 1177, 1183–1184, 30 L.Ed. 98 (1886); *Lessee of Irwin H. Doolittle's Lessee v. Bryan*, 14 How. (55 U.S.) 563, 567, 14 L.Ed. 543 (1853).

Reversed.

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

Supreme Court of the United States

David KING, et al., Petitioners
v.
Sylvia BURWELL, Secretary of Health and Human Services, et al.

|
Argued March 4, 2015.
|
Decided June 25, 2015.

[ROBERTS, C.J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined.]

Chief Justice ROBERTS delivered the opinion of the Court.

[The Patient Protection and Affordable Care Act grew out of a long history of failed health insurance reform. In the 1990s, several States sought to expand access to coverage by imposing a pair of insurance market regulations—a "guaranteed issue" requirement, which bars insurers from denying coverage to any person because of his health, and a "community rating" requirement, which bars insurers from charging a person higher premiums for the same reason. The reforms achieved the goal of expanding access to coverage, but they also encouraged people to wait until they got sick to buy insurance. The result was an economic "death spiral": premiums rose, the number of people buying insurance declined, and insurers left the market entirely. In 2006, however, Massachusetts discovered a way to make the guaranteed issue and community rating requirements work—by requiring individuals to buy insurance and by providing tax credits to certain individuals to make insurance more affordable. The combination of these three reforms—insurance market regulations, a coverage mandate, and tax credits—enabled Massachusetts to drastically reduce its uninsured rate.

[The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements. 42 U.S.C. §§ 300gg, 300gg–1. Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS, unless the cost of buying insurance would exceed eight percent of that individual's income. 26 U.S.C. § 5000A. And third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. § 36B.

[In addition to those three reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish "such Exchange" if the State does not. 42 U.S.C. §§ 18031, 18041. Relatedly, the Act provides that tax credits "shall be allowed" for any "applicable taxpayer," 26 U.S.C. § 36B(a), but only if the taxpayer has enrolled in an insurance plan through "an Exchange established by the State under [42 U.S.C. § 18031]," §§ 36B(b)-(c). An IRS regulation interprets that language as making tax credits available on "an Exchange," 26 CFR § 1.36B–2, "regardless of whether the Exchange is established and operated by a State ... or by HHS," 45 CFR § 155.20.]

II

. . . .

A

We begin with the text of Section 36B. As relevant here, Section 36B allows an individual to receive tax credits only if the individual enrolls in an insurance plan through "an Exchange established by the State under [42 U.S.C. § 18031]." In other words, three things must be true: First, the individual must enroll in an insurance plan through "an Exchange." Second, that Exchange must be "established by the State." And third, that Exchange must be established "under [42 U.S.C. § 18031]." We address each requirement in turn.

First, all parties agree that a Federal Exchange qualifies as "an Exchange" for purposes of Section 36B. See Brief for Petitioners 22; Brief for Respondents 22. Section 18031 provides that "[e]ach State shall ... establish an American Health Benefit Exchange ... for the State." § 18031(b)(1). Although phrased as a requirement, the Act gives the States "flexibility" by allowing them to "elect" whether they want to establish an Exchange. § 18041(b). If the State chooses not to do so, Section 18041 provides that the Secretary "shall ... establish and operate *such Exchange* within the State." § 18041(c)(1) (emphasis added).

By using the phrase "such Exchange," Section 18041 instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section 18031. See Black's Law Dictionary 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned"). In other words, State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes. Although State and Federal Exchanges are established by different sovereigns, Sections 18031 and 18041 do not suggest that they differ in *2490 any meaningful way. A Federal Exchange therefore counts as "an Exchange" under Section 36B.

Second, we must determine whether a Federal Exchange is "established by the State" for purposes of Section 36B. At the outset, it might seem that a Federal Exchange cannot fulfill this requirement. After all, the Act defines "State" to mean "each of the 50 States and the District of Columbia"—a definition that does not include the Federal Government. 42 U.S.C. § 18024(d). But when read in context, "with a view to [its] place in the overall statutory scheme," the meaning of the phrase "established by the State" is not so clear. *Brown & Williamson*, 529 U.S., at 133, 120 S.Ct. 1291 (internal quotation marks omitted).

After telling each State to establish an Exchange, Section 18031 provides that all Exchanges "shall make available qualified health plans to qualified individuals." 42 U.S.C. § 18031(d)(2)(A). Section 18032 then defines the term "qualified individual" in part as an individual who "resides in the State that established the Exchange." § 18032(f)(1)(A). And that's a problem: If we give the phrase "the State that established the Exchange" its most natural meaning, there would be *no* "qualified individuals" on Federal Exchanges. But the Act clearly contemplates that there will be qualified individuals on *every* Exchange. As we just mentioned, the Act requires all Exchanges to "make available qualified health plans to qualified individuals"—something an Exchange could not do if there were no such individuals. § 18031(d)(2)(A). And the Act tells the Exchange, in deciding which health plans to offer, to consider "the interests of qualified individuals ... in the State or States in which such Exchange operates"—again, something the Exchange could not do if qualified individuals did not exist. § 18031(e)(1)(B). This problem arises repeatedly throughout the Act. See, *e.g.*, § 18031(b)(2) (allowing a State to create "one Exchange ... for providing ... services to both qualified individuals and qualified small employers," rather than creating separate Exchanges for those two groups).[1]

1 The dissent argues that one would "naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals." *Post,* at 2501 – 2502 (SCALIA, J., dissenting). But the fact that the dissent's interpretation would make so many parts of the Act "inapplicable" to Federal Exchanges is precisely what creates the problem. It would be odd indeed for Congress to write such detailed instructions about customers on a State Exchange, while having nothing to say about those on a Federal Exchange.

These provisions suggest that the Act may not always use the phrase "established by the

State" in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context.

Third, we must determine whether a Federal Exchange is established "under [42 U.S.C. § 18031]." This too might seem a requirement that a Federal Exchange cannot fulfill, because it is Section 18041 that tells the Secretary when to "establish and operate such Exchange." But here again, the way different provisions in the statute interact suggests otherwise.

The Act defines the term "Exchange" to mean "an American Health Benefit Exchange established under section 18031." § 300gg–91(d)(21). If we import that definition into Section 18041, the Act tells the Secretary to "establish and operate such 'American Health Benefit Exchange established under section 18031.'" That suggests that Section 18041 authorizes the *2491 Secretary to establish an Exchange under Section 18031, not (or not only) under Section 18041. Otherwise, the Federal Exchange, by definition, would not be an "Exchange" at all. See *Halbig*, 758 F.3d, at 399–400 (acknowledging that the Secretary establishes Federal Exchanges under Section 18031).

This interpretation of "under [42 U.S.C. § 18031]" fits best with the statutory context. All of the requirements that an Exchange must meet are in Section 18031, so it is sensible to regard all Exchanges as established under that provision. In addition, every time the Act uses the word "Exchange," the definitional provision requires that we substitute the phrase "Exchange established under section 18031." If Federal Exchanges were not established under Section 18031, therefore, literally none of the Act's requirements would apply to them. Finally, the Act repeatedly uses the phrase "established under [42 U.S.C. § 18031]" in situations where it would make no sense to distinguish between State and Federal Exchanges. See, *e.g.,* 26 U.S.C. § 125(f)(3)(A) (2012 ed., Supp. I) ("The term 'qualified benefit' shall not include any qualified health plan ... offered through an Exchange established under [42 U.S.C. § 18031]"); 26 U.S.C. § 6055(b)(1)(B)(iii)(I) (2012 ed.) (requiring insurers to report whether each insurance plan they provided "is a qualified health plan offered through an Exchange established under [42 U.S.C. § 18031]"). A Federal Exchange may therefore be considered one established "under [42 U.S.C. § 18031]."

The upshot of all this is that the phrase "an Exchange established by the State under [42 U.S.C. § 18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 that it establish an Exchange, the Act tells the Secretary to establish "such Exchange." § 18041. And by using the words "such Exchange," the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not.[2]

2 The dissent argues that the phrase "such Exchange" does not suggest that State and Federal Exchanges "are in all respects equivalent." *Post,* at 2500. In support, it quotes the Constitution's Elections Clause, which makes the state legislature primarily responsible for prescribing election regulations, but allows Congress to "make or alter such Regulations." Art. I, § 4, cl. 1. No one would say that state and federal election regulations are in all respects equivalent, the dissent contends, so we should not say that State and Federal Exchanges are. But the Elections Clause does not precisely define what an election regulation must look like, so Congress can prescribe regulations that differ from what the State would prescribe. The Affordable Care Act *does* precisely define what an Exchange must look like, however, so a Federal Exchange cannot differ from a State Exchange.

The conclusion that Section 36B is ambiguous is further supported by several provisions that assume tax credits will be available on both State and Federal Exchanges. For example, the Act requires all Exchanges to create outreach programs that must "distribute fair and impartial information concerning ... the availability of premium tax credits under section 36B." § 18031(i)(3)(B). The Act also requires all Exchanges to "establish and make available

*2492 by electronic means a calculator to determine the actual cost of coverage after the application of any premium tax credit under section 36B." § 18031(d)(4)(G). And the Act requires all Exchanges to report to the Treasury Secretary information about each health plan they sell, including the "aggregate amount of any advance payment of such credit," "[a]ny information ... necessary to determine eligibility for, and the amount of, such credit," and any "[i]nformation necessary to determine whether a taxpayer has received excess advance payments." 26 U.S.C. § 36B(f)(3). If tax credits were not available on Federal Exchanges, these provisions would make little sense.

Petitioners and the dissent respond that the words "established by the State" would be unnecessary if Congress meant to extend tax credits to both State and Federal Exchanges. Brief for Petitioners 20; *post,* at 2497 – 2498. But "our preference for avoiding surplusage constructions is not absolute." *Lamie v. United States Trustee*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); see also *Marx v. General Revenue Corp.*, 568 U.S. ——, ——, 133 S.Ct. 1166, 1177, 185 L.Ed.2d 242 (2013) ("The canon against surplusage is not an absolute rule"). And specifically with respect to this Act, rigorous application of the canon does not seem a particularly useful guide to a fair construction of the statute.

The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s. See 124 Stat. 270, 911, 912.) Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." Cannan, A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History, 105 L. Lib. J. 131, 163 (2013). And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60–vote filibuster requirement. *Id.*, at 159–167. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. Cf. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 545 (1947) (describing a cartoon "in which a senator tells his colleagues 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.' ").

Anyway, we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group*, 573 U.S., at ——, 134 S.Ct., at 2441 (internal quotation marks omitted). After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase "an Exchange established by the State under [Section 18031]" is unambiguous.

B

Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). Here, the statutory scheme compels *2493 us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. See *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419–420, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").[3]

3 The dissent notes that several other provisions in the Act use the phrase "established by the State," and argues that our holding applies to each of those provisions. *Post,* at 2498 – 2499. But "the presumption of consistent usage readily yields to context," and a statutory term may mean different things in different places. *Utility Air Regulatory Group v. EPA*, 573 U.S. ——, ——, 134 S.Ct. 2427, 2441–2442, 189 L.Ed.2d 372 (2014) (internal quotation marks omitted). That is particularly true when, as here, "the Act is far from a *chef d'oeuvre* of legislative draftsmanship." *Ibid.* Because the other provisions cited by the dissent are not at issue here, we do not address them.

As discussed above, Congress based the Affordable Care Act on three major reforms: first, the guaranteed issue and community rating requirements; second, a requirement that individuals maintain health insurance coverage or make a payment to the IRS; and third, the tax credits for individuals with household incomes between 100 percent and 400 percent of the federal poverty line. In a State that establishes its own Exchange, these three reforms work together to expand insurance coverage. The guaranteed issue and community rating requirements ensure that anyone can buy insurance; the coverage requirement creates an incentive for people to do so before they get sick; and the tax credits—it is hoped—make insurance more affordable. Together, those reforms "minimize ... adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." 42 U.S.C. § 18091(2)(I).

Under petitioners' reading, however, the Act would operate quite differently in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way. As explained earlier, the coverage requirement applies only when the cost of buying health insurance (minus the amount of the tax credits) is less than eight percent of an individual's income. 26 U.S.C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii). So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a *lot* fewer. In 2014, approximately 87 percent of people who bought insurance on a Federal Exchange did so with tax credits, and virtually all of those people would become exempt. HHS, A. Burke, A. Misra, & S. Sheingold, Premium Affordability, Competition, and Choice in the Health Insurance Marketplace 5 (2014); Brief for Bipartisan Economic Scholars as *Amici Curiae* 19–20. If petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange.

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. E. Saltzman & C. Eibner, The Effect of Eliminating the Affordable Care Act's Tax Credits in Federally Facilitated Marketplaces (2015). Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. L. Blumberg, M. Buettgens, & J. Holahan, The Implications of a Supreme Court Finding for the Plaintiff in *2494 King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums (2015). And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, 42 U.S.C. § 18032(c)(1), premiums outside the Exchange would rise along with those inside the Exchange. Brief for Bipartisan Economic Scholars as *Amici Curiae* 11–12.

It is implausible that Congress meant the Act to operate in this manner. See *National Federation of Independent Business v. Sebelius*, 567 U.S. ——, ——, 132 S.Ct. 2566, 2674, 183 L.Ed.2d 450 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting) ("Without the federal subsidies ... the exchanges would not operate as Congress intended and may not operate at all."). Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well.[4]

4 The dissent argues that our analysis "show[s] only that the statutory scheme contains a flaw," one "that appeared as well in other parts of the Act." *Post,* at 2503. For support, the dissent notes that the guaranteed issue and community rating requirements might apply in the federal territories, even though the coverage requirement does not. *Id.,* at 2503 – 2504. The confusion arises from the fact that the guaranteed issue and community rating requirements were added as amendments to the Public Health Service Act, which contains a definition of the word "State" that includes the territories, 42 U.S.C. § 201(f), while the later-enacted Affordable Care Act contains a definition of the word "State" that excludes the territories, § 18024(d). The predicate for the dissent's point is therefore uncertain at best.

The dissent also notes that a different part of the Act "established a long-term-care insurance program with guaranteed-issue and community-rating requirements, but without an individual mandate or subsidies." *Post,* at 2503. True enough. But the fact that Congress was willing to accept the risk of adverse selection in a comparatively minor program does not show that Congress was willing to do so in the general health insurance program—the very heart of the Act. Moreover, Congress said expressly that it wanted to avoid adverse selection in the *health* insurance markets. § 18091(2)(I).

Petitioners respond that Congress was not worried about the effects of withholding tax credits from States with Federal Exchanges because "Congress evidently believed it was offering states a deal they would not refuse." Brief for Petitioners 36. Congress may have been wrong about the States' willingness to establish their own Exchanges, petitioners continue, but that does not allow this Court to rewrite the Act to fix that problem. That is particularly true, petitioners conclude, because the States likely *would* have created their own Exchanges in the absence of the IRS Rule, which eliminated any incentive that the States had to do so. *Id.,* at 36–38.

Section 18041 refutes the argument that Congress believed it was offering the States a deal they would not refuse. That section provides that, if a State elects not to establish an Exchange, the Secretary "shall ... establish and operate such Exchange within the State." 42 U.S.C. § 18041(c)(1)(A). The whole point of that provision is to create a federal fallback in case a State chooses not to establish its own Exchange. Contrary to petitioners' argument, Congress did not believe it was offering States a deal they would not refuse—it expressly addressed what would happen if a State *did* refuse the deal.

C

Finally, the structure of Section 36B itself suggests that tax credits are not *2495 limited to State Exchanges. Section 36B(a) initially provides that tax credits "shall be allowed" for any "applicable taxpayer." Section 36B(c)(1) then defines an "applicable taxpayer" as someone who (among other things) has a household income between 100 percent and 400 percent of the federal poverty line. Together, these two provisions appear to make anyone in the specified income range eligible to receive a tax credit.

According to petitioners, however, those provisions are an empty promise in States with a Federal Exchange. In their view, an applicable taxpayer in such a State would be *eligible* for a tax credit—but the *amount* of that tax credit would always be zero. And that is because—diving several layers down into the Tax Code—Section 36B says that the amount of the tax credits shall be "an amount equal to the premium assistance credit amount," § 36B(a); and then says that the term "premium assistance credit amount" means "the sum of the premium assistance amounts determined under paragraph (2) with respect to all coverage months of the taxpayer occurring during the taxable year," § 36B(b)(1); and then says that the term "premium assistance amount" is tied to the amount of the monthly premium for insurance purchased on "an Exchange established by the State under [42 U.S.C. § 18031]," § 36B(b)(2); and then says that the term "coverage month" means any month in which the taxpayer has insurance through "an Exchange established by the State under [42 U.S.C. § 18031]," § 36B(c)(2)(A)(i).

We have held that Congress "does not alter the fundamental details of a regulatory scheme

in vague terms or ancillary provisions." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). But in petitioners' view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code. We doubt that is what Congress meant to do. Had Congress meant to limit tax credits to State Exchanges, it likely would have done so in the definition of "applicable taxpayer" or in some other prominent manner. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit.[5]

5 The dissent cites several provisions that "make[ ] taxpayers of all States eligible for a credit, only to provide later that the amount of the credit may be zero." *Post,* at 2501 (citing 26 U.S.C. §§ 24, 32, 35, 36). None of those provisions, however, is crucial to the viability of a comprehensive program like the Affordable Care Act. No one suggests, for example, that the first-time-homebuyer tax credit, § 36, is essential to the viability of federal housing regulation.

D

Petitioners' arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase "an Exchange established by the State under [42 U.S.C. § 18031]" may seem plain "when viewed in isolation," such a reading turns out to be "untenable in light of [the statute] as a whole." *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 343, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.

Reliance on context and structure in statutory interpretation is a "subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation *2496 of legislation becomes legislation itself." *Palmer v. Massachusetts*, 308 U.S. 79, 83, 60 S.Ct. 34, 84 L.Ed. 93 (1939). For the reasons we have given, however, such reliance is appropriate in this case, and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.

* * *

In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—"to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

The judgment of the United States Court of Appeals for the Fourth Circuit is

Affirmed.

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, dissenting.

The Court holds that when the Patient Protection and Affordable Care Act says "Exchange established by the State" it means "Exchange established by the State or the Federal Government." That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.

The Patient Protection and Affordable Care Act makes major reforms to the American

health-insurance market. It provides, among other things, that every State "shall ... establish an American Health Benefit Exchange"—a marketplace where people can shop for health-insurance plans. 42 U.S.C. § 18031(b)(1). And it provides that if a State does not comply with this instruction, the Secretary of Health and Human Services must "establish and operate such Exchange within the State." § 18041(c)(1).

A separate part of the Act—housed in § 36B of the Internal Revenue Code—grants "premium tax credits" to subsidize certain purchases of health insurance made on Exchanges. The tax credit consists of "premium assistance amounts" for "coverage months." 26 U.S.C. § 36B(b)(1). An individual has a coverage month only when he is covered by an insurance plan "that was enrolled in through an Exchange established by the State under [§ 18031]." § 36B(c)(2)(A). And the law ties the size of the premium assistance amount to the premiums for health plans which cover the individual "and which were enrolled in through an Exchange established by the State under [§ 18031]." § 36B(b)(2)(A). The premium assistance amount further depends on the cost of certain other insurance plans "offered through the same Exchange." § 36B(b)(3)(B)(i).

This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it. In order to receive *2497 any money under § 36B, an individual must enroll in an insurance plan through an "Exchange established by the State." The Secretary of Health and Human Services is not a State. So an Exchange established by the Secretary is not an Exchange established by the State—which means people who buy health insurance through such an Exchange get no money under § 36B.

Words no longer have meaning if an Exchange that is *not* established by a State is "established by the State." It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words "established by the State." And it is hard to come up with a reason to include the words "by the State" other than the purpose of limiting credits to state Exchanges. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth–Stephens Co.*, 267 U.S. 364, 370, 45 S.Ct. 274, 69 L.Ed. 660 (1925) (internal quotation marks omitted). Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.

II

The Court interprets § 36B to award tax credits on both federal and state Exchanges. It accepts that the "most natural sense" of the phrase "Exchange established by the State" is an Exchange established by a State. *Ante,* at 2502. (Understatement, thy name is an opinion on the Affordable Care Act!) Yet the opinion continues, with no semblance of shame, that "it is also possible that the phrase refers to *all* Exchanges—both State and Federal." *Ante,* at 2491. (Impossible possibility, thy name is an opinion on the Affordable Care Act!) The Court claims that "the context and structure of the Act compel [it] to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." *Ante,* at 2495.

I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.

Any effort to understand rather than to rewrite a law must accept and apply the presumption that lawmakers use words in "their natural and ordinary signification." *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 12, 24 L.Ed. 708 (1878). Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct. Today's interpretation is not merely unnatural; it is unheard of. Who would ever have dreamt that

"Exchange established by the State" means "Exchange established by the State *or the Federal Government* "? Little short of an express statutory definition could justify adopting this singular reading. Yet the only pertinent definition here provides that "State" means "each of the 50 States and the District of Columbia." 42 U.S.C. § 18024(d). Because the Secretary is neither one of the 50 States nor the District of Columbia, that definition positively contradicts the eccentric theory that an Exchange established by the Secretary has been established by the State.

Far from offering the overwhelming evidence of meaning needed to justify the *2498 Court's interpretation, other contextual clues undermine it at every turn. To begin with, other parts of the Act sharply distinguish between the establishment of an Exchange by a State and the establishment of an Exchange by the Federal Government. The States' authority to set up Exchanges comes from one provision, § 18031(b); the Secretary's authority comes from an entirely different provision, § 18041(c). Funding for States to establish Exchanges comes from one part of the law, § 18031(a); funding for the Secretary to establish Exchanges comes from an entirely different part of the law, § 18121. States generally run state-created Exchanges; the Secretary generally runs federally created Exchanges. § 18041(b)-(c). And the Secretary's authority to set up an Exchange in a State depends upon the State's "*[f]ailure* to establish [an] Exchange." § 18041(c) (emphasis added). Provisions such as these destroy any pretense that a federal Exchange is in some sense also established by a State.

Reading the rest of the Act also confirms that, as relevant here, there are *only* two ways to set up an Exchange in a State: establishment by a State and establishment by the Secretary. §§ 18031(b), 18041(c). So saying that an Exchange established by the Federal Government is "established by the State" goes beyond giving words bizarre meanings; it leaves the limiting phrase "by the State" with no operative effect at all. That is a stark violation of the elementary principle that requires an interpreter "to give effect, if possible, to every clause and word of a statute." *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883). In weighing this argument, it is well to remember the difference between giving a term a meaning that duplicates another part of the law, and giving a term no meaning at all. Lawmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets (aid and abet, cease and desist, null and void). Lawmakers do not, however, tend to use terms that "have no operation at all." *Marbury v. Madison*, 1 Cranch 137, 174, 2 L.Ed. 60 (1803). So while the rule against treating a term as a redundancy is far from categorical, the rule against treating it as a nullity is as close to absolute as interpretive principles get. The Court's reading does not merely give "by the State" a duplicative effect; it causes the phrase to have no effect whatever.

Makng matters worse, the reader of the whole Act will come across a number of provisions beyond § 36B that refer to the establishment of Exchanges by States. Adopting the Court's interpretation means nullifying the term "by the State" not just once, but again and again throughout the Act. Consider for the moment only those parts of the Act that mention an "Exchange established by the State" in connection with tax credits:

• The formula for calculating the amount of the tax credit, as already explained, twice mentions "an Exchange established by the State." 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i).

• The Act directs States to screen children for eligibility for "[tax credits] under section 36B" and for "any other assistance or subsidies available for coverage obtained through" an "Exchange established by the State." 42 U.S.C. § 1396w–3(b)(1)(B)–(C).

• The Act requires "an Exchange established by the State" to use a "secure electronic interface" to determine eligibility for (among other things) tax credits. § 1396w–3(b)(1)(D).

• The Act authorizes "an Exchange established by the State" to make arrangements *2499 under which other state agencies "determine whether a State resident is eligible for [tax credits] under section 36B." § 1396w–3(b)(2).

• The Act directs States to operate Web sites that allow anyone "who is eligible to receive

[tax credits] under section 36B" to compare insurance plans offered through "an Exchange established by the State." § 1396w–3(b)(4).

• One of the Act's provisions addresses the enrollment of certain children in health plans "offered through an Exchange established by the State" and then discusses the eligibility of these children for tax credits. § 1397ee(d)(3)(B).

It is bad enough for a court to cross out "by the State" once. But seven times?

Congress did not, by the way, repeat "Exchange established by the State under [§ 18031]" by rote throughout the Act. Quite the contrary, clause after clause of the law uses a more general term such as "Exchange" or "Exchange established under [§ 18031]." See, *e.g.,* 42 U.S.C. §§ 18031(k), 18033; 26 U.S.C. § 6055. It is common sense that any speaker who says "Exchange" some of the time, but "Exchange established by the State" the rest of the time, probably means something by the contrast.

Equating establishment "by the State" with establishment by the Federal Government makes nonsense of other parts of the Act. The Act requires States to ensure (on pain of losing Medicaid funding) that any "Exchange established by the State" uses a "secure electronic interface" to determine an individual's eligibility for various benefits (including tax credits). 42 U.S.C. § 1396w–3(b)(1)(D). How could a State control the type of electronic interface used by a federal Exchange? The Act allows a State to control contracting decisions made by "an Exchange established by the State." § 18031(f)(3). Why would a State get to control the contracting decisions of a federal Exchange? The Act also provides "Assistance to States to establish American Health Benefit Exchanges" and directs the Secretary to renew this funding "if the State ... is making progress ... toward ... establishing an Exchange." § 18031(a). Does a State that refuses to set up an Exchange still receive this funding, on the premise that Exchanges established by the Federal Government are really established by States? It is presumably in order to avoid these questions that the Court concludes that federal Exchanges count as state Exchanges only "for purposes of the tax credits." *Ante,* at 2491. (Contrivance, thy name is an opinion on the Affordable Care Act!)

It is probably piling on to add that the Congress that wrote the Affordable Care Act knew how to equate two different types of Exchanges when it wanted to do so. The Act includes a clause providing that "[a] *territory* that ... establishes ... an Exchange ... shall be treated as a State" for certain purposes. § 18043(a) (emphasis added). Tellingly, it does not include a comparable clause providing that the *Secretary* shall be treated as a State for purposes of § 36B when *she* establishes an Exchange.

Faced with overwhelming confirmation that "Exchange established by the State" means what it looks like it means, the Court comes up with argument after feeble argument to support its contrary interpretation. None of its tries comes close to establishing the implausible conclusion that Congress used "by the State" to mean "by the State or not by the State."

The Court emphasizes that if a State does not set up an Exchange, the Secretary must establish "such Exchange." § 18041(c). It claims that the word "such" *2500 implies that federal and state Exchanges are "the same." *Ante,* at 2491. To see the error in this reasoning, one need only consider a parallel provision from our Constitution: "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*." Art. I, § 4, cl. 1 (emphasis added). Just as the Affordable Care Act directs States to establish Exchanges while allowing the Secretary to establish "such Exchange" as a fallback, the Elections Clause directs state legislatures to prescribe election regulations while allowing Congress to make "such Regulations" as a fallback. Would anybody refer to an election regulation made by Congress as a "regulation prescribed by the state legislature"? Would anybody say that a federal election law and a state election law are in all respects equivalent? Of course not. The word "such" does not help the Court one whit. The Court's argument also overlooks the rudimentary principle that a specific provision governs a general one. Even if it were true that the term "such Exchange" in § 18041(c) implies that federal and state Exchanges are the same in general, the term "established by the State" in § 36B makes

plain that they differ when it comes to tax credits in particular.

The Court's next bit of interpretive jiggery-pokery involves other parts of the Act that purportedly presuppose the availability of tax credits on both federal and state Exchanges. *Ante,* at 2491 – 2492. It is curious that the Court is willing to subordinate the express words of the section that grants tax credits to the mere implications of other provisions with only tangential connections to tax credits. One would think that interpretation would work the other way around. In any event, each of the provisions mentioned by the Court is perfectly consistent with limiting tax credits to state Exchanges. One of them says that the minimum functions of an Exchange include (alongside several tasks that have nothing to do with tax credits) setting up an electronic calculator that shows "the actual cost of coverage after the application of any premium tax credit." 42 U.S.C. § 18031(d)(4)(G). What stops a federal Exchange's electronic calculator from telling a customer that his tax credit is zero? Another provision requires an Exchange's outreach program to educate the public about health plans, to facilitate enrollment, and to "distribute fair and impartial information" about enrollment and "the availability of premium tax credits." § 18031(i)(3)(B). What stops a federal Exchange's outreach program from fairly and impartially telling customers that no tax credits are available? A third provision requires an Exchange to report information about each insurance plan sold—including level of coverage, premium, name of the insured, and "amount of any advance payment" of the tax credit.26 U.S.C. § 36B(f)(3). What stops a federal Exchange's report from confirming that no tax credits have been paid out?

The Court persists that these provisions "would make little sense" if no tax credits were available on federal Exchanges. *Ante,* at 2492. Even if that observation were true, it would show only oddity, not ambiguity. Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provisions all lined up perfectly with each other. This Court "does not revise legislation ... just because the text as written creates an apparent anomaly." *Michigan v. Bay Mills Indian Community*, 572 U.S. ——, ——, 134 S.Ct. 2024, 2033, 188 L.Ed.2d 1071 (2014). At any rate, the provisions cited by the Court are not particularly unusual. Each requires *2501 an Exchange to perform a standardized series of tasks, some aspects of which relate in some way to tax credits. It is entirely natural for slight mismatches to occur when, as here, lawmakers draft "a single statutory provision" to cover "different kinds" of situations. *Robers v. United States*, 572 U.S. ——, ——, 134 S.Ct. 1854, 1858, 188 L.Ed.2d 885 (2014). Lawmakers need not, and often do not, "write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed." *Ibid.*

Roaming even farther afield from § 36B, the Court turns to the Act's provisions about "qualified individuals." *Ante,* at 2489 – 2490. Qualified individuals receive favored treatment on Exchanges, although customers who are not qualified individuals may also shop there. See *Halbig v. Burwell*, 758 F.3d 390, 404–405 (C.A.D.C.2014). The Court claims that the Act must equate federal and state establishment of Exchanges when it defines a qualified individual as someone who (among other things) lives in the "State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A). Otherwise, the Court says, there would be no qualified individuals on federal Exchanges, contradicting (for example) the provision requiring every Exchange to take the " 'interests of qualified individuals' " into account when selecting health plans. *Ante,* at 2490 (quoting § 18031(e)(1)(b)). Pure applesauce. Imagine that a university sends around a bulletin reminding every professor to take the "interests of graduate students" into account when setting office hours, but that some professors teach only undergraduates. Would anybody reason that the bulletin implicitly presupposes that every professor has "graduate students," so that "graduate students" must really mean "graduate or undergraduate students"? Surely not. Just as one naturally reads instructions about graduate students to be inapplicable to the extent a particular professor has no such students, so too would one naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals. There is no need to rewrite the term "State that established the Exchange" in the definition of "qualified individual," much less a need to rewrite the separate term "Exchange established by the State" in a separate part of the Act.

Least convincing of all, however, is the Court's attempt to uncover support for its interpretation in "the structure of Section 36B itself." *Ante,* at 2494. The Court finds it

strange that Congress limited the tax credit to state Exchanges in the formula for calculating the *amount* of the credit, rather than in the provision defining the range of taxpayers *eligible* for the credit. Had the Court bothered to look at the rest of the Tax Code, it would have seen that the structure it finds strange is in fact quite common. Consider, for example, the many provisions that initially make taxpayers of all incomes eligible for a tax credit, only to provide later that the amount of the credit is zero if the taxpayer's income exceeds a specified threshold. See, *e.g.,* 26 U.S.C. § 24 (child tax credit); § 32 (earned-income tax credit); § 36 (first-time-homebuyer tax credit). Or consider, for an even closer parallel, a neighboring provision that initially makes taxpayers of all States eligible for a credit, only to provide later that the amount of the credit may be zero if the taxpayer's State does not satisfy certain requirements. See § 35 (health-insurance-costs tax credit). One begins to get the sense that the Court's insistence on reading things in context applies to "established by the State," but to nothing else.

For what it is worth, lawmakers usually draft tax-credit provisions the way they do—*i.e.,* the way they drafted § 36B— *2502 because the mechanics of the credit require it. Many Americans move to new States in the middle of the year. Mentioning state Exchanges in the definition of "coverage month"—rather than (as the Court proposes) in the provisions concerning taxpayers' eligibility for the credit—accounts for taxpayers who live in a State with a state Exchange for a part of the year, but a State with a federal Exchange for the rest of the year. In addition, § 36B awards a credit with respect to insurance plans "which cover the taxpayer, *the taxpayer's spouse, or any dependent ... of the taxpayer* and which were enrolled in through an Exchange established by the State." § 36B(b)(2)(A) (emphasis added). If Congress had mentioned state Exchanges in the provisions discussing taxpayers' eligibility for the credit, a taxpayer who buys insurance from a federal Exchange would get no money, even if he has a spouse or dependent who buys insurance from a state Exchange—say a child attending college in a different State. It thus makes perfect sense for "Exchange established by the State" to appear where it does, rather than where the Court suggests. Even if that were not so, of course, its location would not make it any less clear.

The Court has not come close to presenting the compelling contextual case necessary to justify departing from the ordinary meaning of the terms of the law. Quite the contrary, context only underscores the outlandishness of the Court's interpretation. Reading the Act as a whole leaves no doubt about the matter: "Exchange established by the State" means what it looks like it means.

III

For its next defense of the indefensible, the Court turns to the Affordable Care Act's design and purposes. As relevant here, the Act makes three major reforms. The guaranteed-issue and community-rating requirements prohibit insurers from considering a customer's health when deciding whether to sell insurance and how much to charge, 42 U.S.C. §§ 300gg, 300gg–1; its famous individual mandate requires everyone to maintain insurance coverage or to pay what the Act calls a "penalty," 26 U.S.C. § 5000A(b)(1), and what we have nonetheless called a tax, see *National Federation of Independent Business v. Sebelius*, 567 U.S. ——, ——, 132 S.Ct. 2566, 2597–2598, 183 L.Ed.2d 450 (2012); and its tax credits help make insurance more affordable. The Court reasons that Congress intended these three reforms to "work together to expand insurance coverage"; and because the first two apply in every State, so must the third. *Ante,* at 2493.

This reasoning suffers from no shortage of flaws. To begin with, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *Kloeckner v. Solis*, 568 U.S. ——, ——, n. 4, 133 S.Ct. 596, 607, n. 4, 184 L.Ed.2d 433 (2012). Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision. Could anyone maintain with a straight face that § 36B is unclear? To mention just the highlights, the Court's interpretation clashes with a statutory definition, renders words inoperative in at least seven separate provisions of the Act, overlooks the contrast between provisions that say "Exchange" and those that say "Exchange established by the State," gives the same phrase one meaning for purposes of tax credits but an entirely different meaning for other purposes, and (let us not forget) contradicts the ordinary meaning

of the words Congress used. On the other side of the ledger, the Court has come up with nothing more than a general provision that turns out to be controlled by *2503 a specific one, a handful of clauses that are consistent with either understanding of establishment by the State, and a resemblance between the tax-credit provision and the rest of the Tax Code. If that is all it takes to make something ambiguous, everything is ambiguous.

Having gone wrong in consulting statutory purpose at all, the Court goes wrong again in analyzing it. The purposes of a law must be "collected chiefly from its words," not "from extrinsic circumstances." *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L.Ed. 529 (1819) (Marshall, C.J.). Only by concentrating on the law's terms can a judge hope to uncover the scheme *of the statute,* rather than some other scheme that the judge thinks desirable. Like it or not, the express terms of the Affordable Care Act make only two of the three reforms mentioned by the Court applicable in States that do not establish Exchanges. It is perfectly possible for them to operate independently of tax credits. The guaranteed-issue and community-rating requirements continue to ensure that insurance companies treat all customers the same no matter their health, and the individual mandate continues to encourage people to maintain coverage, lest they be "taxed."

The Court protests that without the tax credits, the number of people covered by the individual mandate shrinks, and without a broadly applicable individual mandate the guaranteed-issue and community-rating requirements "would destabilize the individual insurance market." *Ante,* at 2493. If true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says. Moreover, it is a flaw that appeared as well in other parts of the Act. A different title established a long-term-care insurance program with guaranteed-issue and community-rating requirements, but without an individual mandate or subsidies. §§ 8001–8002, 124 Stat. 828–847 (2010). This program never came into effect "only because Congress, in response to actuarial analyses predicting that the [program] would be fiscally unsustainable, repealed the provision in 2013." *Halbig*, 758 F.3d, at 410. How could the Court say that Congress would never dream of combining guaranteed-issue and community-rating requirements with a narrow individual mandate, when it combined those requirements with *no* individual mandate in the context of long-term-care insurance?

Similarly, the Department of Health and Human Services originally interpreted the Act to impose guaranteed-issue and community-rating requirements in the Federal Territories, even though the Act plainly does not make the individual mandate applicable there. *Ibid.*; see 26 U.S.C. § 5000A(f)(4); 42 U.S.C. § 201(f). "This combination, predictably, [threw] individual insurance markets in the territories into turmoil." *Halbig, supra,* at 410. Responding to complaints from the Territories, the Department at first insisted that it had "no statutory authority" to address the problem and suggested that the Territories "seek legislative relief from Congress" instead. Letter from G. Cohen, Director of the Center for Consumer Information and Insurance Oversight, to S. Igisomar, Secretary of Commerce of the Commonwealth of Northern Mariana Islands (July 12, 2013). The Department changed its mind a year later, after what it described as "a careful review of [the] situation and the relevant statutory language." Letter from M. Tavenner, Administrator of the Centers for Medicare and Medicaid Services, to G. Francis, Insurance Commissioner of the Virgin Islands (July 16, 2014). How could the Court pronounce it "implausible" for Congress to have tolerated instability in insurance *2504 markets in States with federal Exchanges, *ante,* at 2494, when even the Government maintained until recently that Congress did exactly that in American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands?

Compounding its errors, the Court forgets that it is no more appropriate to consider one of a statute's purposes in isolation than it is to consider one of its words that way. No law pursues just one purpose at all costs, and no statutory scheme encompasses just one element. Most relevant here, the Affordable Care Act displays a congressional preference for state participation in the establishment of Exchanges: Each State gets the first opportunity to set up its Exchange, 42 U.S.C. § 18031(b); States that take up the opportunity receive federal funding for "activities ... related to establishing" an Exchange, § 18031(a)(3); and the Secretary may establish an Exchange in a State only as a fallback, § 18041(c). But setting up

and running an Exchange involve significant burdens—meeting strict deadlines, § 18041(b), implementing requirements related to the offering of insurance plans, § 18031(d)(4), setting up outreach programs, § 18031(i), and ensuring that the Exchange is self-sustaining by 2015, § 18031(d)(5)(A). A State would have much less reason to take on these burdens if its citizens could receive tax credits no matter who establishes its Exchange. (Now that the Internal Revenue Service has interpreted § 36B to authorize tax credits everywhere, by the way, 34 States have failed to set up their own Exchanges. *Ante,* at 2487.) So even if making credits available on all Exchanges advances the goal of improving healthcare markets, it frustrates the goal of encouraging state involvement in the implementation of the Act. *This* is what justifies going out of our way to read "established by the State" to mean "established by the State or not established by the State"?

Worst of all for the repute of today's decision, the Court's reasoning is largely self-defeating. The Court predicts that making tax credits unavailable in States that do not set up their own Exchanges would cause disastrous economic consequences there. If that is so, however, wouldn't one expect States to react by setting up their own Exchanges? And wouldn't that outcome satisfy two of the Act's goals rather than just one: enabling the Act's reforms to work *and* promoting state involvement in the Act's implementation? The Court protests that the very existence of a federal fallback shows that Congress expected that some States might fail to set up their own Exchanges. *Ante,* at 2495. So it does. It does not show, however, that Congress expected the number of recalcitrant States to be particularly large. The more accurate the Court's dire economic predictions, the smaller that number is likely to be. That reality destroys the Court's pretense that applying the law as written would imperil "the viability of the entire Affordable Care Act." *Ante,* at 2495. All in all, the Court's arguments about the law's purpose and design are no more convincing than its arguments about context.

IV

Perhaps sensing the dismal failure of its efforts to show that "established by the State" means "established by the State or the Federal Government," the Court tries to palm off the pertinent statutory phrase as "inartful drafting." *Ante,* at 2495. This Court, however, has no free-floating power "to rescue Congress from its drafting errors." *Lamie v. United States Trustee*, 540 U.S. 526, 542, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (internal quotation marks omitted). Only when it is patently *2505 obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. The occurrence of a misprint may be apparent from the face of the law, as it is where the Affordable Care Act "creates three separate Section 1563s." *Ante,* at 2492. But the Court does not pretend that there is any such indication of a drafting error on the face of § 36B. The occurrence of a misprint may also be apparent because a provision decrees an absurd result—a consequence "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges*, 4 Wheat., at 203. But § 36B does not come remotely close to satisfying that demanding standard. It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble.

Let us not forget that the term "Exchange established by the State" appears twice in § 36B and five more times in other parts of the Act that mention tax credits. What are the odds, do you think, that the same slip of the pen occurred in seven separate places? No provision of the Act—none at all—contradicts the limitation of tax credits to state Exchanges. And as I have already explained, uses of the term "Exchange established by the State" beyond the context of tax credits look anything but accidental. *Supra,* at 2487. If there was a mistake here, context suggests it was a substantive mistake in designing this part of the law, not a technical mistake in transcribing it.

V

The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give *Congress* "[a]ll legislative Powers" enumerated in the Constitution. Art. I, § 1. They made Congress, not this Court, responsible

for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that "[o]ur task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989).

Trying to make its judge-empowering approach seem respectful of congressional authority, the Court asserts that its decision merely ensures that the Affordable Care Act operates the way Congress "meant [it] to operate." *Ante,* at 2494. First of all, what makes the Court so sure that Congress "meant" tax credits to be available everywhere? Our only evidence of what Congress meant comes from the terms of the law, and those terms show beyond all question that tax credits are available only on state Exchanges. More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, not by the unenacted will of our lawmakers. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie, supra,* at 542, 124 S.Ct. 1023. In the meantime, this Court "has no roving license ... to disregard clear language simply on the view that ... Congress 'must have intended' something broader." *Bay Mills,* 572 U.S., at ——, 134 S.Ct., at 2034.

*2506 Even less defensible, if possible, is the Court's claim that its interpretive approach is justified because this Act "does not reflect the type of care and deliberation that one might expect of such significant legislation." *Ante,* at 2492 – 2493. It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate. Much less is it our place to make everything come out right when Congress does not do its job properly. It is up to Congress to design its laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility.

Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges. If Congress values above everything else the Act's applicability across the country, it could make tax credits available in every Exchange. If it prizes state involvement in the Act's implementation, it could continue to limit tax credits to state Exchanges while taking other steps to mitigate the economic consequences predicted by the Court. If Congress wants to accommodate both goals, it could make tax credits available everywhere while offering new incentives for States to set up their own Exchanges. And if Congress thinks that the present design of the Act works well enough, it could do nothing. Congress could also do something else altogether, entirely abandoning the structure of the Affordable Care Act. The Court's insistence on making a choice that should be made by Congress both aggrandizes judicial power and encourages congressional lassitude.

Just ponder the significance of the Court's decision to take matters into its own hands. The Court's revision of the law authorizes the Internal Revenue Service to spend tens of billions of dollars every year in tax credits on federal Exchanges. It affects the price of insurance for millions of Americans. It diminishes the participation of the States in the implementation of the Act. It vastly expands the reach of the Act's individual mandate, whose scope depends in part on the availability of credits. What a parody today's decision makes of Hamilton's assurances to the people of New York: "The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over ... the purse; no direction ... of the wealth of society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961).

* * *

Today's opinion changes the usual rules of statutory interpretation for the sake of the Affordable Care Act. That, alas, is not a novelty. In *National Federation of Independent Business v. Sebelius*, 567 U.S. ——, 132 S.Ct. 2566, 183 L.Ed.2d 450 this Court revised major

components of the statute in order to save them from unconstitutionality. The Act that Congress passed provides that every individual "shall" maintain insurance or else pay a "penalty." 26 U.S.C. § 5000A. This Court, however, saw that the Commerce Clause does not authorize a federal mandate to buy health insurance. So it rewrote the mandate-cum-penalty as a tax. 567 U.S., at ——— – ———, 132 S.Ct., at 2583–2601 (principal opinion). The Act that Congress passed also requires every State to accept an expansion of its Medicaid program, or else risk losing *all* Medicaid *2507 funding. 42 U.S.C. § 1396c. This Court, however, saw that the Spending Clause does not authorize this coercive condition. So it rewrote the law to withhold only the *incremental* funds associated with the Medicaid expansion. 567 U.S., at ——— – ———, 132 S.Ct., at 2601–2608 (principal opinion). Having transformed two major parts of the law, the Court today has turned its attention to a third. The Act that Congress passed makes tax credits available only on an "Exchange established by the State." This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.

Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft–Hartley Act; perhaps not. But this Court's two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed ("penalty" means tax, "further [Medicaid] payments to the State" means only incremental Medicaid payments to the State, "established by the State" means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.

I dissent.

Supreme Court of the United States.

Justin Rashaad BROWN, Petitioner
v.
UNITED STATES

Eugene Jackson, Petitioner
v.
United States
|
Decided May 23, 2024

[These cases concern the application of the Armed Career Criminal Act to state drug convictions that occurred before recent technical amendments to the federal drug schedules. ACCA imposes a 15-year mandatory minimum sentence on defendants who are convicted for the illegal possession of a firearm and who have a criminal history thought to demonstrate a propensity for violence. As relevant here, a defendant with "three previous convictions" for "a serious drug offense" qualifies for ACCA's enhanced sentencing. 18 U.S.C. § 924(e)(1). For a state crime to qualify as a "serious drug offense," it must carry a maximum sentence of at least 10 years' imprisonment, and it must "involv[e] ... a controlled substance ... as defined in section 102 of the Controlled Substances Act." §§ 924(e)(1), (2)(A)(ii).

[Under the categorical approach, a state drug offense counts as an ACCA predicate only if the State's definition of the drug in question "matche[s]" the definition under federal law. *Shular v. United States*, 589 U.S. 154, 158, 140 S.Ct. 779, 206 L.Ed.2d 81. The question presented is whether a state crime constitutes a "serious drug offense" if it involved a drug that was on the federal schedules when the defendant possessed or trafficked in it but was later removed.

[Petitioners Justin Rashaad Brown and Eugene Jackson were separately convicted of the federal crime of possession of a firearm by a convicted felon in violation of § 922(g)(1). In both cases, an ACCA enhancement was recommended based on prior state felony drug convictions. And both defendants argued that their prior convictions did not qualify as "serious drug offense[s]."

[Among many other arguments in the case, all of which were rejected by the Court, Brown suggested that present-tense language in ACCA's definition of a "serious drug crime"—language such as "involving" and "as defined in"—indicates a present-day focus requiring courts to look to the drug schedules in effect at the time of federal sentencing.]

Justice ALITO delivered the opinion of the Court.

. . . . We turn next to Brown's interpretation, which would require the state and federal definitions to match when the defendant is sentenced for a federal firearm offense. Brown first argues that his interpretation is grounded in ACCA's text because it focuses on the "here-and-now import" of "historical facts." Brief for Petitioner Brown 8. Specifically, Brown notes that ACCA uses the "*present* participle of 'involve,' " rather than "the past participle." Reply Brief for Petitioner Brown 2–3. And he suggests that the phrase " 'as defined in' " is likewise in the present tense. *Id.*, at 3.

Unfortunately for Brown, we have already rejected this textual argument.[6] The petitioner in *McNeill* likewise argued that the present-tense language in ACCA's definition of a "serious drug offense" indicated a present-day focus. 563 U.S. at 820, 131 S.Ct. 2218. Citing that language, he asked the Court to require federal courts to "loo[k] to the state law in effect at the time of the federal sentencing," *ibid.*, but we declined *120 to do so. Because "ACCA is concerned with convictions that have already occurred," we held that it requires a historical inquiry into the state law at the **1209 time of that prior offense. *Ibid.* And the "[u]se of the present tense ... d[id] not suggest otherwise." *Ibid.*

6 The dissent makes a similar textual argument but does not grapple with our reasoning in *McNeill v. United States*, 563 U.S. 816, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011). See *post*, at 1213, and n. 2.

McNeill's conclusion makes sense. Use of the present tense, as opposed to the past, was likely a stylistic rather than a substantive choice. Around the time of ACCA's enactment, legislative drafters were instructed, "[w]henever possible," to "use the present tense (rather than the past or future)." House Office of the Legislative Counsel, Style Manual; Drafting Suggestions for the Trained Drafter § 102(c), p. 2 (1989); see also D. Hirsch, Drafting Federal Law § 5.6, p. 45 (2d ed. 1989) ("Various commentators on drafting have tried, over the years, to persuade drafters to use the present tense ... "). So, at least in the instant context, we cannot place too much weight on the use of the present tense as opposed to the past. . . .

Justice JACKSON, with whom Justice KAGAN joins, and with whom Justice GORSUCH joins as to Parts I, II, and III, dissenting.

The Court maintains that, "[s]tanding alone," the text of 18 U.S.C. § 924(e)(2)(A)(ii) "does not definitively answer" the question presented in these cases. *Ante,* at 1203 – 1204. Instead, says the majority, we must look beyond the text to precedent, statutory context, and purpose—which apparently converge to persuade the majority that § 924(e)(2)(A)(ii) requires sentencing courts to apply the drug schedules in effect at the time of a defendant's prior state drug conviction when determining the applicability of the 15-year mandatory minimum in the Armed Career Criminal Act (ACCA). But the relevant text *does* definitively answer the question presented here. And it establishes that courts should apply the drug schedules in effect at the time of the federal firearms offense that triggers ACCA's potential application. Nothing else—not precedent, context, or purpose—requires a different result. Therefore, I respectfully dissent.

I

. . . . The fact that ACCA's "serious drug offense" definition uses the present tense, as the majority concedes, see *ante,* at 1208 – 1209, further bolsters the conclusion that Congress was consciously incorporating the annual updates that the federal drug schedules embody. As we have previously recognized, "the present tense generally does not include the past." *Carr v. United States*, 560 U.S. 438, 448, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010). If Congress had wanted to reference a past version of the drug schedules, it easily could have indicated as much in the text of ACCA. But Congress used the present tense instead, directing sentencing courts to look to the meaning of "controlled substance" in effect when a defendant commits the federal crime requiring ACCA's application, not at some previous point in time.[2] . . . .

2 The majority attributes ACCA's use of the present tense to a mere "stylistic" choice by Congress, relying primarily on a contemporaneous legislative drafting manual as support for that conclusion. *Ante*, at 1208 – 1209. But the wholly speculative suggestion that ACCA's drafters actually relied on the cited manual's tense-related directives conveniently comes out of nowhere. Moreover, to the extent the majority now believes that verb tense is irrelevant when a court undertakes to interpret the text of a statute, it has taken a strange and unwarranted departure from this Court's ordinary interpretive practices. Before today, we have consistently used all aspects of a statute's text to ascertain its meaning, including the verbs that Congress chooses. See, *e.g.*, *Barton v. Barr*, 590 U.S. 222, 236, 140 S.Ct. 1442, 206 L.Ed.2d 682 (2020); *Carr v. United States*, 560 U.S. 438, 448, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010); *United States v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). An objection to this approach has surfaced only once before, in dissent. See *Carr*, 560 U.S. at 462–464, 130 S.Ct. 2229 (opinion of ALITO, J.) (relying on legislative drafting manuals to suggest that the tense of the verbs in a statute was not relevant to the provision's interpretation).

Supreme Court of the United States

Avondale LOCKHART, Petitioner
v.
UNITED STATES.

|
Argued Nov. 3, 2015.
|
Decided March 1, 2016.

Justice SOTOMAYOR delivered the opinion of the Court.

. . . .

I

In April 2000, Avondale Lockhart was convicted of sexual abuse in the first degree under N.Y. Penal Law Ann. § 130.65(1) (West Cum. Supp. 2015). The *962 crime involved his then–53–year–old girlfriend. Presentence Investigation Report (PSR), in No. 11–CR–231–01, p. 13, ¶¶ 47–48. Eleven years later, Lockhart was indicted in the Eastern District of New York for attempting to receive child pornography in violation of 18 U.S.C. § 2252(a)(2) and for possessing child pornography in violation of § 2252(a)(4)(b). Lockhart pleaded guilty to the possession offense and the Government dismissed the receipt offense.

Lockhart's presentence report calculated a guidelines range of 78 to 97 months for the possession offense. But the report also concluded that Lockhart was subject to § 2252(b)(2)'s mandatory minimum because his prior New York abuse conviction related "to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." PSR ¶¶ 87–88.

Lockhart objected, arguing that the statutory phrase "involving a minor or ward" applies to all three listed crimes: "aggravated sexual abuse," "sexual abuse," *and* "abusive sexual conduct." He therefore contended that his prior conviction for sexual abuse involving an *adult* fell outside the enhancement's ambit. The District Court rejected Lockhart's argument and applied the mandatory minimum. The Second Circuit affirmed his sentence. 749 F.3d 148 (C.A.2 2014).

II

Section 2252(b)(2) reads in full:

> "Whoever violates, or attempts or conspires to violate [18 U.S.C. § 2252(a)(4)] shall be fined under this title or imprisoned not more than 10 years, or both, but ... if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years."

This case concerns that provision's list of state sexual-abuse offenses. The issue before us is whether the limiting phrase that appears at the end of that list—"involving a minor or ward"—applies to all three predicate crimes preceding it in the list or only the final predicate crime. We hold that "involving a minor or ward" modifies only "abusive sexual conduct," the antecedent immediately preceding it. Although § 2252(b)(2)'s list of state predicates is awkwardly phrased (to put it charitably), the

provision's text and context together reveal a straightforward reading. A timeworn textual canon is confirmed by the structure and internal logic of the statutory scheme.

A

Consider the text. When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the "rule of the last antecedent." See *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003). The rule provides that "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Ibid.*; see also Black's Law Dictionary 1532–1533 (10th ed. 2014) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire *963 writing"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 144 (2012).

This Court has applied the rule from our earliest decisions to our more recent. See, *e.g.*, *Sims Lessee v. Irvine*, 3 Dall. 425, 444, n., 1 L.Ed. 665 (1799); *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389, n. 4, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); *Barnhart*, 540 U.S., at 26, 124 S.Ct. 376. The rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it. That is particularly true where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all. For example, imagine you are the general manager of the Yankees and you are rounding out your 2016 roster. You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year's World Champion Kansas City Royals. It would be natural for your scouts to confine their search for a pitcher to last year's championship team, but to look more broadly for catchers and shortstops.

Applied here, the last antecedent principle suggests that the phrase "involving a minor or ward" modifies only the phrase that it immediately follows: "abusive sexual conduct." As a corollary, it also suggests that the phrases "aggravated sexual abuse" and "sexual abuse" are not so constrained.

Of course, as with any canon of statutory interpretation, the rule of the last antecedent "is not an absolute and can assuredly be overcome by other indicia of meaning." *Barnhart*, 540 U.S., at 26, 124 S.Ct. 376; see also *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). For instance, take " 'the laws, the treaties, and the constitution of the United States.' " *Post,* at 964, n. 1 (KAGAN, J., dissenting). A reader intuitively applies "of the United States" to "the laws," "the treaties" and "the constitution" because (among other things) laws, treaties, and the constitution are often cited together, because readers are used to seeing "of the United States" modify each of them, and because the listed items are simple and parallel without unexpected internal modifiers or structure. Section 2252(b)(2), by contrast, does not contain items that readers are used to seeing listed together or a concluding modifier that readers are accustomed to applying to each of them. And the varied syntax of each item in the list makes it hard for the reader to carry the final modifying clause across all three.

More importantly, here the interpretation urged by the rule of the last antecedent is not overcome by other indicia of meaning. To the contrary, § 2252(b)(2)'s context fortifies the meaning that principle commands.

B

Our inquiry into § 2252(b)(2)'s context begins with the internal logic of that provision. Section 2252(b)(2) establishes sentencing minimums and maximums for three

categories of offenders. The first third of the section imposes a 10–year maximum sentence on offenders with no prior convictions. The second third imposes a 10–year minimum and 20–year maximum on offenders who have previously violated a federal offense listed within various chapters of the Federal Criminal Code. And the last third imposes the same minimum and maximum on offenders who have previously committed state "sexual *964 abuse, aggravated sexual abuse, or abusive sexual conduct involving a minor or ward" as well as a number of state crimes related to the possession and distribution of child pornography.

Among the chapters of the Federal Criminal Code that can trigger § 2252(b)(2)'s recidivist enhancement are crimes "under ... chapter 109A." Chapter 109A criminalizes a range of sexual-abuse offenses involving adults *or* minors and wards.[1] And it places those federal sexual-abuse crimes under headings that use language nearly identical to the language § 2252(b)(2) uses to enumerate the three categories of state sexual-abuse predicates. The first section in Chapter 109A is titled "Aggravated sexual abuse." 18 U.S.C. § 2241. The second is titled "Sexual abuse." § 2242. And the third is titled "Sexual abuse of a minor or ward." § 2243. Applying the rule of the last antecedent, those sections mirror precisely the order, precisely the divisions, and nearly precisely the words used to describe the three state sexual-abuse predicate crimes in § 2252(b)(2): "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct involving a minor or ward."

1 For example, § 2241(a) of Chapter 109A prohibits forced sexual acts against "another person"—not just a person under a certain age. Section 2241(c) specially criminalizes sexual acts "with another person who has not attained the age of 12 years," and § 2243(b) does the same for sexual acts with wards who are "in official detention" or "under the custodial, supervisory, or disciplinary authority of the person so engaging."

This similarity appears to be more than a coincidence. We cannot state with certainty that Congress used Chapter 109A as a template for the list of state predicates set out in § 2252(b)(2), but we cannot ignore the parallel, particularly because the headings in Chapter 109A were in place when Congress amended the statute to add § 2252(b)(2)'s state sexual-abuse predicates.[2]

2 See 18 U.S.C. § 2241 (1994 ed.) ("Aggravated sexual abuse"); § 2242 ("Sexual abuse"); § 2243 ("Sexual abuse of a minor or ward").

If Congress had intended to limit each of the state predicates to conduct "involving a minor or ward," we doubt it would have followed, or thought it needed to follow, so closely the structure and language of Chapter 109A.[3] The conclusion that Congress followed the federal template is supported by the fact that Congress did nothing to indicate that offenders with prior federal sexual-abuse convictions are more culpable, harmful, or worthy of enhanced punishment than offenders with nearly identical state priors. We therefore see no reason to interpret § 2252(b)(2) so that "[s]exual abuse" that occurs in the Second Circuit courthouse triggers the sentence enhancement, but "sexual abuse" that occurs next door in the Manhattan municipal building does not.

3 The dissent points out that § 2252(b)(2) (2012 ed.) did not also borrow from the heading of the fourth section in Chapter 109A (or, we note, from the fifth, sixth, seventh, or eighth sections) in defining its categories of state sexual-abuse predicates. *Post*, at 968 – 969 (KAGAN, J. dissenting). But the significance of the similarity between the three state predicates in § 2252(b)(2) and the wording, structure, and order of the first three sections of Chapter 109A is not diminished by the fact that Congress stopped there (especially when the remaining sections largely set out derivations from, definitions of, and penalties for the first three). See, *e.g.*, § 2244 (listing offenses derived from §§ 2241, 2242, and 2243); § 2245 (creating an enhancement for offenses under Chapter 109A resulting in death); § 2246 (listing definitions).

III

A

Lockhart argues, to the contrary, that the phrase "involving a minor or ward" *965 should be interpreted to modify all three state sexual-abuse predicates. He first contends, as does our dissenting colleague, that the so-called series-qualifier principle supports his reading. This principle, Lockhart says, requires a modifier to apply to all items in a series when such an

application would represent a natural construction. Brief for Petitioner 12; *post,* at 970.

This Court has long acknowledged that structural or contextual evidence may "rebut the last antecedent inference." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 344, n. 4, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005). For instance, in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944 (1920), on which Lockhart relies, this Court declined to apply the rule of the last antecedent where "[n]o reason appears why" a modifying clause is not "applicable as much to the first and other words as to the last" and where "special reasons exist for so construing the clause in question." *Id.*, at 348, 40 S.Ct. 516. In *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), this Court declined to apply the rule of the last antecedent where "there is no reason consistent with any discernable purpose of the statute to apply" the limiting phrase to the last antecedent alone. *Id.*, at 341, 92 S.Ct. 515. Likewise, in *Jama,* the Court suggested that the rule would not be appropriate where the "modifying clause appear[s] ... at the end of a single, integrated list." 543 U.S., at 344, n. 4, 125 S.Ct. 694. And, most recently, in *Paroline v. United States*, 572 U.S. ——, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014), the Court noted that the rule need not be applied "in a mechanical way where it would require accepting 'unlikely premises.' " *Id.*, at ——, 134 S.Ct., at 1721.

But in none of those cases did the Court describe, much less apply, a countervailing grammatical mandate that could bear the weight that either Lockhart or the dissent places on the series qualifier principle. Instead, the Court simply observed that sometimes context weighs against the application of the rule of the last antecedent. *Barnhart*, 540 U.S., at 26, 124 S.Ct. 376. Whether a modifier is "applicable as much to the first ... as to the last" words in a list, whether a set of items form a "single, integrated list," and whether the application of the rule would require acceptance of an "unlikely premise" are fundamentally contextual questions.

Lockhart attempts to identify contextual indicia that he says rebut the rule of the last antecedent, but those indicia hurt rather than help his prospects. He points out that the final two state predicates, "sexual abuse" and "abusive sexual conduct," are "nearly synonymous as a matter of everyday speech." Brief for Petitioner 17. And, of course, anyone who commits "aggravated sexual abuse" has also necessarily committed "sexual abuse." So, he posits, the items in the list are sufficiently similar that a limiting phrase could apply equally to all three of them.

But Lockhart's effort to demonstrate some similarity among the items in the list of state predicates reveals far too much similarity. The three state predicate crimes are not just related on Lockhart's reading; they are hopelessly redundant. Any conduct that would qualify as "aggravated sexual abuse ... involving a minor or ward" or "sexual abuse ... involving a minor or ward" would also qualify as "abusive sexual conduct involving a minor or ward." We take no position today on the meaning of the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct," including their similarities and differences. But it is clear that applying *966 the limiting phrase to all three items would risk running headlong into the rule against superfluity by transforming a list of separate predicates into a set of synonyms describing the same predicate. See *Bailey v. United States*, 516 U.S. 137, 146, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning").

Applying the limiting phrase "involving a minor or ward" more sparingly, by contrast, preserves some distinction between the categories of state predicates by limiting only the third category to conduct "involving a minor or ward." We recognize that this interpretation does not eliminate all superfluity between "aggravated sexual abuse" and "sexual abuse." See *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007) ("[O]ur hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage"). But there is a ready explanation for the redundancy that remains: It follows the categories in Chapter 109A's federal template. See *supra,* at 964. We see no similar explanation for Lockhart's complete collapse of the list.

The dissent offers a suggestion rooted in its impressions about how people ordinarily speak and write. *Post,* at 969 – 971. The problem is that, as even the dissent acknowledges, § 2252(b)(2)'s list of state predicates is hardly intuitive. No one would mistake its odd repetition and inelegant phrasing for a reflection of the accumulated wisdom of everyday speech patterns. It would be as if a friend asked you to get her tart lemons, sour lemons, or sour fruit from Mexico. If you brought back lemons from California, but your friend insisted that she was using customary speech and obviously asked for Mexican fruit only, you would be forgiven for disagreeing on both counts.

Faced with § 2252(b)(2)'s inartful drafting, then, do we interpret the provision by viewing it as a clear, commonsense list best construed as if conversational English? Or do we look around to see if there might be some provenance to its peculiarity? With Chapter 109A so readily at hand, we are unpersuaded by our dissenting colleague's invocation of basic examples from day-to-day life. Whatever the validity of the dissent's broader point, this simply is not a case in which colloquial practice is of much use. Section 2252(b)(2)'s list is hardly the way an average person, or even an average lawyer, would set about to describe the relevant conduct if they had started from scratch.

B

Lockhart next takes aim at our construction of § 2252(b)(2) to avoid disparity between the state and federal sexual-abuse predicates. He contends that other disparities between state and federal predicates in § 2252(b)(2) indicate that parity was not Congress' concern. For example, § 2252(b)(2) imposes the recidivist enhancement on offenders with prior federal convictions under Chapter 71 of Title 18, which governs obscenity. See §§ 1461–1470. Yet § 2252(b)(2) does not impose a similar enhancement for offenses under state obscenity laws. Similarly, § 2252(b)(2)'s neighbor provision, § 2252(b)(1), creates a mandatory minimum for sex trafficking involving children, but not sex trafficking involving adults.

However, our construction of § 2252(b)(2)'s sexual-abuse predicates does not rely on a general assumption that Congress sought full parity between all of the federal and state predicates in § 2252(b)(2). It relies instead on contextual *967 cues particular to the sexual-abuse predicates. To enumerate the state sexual-abuse predicates, Congress used language similar to that in Chapter 109A of the Federal Criminal Code, which describes crimes involving both adults and children. See *supra,* at 964. We therefore assume that the same language used to describe the state sexual-abuse predicates also describes conduct involving both adults and children.

C

Lockhart, joined by the dissent, see *post,* at 973 – 974, next says that the provision's legislative history supports the view that Congress deliberately structured § 2252(b)(2) to treat state and federal predicates differently. They rely on two sources. The first is a reference in a Report from the Senate Judiciary Committee on the Child Pornography Prevention Act of 1996, 110 Stat. 3009–26. That Act was the first to add the language at issue here—"aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—to the U.S. Code. (It was initially added to § 2252(b)(1), then added two years later to § 2252(b)(2)).

The Report noted that the enhancement applies to persons with prior convictions "under any State child abuse law or law relating to the production, receipt or distribution of child pornography." See S.Rep. No. 104–358, p. 9 (1996). But that reference incompletely describes the state pornography production and distribution predicates, which cover not only "production, receipt, or distributing of child pornography," as the Report indicates, but also "production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography," § 2252(b)(2). For the reasons discussed, we have no trouble concluding that the Report also incompletely describes the state sexual-abuse predicates.

Lockhart and the dissent also rely on a letter sent from the Department of Justice (DOJ) to the House of Representative's Committee on the Judiciary commenting on the proposed

"Child Protection and Sexual Predator Punishment Act of 1998." H.R.Rep. No. 105–557, pp. 26–34 (1998). In the letter, DOJ provides commentary on the then-present state of §§ 2252(b)(1) and 2252(b)(2), noting that although there is a "5–year mandatory minimum sentence for individuals charged with receipt or distribution of child pornography and who have prior state convictions for child molestation" pursuant to § 2252(b)(1), there is "no enhanced provision for those individuals charged with possession of child pornography who have prior convictions for child abuse" pursuant to § 2252(b)(2). *Id.,* at 31. That letter, they say, demonstrates that DOJ understood the language at issue here to impose a sentencing enhancement only for prior state convictions involving children.

We doubt that DOJ was trying to describe the full reach of the language in § 2252(b)(1), as the dissent suggests. To the contrary, there are several clues that the letter was relaying on just one of the provision's many salient features. For instance, the letter's references to "child molestation" and "child abuse" do not encompass a large number of state crimes that are unambiguously covered by "abusive sexual conduct involving a minor or ward"—namely, crimes involving "wards." Wards can be minors, but they can also be adults. See, *e.g.,* § 2243(b) (defining "wards" as persons who are "in official detention" and "under ... custodial, supervisory, or disciplinary authority"). Moreover, we doubt that DOJ intended to express a belief that the potentially broad scope of serious crimes encompassed by *968 "aggravated sexual abuse, sexual abuse, and abusive sexual conduct" reaches no further than state crimes that would traditionally be characterized as "child molestation" or "child abuse."

Thus, Congress' amendment to the provision did give "DOJ just what it wanted," *post,* at 973. But the amendment also did more than that. We therefore think it unnecessary to restrict our interpretation of the provision to the parts of it that DOJ chose to highlight in its letter. Just as importantly, the terse descriptions of the provision in the Senate Report and DOJ letter do nothing to explain *why* Congress would have wanted to apply the mandatory minimum to individuals convicted in federal court of sexual abuse or aggravated sexual abuse involving an adult, but not to individuals convicted in state court of the same. The legislative history, in short, "hardly speaks with [a] clarity of purpose" through which we can discern Congress' statutory objective. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 483, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

The best explanation Lockhart can muster is a basic administrability concern: Congress "knew what conduct it was capturing under federal law and could be confident that all covered federal offenses were proper predicates. But Congress did not have the same familiarity with the varied and mutable sexual-abuse laws of all fifty states." Brief for Petitioner 27. Perhaps Congress worried that state laws punishing relatively minor offenses like public lewdness or indecent exposure involving an adult would be swept into § 2252(b)(2). *Id.,* at 28. But the risk Lockhart identifies is minimal. Whether the terms in § 2252(b)(2) are given their "generic" meaning, see *Descamps v. United States*, 570 U.S. ——, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013); *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), or are defined in light of their federal counterparts—which we do not decide—they are unlikely to sweep in the bizarre or unexpected state offenses that worry Lockhart.

D

Finally, Lockhart asks us to apply the rule of lenity. We have used the lenity principle to resolve ambiguity in favor of the defendant only "at the end of the process of construing what Congress has expressed" when the ordinary canons of statutory construction have revealed no satisfactory construction. *Callanan v. United States*, 364 U.S. 587, 596, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961). That is not the case here. To be sure, Lockhart contends that if we applied a different principle of statutory construction—namely, his "series-qualifier principle"—we would arrive at an alternative construction of § 2252(b)(2). But the arguable availability of multiple, divergent principles of statutory construction cannot automatically trigger the rule of lenity. Cf. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395, 401 (1950) ("[T]here are two opposing canons on almost every point"). Here, the rule of the last antecedent is well supported by context and Lockhart's alternative is not. We will not apply the rule of lenity to override a sensible grammatical principle buttressed by the statute's text

and structure.

* * *

We conclude that the text and structure of § 2252(b)(2) confirm that the provision applies to prior state convictions for "sexual abuse" and "aggravated sexual abuse," whether or not the convictions involved a minor or ward. We therefore hold that Lockhart's prior conviction for sexual abuse of an adult is encompassed by *969 § 2252(b)(2). The judgment of the Court of Appeals, accordingly, is affirmed.

So ordered.

Justice KAGAN, with whom Justice BREYER joins, dissenting.

Imagine a friend told you that she hoped to meet "an actor, director, or producer involved with the new Star Wars movie." You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest Zoolander. Suppose a real estate agent promised to find a client "a house, condo, or apartment in New York." Wouldn't the potential buyer be annoyed if the agent sent him information about condos in Maryland or California? And consider a law imposing a penalty for the "violation of any statute, rule, or regulation relating to insider trading." Surely a person would have cause to protest if punished under that provision for violating a traffic statute. The reason in all three cases is the same: Everyone understands that the modifying phrase—"involved with the new Star Wars movie," "in New York," "relating to insider trading"—applies to each term in the preceding list, not just the last.

That ordinary understanding of how English works, in speech and writing alike, should decide this case. Avondale Lockhart is subject to a 10–year mandatory minimum sentence for possessing child pornography if, but only if, he has a prior state-law conviction for "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2). The Court today, relying on what is called the "rule of the last antecedent," reads the phrase "involving a minor or ward" as modifying only the final term in that three-item list. But properly read, the modifier applies to each of the terms—just as in the examples above. That normal construction finds support in uncommonly clear-cut legislative history, which states in so many words that the three predicate crimes all involve abuse of children. And if any doubt remained, the rule of lenity would command the same result: Lockhart's prior conviction for sexual abuse *of an adult* does not trigger § 2252(b)(2)'s mandatory minimum penalty. I respectfully dissent.

I

Begin where the majority does—with the rule of the last antecedent. See *ante,* at 962. This Court most fully discussed that principle in *Barnhart v. Thomas*, 540 U.S. 20, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003), which considered a statute providing that an individual qualifies as disabled if "he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work *which exists in the national economy*." *Id.*, at 21–22, 124 S.Ct. 376 (quoting 42 U.S.C. § 423(d)(2)(A)) (emphasis added). The Court held, invoking the last-antecedent rule, that the italicized phrase modifies only the term "substantial gainful work," and not the term "previous work" occurring earlier in the sentence. Two points are of especial note. First, *Barnhart* contained a significant caveat: The last-antecedent rule "can assuredly be overcome by other indicia of meaning." 540 U.S., at 26, 124 S.Ct. 376; see, *e.g., Nobelman v. American Savings Bank*, 508 U.S. 324, 330–331, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993) (refusing to apply the rule when a contrary interpretation was "the more reasonable one"). Second, the grammatical structure of the provision in *Barnhart* is nothing like that of the statute in this case: The modifying phrase does not, as here, immediately follow a list of multiple, parallel terms. That is true as well in the other *970 instances in which this Court has followed the rule. See, *e.g., Jama v. Immigration and Customs Enforcement,* 543 U.S. 335, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005); *Batchelor v. United States*, 156 U.S. 426, 15 S.Ct. 446, 39 L.Ed. 478 (1895); *Sims Lessee v.*

Irvine, 3 Dall. 425, 1 L.Ed. 665 (1799).

Indeed, this Court has made clear that the last-antecedent rule does not generally apply to the grammatical construction present here: when "[t]he modifying clause appear[s] ... at the end of a single, integrated list." *Jama*, 543 U.S., at 344, n. 4, 125 S.Ct. 694. Then, the exact opposite is usually true: As in the examples beginning this opinion, the modifying phrase refers alike to each of the list's terms. A leading treatise puts the point as follows: "When there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier at the end of the list "normally applies to the entire series." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012); compare *id.,* at 152 ("When the syntax involves something other than [such] a parallel series of nouns or verbs," the modifier "normally applies only to the nearest reasonable referent"). That interpretive practice of applying the modifier to the whole list boasts a fancy name—the "series-qualifier canon," see Black's Law Dictionary 1574 (10th ed. 2014)—but, as my opening examples show, it reflects the completely ordinary way that people speak and listen, write and read.[1]

1 The majority's baseball example, see *ante,* at 963, reads the other way only because its three terms are *not* parallel. The words "catcher" and "shortstop," but not "pitcher," are qualified separate and apart from the modifying clause at the end of the sentence: "Pitcher" thus calls for a modifier of its own, and the phrase "from the Kansas City Royals" answers that call. Imagine the sentence is slightly reworded to refer to a "defensive catcher, quick-footed shortstop, or hard-throwing pitcher from the Kansas City Royals." Or, alternatively, suppose the sentence referred simply to a "catcher, shortstop, or pitcher from the Kansas City Royals." Either way, all three players must come from the Royals—because the three terms (unlike in the majority's sentence) are a parallel series with a modifying clause at the end.

Even the exception to the series-qualifier principle is intuitive, emphasizing both its common-sensical basis and its customary usage. When the nouns in a list are so disparate that the modifying clause does not make sense when applied to them all, then the last-antecedent rule takes over. Suppose your friend told you not that she wants to meet "an actor, director, or producer involved with Star Wars," but instead that she hopes someday to meet "a President, Supreme Court Justice, or actor involved with Star Wars." Presumably, you would know that she wants to meet a President or Justice even if that person has no connection to the famed film franchise. But so long as the modifying clause "is applicable as much to the first and other words as to the last," this Court has stated, "the natural construction of the language demands that the clause be read as applicable to all." *Paroline v. United States*, 572 U.S. ——, ——, 134 S.Ct. 1710, 1721, 188 L.Ed.2d 714 (2014) (quoting *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920)). In other words, the modifier then qualifies not just the last antecedent but the whole series.

As the majority itself must acknowledge, see *ante,* at 964 – 965, this Court has repeatedly applied the series-qualifier rule in just that manner. In *Paroline,* for example, this Court considered a statute requiring possessors of child pornography to pay restitution to the individuals whose abuse is recorded in those materials. The law defines such a victim's losses to include *971 "medical services relating to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; attorneys' fees, as well as other costs incurred; and any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. §§ 2259(b)(3)(A)-(F) (lettering omitted). The victim bringing the lawsuit invoked the last-antecedent rule to argue that the modifier at the end of the provision—"as a proximate result of the offense"—pertained only to the last item in the preceding list, and not to any of the others. See 572 U.S., at ——, 134 S.Ct., at 1721. But the Court rejected that view: It recited the "canon[ ] of statutory construction," derived from the "natural" use of language, that "[w]hen several words are followed by a clause" that can sensibly modify them all, it should be understood to do so. *Ibid.* Thus, the Court read the proximate-cause requirement to cover each and every term in the list.

United States v. Bass, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), to take just one other example, followed the same rule. There, the Court confronted a statute making it a crime for a convicted felon to "receive [ ], possess[ ], or transport[ ] in commerce or affecting commerce ... any firearm." 18 U.S.C.App. § 1202(a) (1970 ed.) (current version at 18 U.S.C. § 922(g)). The Government contended that the modifying clause—"in commerce or affecting

commerce"—applied only to "transport" and not to "receive" or "possess." But the Court rebuffed that argument. "[T]he natural construction of the language," the Court recognized, "suggests that the clause 'in commerce or affecting commerce' qualifies all three antecedents in the list." 404 U.S., at 339, 92 S.Ct. 515 (some internal quotation marks omitted). Relying on longstanding precedents endorsing such a construction, the Court explained: "Since 'in commerce or affecting commerce' undeniably applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three." *Id.*, at 339–340, 92 S.Ct. 515 (citing *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 218, 40 S.Ct. 139, 64 L.Ed. 229 (1920); *Porto Rico Railway*, 253 U.S., at 348, 40 S.Ct. 516); see also, *e.g.*, *Jones v. United States*, 529 U.S. 848, 853, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000) (similarly treating the interstate commerce element in the phrase "any building, vehicle, or other real or personal property used in interstate or foreign commerce" as applying to buildings and vehicles).

That analysis holds equally for § 2252(b)(2), the sentencing provision at issue here. The relevant language—"aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—contains a "single, integrated list" of parallel terms (*i.e.,* sex crimes) followed by a modifying clause. *Jama*, 543 U.S., at 344, n. 4, 125 S.Ct. 694. Given the close relation among the terms in the series, the modifier makes sense "as much to the first and other words as to the last." *Paroline*, 572 U.S., at ——, 134 S.Ct., at 1721. In other words, the reference to a minor or ward applies as well to sexual abuse and aggravated sexual abuse as to abusive sexual conduct. (The case would be different if, for example, the statute established a mandatory minimum for any person previously convicted of "arson, receipt of stolen property, or abusive sexual conduct involving a minor or ward.") So interpreting the modifier "as applicable to all" the preceding terms is what "the natural construction of the language" requires. *Ibid.*; *Bass*, 404 U.S., at 339, 92 S.Ct. 515.

The majority responds to all this by claiming that the "inelegant phrasing" of *972 § 2252(b)(2) renders it somehow exempt from a grammatical rule reflecting "how people ordinarily" use the English language. *Ante,* at 966. But to begin with, the majority is wrong to suggest that the series-qualifier canon is only about "colloquial" or "conversational" English. *Ibid.* In fact, it applies to both speech and writing, in both their informal and their formal varieties. Here is a way to test my point: Pick up a journal, or a book, or for that matter a Supreme Court opinion—most of which keep "everyday" colloquialisms at a far distance. *Ibid.* You'll come across many sentences having the structure of the statutory provision at issue here: a few nouns followed by a modifying clause. And you'll discover, again and yet again, that the clause modifies every noun in the series, not just the last—in other words, that even (especially?) in formal writing, the series-qualifier principle works.[2] And the majority is wrong too in suggesting that the "odd repetition" in § 2252(b)(2)'s list of state predicates causes the series-qualifier principle to lose its force. *Ibid.* The majority's own made-up sentence proves that much. If a friend asked you "to get her tart lemons, sour lemons, or sour fruit from Mexico," you might well think her list of terms perplexing: You might puzzle over the difference between tart and sour lemons, and wonder why she had specifically mentioned lemons when she apparently would be happy with sour fruit of any kind. But of one thing, you would have no doubt: Your friend wants some produce *from Mexico*; it would not do to get her, say, sour lemons from Vietnam. However weird the way she listed fruits—or the way § 2252(b)(2) lists offenses—the modifying clause still refers to them all.

2 Too busy to carry out this homework assignment? Consider some examples (there are many more) from just the last few months of this Court's work. In *OBB Personenverkehr AG v. Sachs*, 577 U.S. ——, ——, 136 S.Ct. 390, 395, 193 L.Ed.2d 269 (2015), this Court described a lawsuit as alleging "wrongful arrest, imprisonment, and torture *by Saudi police*." In *James v. Boise*, 577 U.S. ——, ——, 136 S.Ct. 685, 686–687, ——L.Ed.2d —— (2016) (*per curiam*) (quoting *Martin v. Hunter's Lessee*, 1 Wheat. 304, 348, 4 L.Ed. 97 (1816)), this Court affirmed that state courts must follow its interpretations of "the laws, the treaties, and the constitution *of the United States*." In *Musacchio v. United States*, 577 U.S. ——, ——, 136 S.Ct. 709, 715, —— L.Ed.2d —— (2016) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010)), this Court noted that in interpreting statutes it looks to the "text, context, and relevant historical treatment *of the provision at issue*." In *FERC v. Electric Power Supply Assn.*, 577 U.S. ——, ——, 136 S.Ct. 760, 774, —— L.Ed.2d —— (2016), this Court applied a statute addressing "any rule, regulation, practice, or contract *affecting [a wholesale] rate [or] charge*." And in *Montanile v. Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 577 U.S. ——, ——, 136 S.Ct. 651, 655, —— L.Ed.2d —— (2016), this Court interpreted an employee benefits plan requiring reimbursement "for attorneys' fees, costs, expenses or damages *claimed by the covered person*." In each case, of course, the italicized modifying clause refers to every item in the preceding list. That is because the series-qualifier rule reflects how all of us use language, in writing and in speech, in formal and informal contexts, all the time.

The majority as well seeks refuge in the idea that applying the series-qualifier canon to § 2252(b)(2) would violate the rule against superfluity. See *ante,* at 965 – 966. Says the majority: "Any conduct that would qualify as 'aggravated sexual abuse ... involving a minor or ward' or 'sexual abuse ... involving a minor or ward' would also qualify as 'abusive sexual conduct involving a minor or ward.' " *Ante,* at 965. But that rejoinder doesn't work. "[T]he canon against superfluity," this Court has often stated, "assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft *973 Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 106, 131 S.Ct. 2238, 180 L.Ed.2d 131 (2011) (internal quotation marks omitted); see, *e.g., Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236, 131 S.Ct. 1068, 179 L.Ed.2d 1 (2011). And the majority's approach (as it admits, see *ante,* at 965) produces superfluity too—and in equal measure. Now (to rearrange the majority's sentence) any conduct that would qualify as "abusive sexual conduct involving a minor or ward" or "aggravated sexual abuse" would also qualify as "sexual abuse." In other words, on the majority's reading as well, two listed crimes become subsets of a third, so that the three could have been written as one. And indeed, the majority's superfluity has an especially odd quality, because it relates to the modifying clause itself: The majority, that is, makes the term "involving a minor or ward" wholly unnecessary. Remember the old adage about the pot and the kettle? That is why the rule against superfluity cannot excuse the majority from reading § 2252(b)(2)'s modifier, as ordinary usage demands, to pertain to all the terms in the preceding series.[3]

3 The majority asserts that it has found, concealed within § 2252(b)(2)'s structure, an "explanation" for its own superfluity, *ante,* at 965, but that claim, as I'll soon show, collapses on further examination. See *infra,* at 975 – 977.

II

Legislative history confirms what the natural construction of language shows: Each of the three predicate offenses at issue here must involve a minor. The list of those crimes appears in two places in § 2252(b)—both in § 2252(b)(1), which contains a sentencing enhancement for those convicted of distributing or receiving child pornography, and in § 2252(b)(2), which includes a similar enhancement for those (like Lockhart) convicted of possessing such material. Descriptions of that list of offenses, made at the time Congress added it to those provisions, belie the majority's position.

The relevant language—again, providing for a mandatory minimum sentence if a person has a prior state-law conviction for "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—first made its appearance in 1996, when Congress inserted it into § 2252(b)(1). See Child Pornography Prevention Act of 1996, § 121(5), 110 Stat. 3009–30, 18 U.S.C. § 2251 note. At that time, the Senate Report on the legislation explained what the new language meant: The mandatory minimum would apply to an "offender with a prior conviction under ... any *State child abuse law*." S.Rep. No. 104–358, p. 9 (1996) (emphasis added). It is hard to imagine saying any more directly that the just-added state sexual-abuse predicates all involve minors, and minors only.[4]

4 And it makes no difference that the Senate Report accompanied § 2252(b)(1)'s, rather than § 2252(b)(2)'s, amendment. No one can possibly think (and the majority therefore does not try to argue) that the disputed language means something different in § 2252(b)(2) than in its neighbor and model, § 2252(b)(1).

Two years later, in urging Congress to include the same predicate offenses in § 2252(b)(2), the Department of Justice (DOJ) itself read the list that way. In a formal bill comment, DOJ noted that proposed legislation on child pornography failed to fix a statutory oddity: Only § 2252(b)(1), and not § 2252(b)(2), then contained the state predicates at issue here. DOJ described that discrepancy as follows: Whereas § 2252(b)(1) provided a penalty enhancement for "individuals charged with receipt or distribution of *974 child pornography *and who have prior state convictions for child molestation,*" the adjacent § 2252(b)(2) contained no such enhancement for those "charged with possession of child pornography *who have prior convictions for child abuse*." H.R.Rep. No. 105–557, p. 31 (1998) (emphasis added). That should change, DOJ wrote: A possessor of child pornography should also be subject to a 2–year mandatory minimum if he had "a *prior conviction for sexual abuse of a minor*." *Ibid.* (emphasis added). DOJ thus made clear that the predicate offenses it recommended adding to § 2252(b)(2)—like those already in § 2252(b)(1)—related not to all sexual abuse but only to sexual abuse of children. And Congress gave DOJ just what it wanted: Soon after receiving the letter, Congress added the language at issue to § 2252(b)(2), resulting in the requested 2–year minimum sentence. See Protection of Children From Sexual Predators Act of 1998, § 202(a)(2), 112 Stat. 2977, 18 U.S.C. § 1 note. So every indication, in 1998 no less than in 1996, was that all the predicate crimes relate to children alone.

The majority's response to this history fails to blunt its force. According to the majority, the reference to "any state child abuse law" in the Senate Report is simply an "incomplete[ ] descri[ption]" of "the state sexual-abuse predicates." *Ante,* at 967. And similarly, the majority ventures, the DOJ letter was merely noting "one of the provision's many salient features." *Ibid.* But suppose that you (like the Senate Report's or DOJ letter's authors) had to paraphrase or condense the statutory language at issue here, and that you (like the majority) thought it captured *all* sexual-abuse crimes. Would you then use the phrase "any state child abuse law" as a descriptor (as the Senate Report did)? And would you refer to the whole list of state predicates as involving "sexual abuse of a minor" (as the DOJ letter did)? Of course not. But you might well use such shorthand if, alternatively, you understood the statutory language (as I do) to cover only sexual offenses against children. And so the authors of the Report and letter did here. Such documents of necessity abridge statutory language; but they do not do so by conveying an utterly false impression of what that language is most centrally about—as by describing a provision that (supposedly) covers all sexual abuse as one that reaches only child molestation.[5]

5 The majority tries to bolster its "incomplete description" claim by highlighting another summary statement in the Senate Report, but that reference merely illustrates my point. In amending § 2252(b)(1) (and later § 2252(b)(2)), Congress added not only the child sexual-abuse predicates at issue here, but also a set of predicate state offenses relating to child pornography. Specifically, Congress provided a mandatory minimum sentence for individuals previously convicted of the "production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." Child Pornography Prevention Act, § 121(5), 110 Stat. 3009–30. The Senate Report described those predicate crimes in an abbreviated fashion as "relating to the production, receipt or distribution of child pornography." S.Rep. No. 104–358, p. 9 (1996). That synopsis doubtless leaves some things out, as any synopsis does; but no reader of the Report would be terribly surprised to see the fuller statutory list. The same cannot be said of the phrase "any state child abuse law" if that in fact refers to laws prohibiting *all* rape, sexual assault, and similar behavior.

The majority makes the identical mistake in asserting that the DOJ letter merely "highlight[s]" one of § 2252(b)(1)'s many features. *Ante,* at 967. To support that claim, the majority notes that the letter omits any discussion of sexual crimes against adult wards, even though the statute covers those offenses on any theory. But that elision is perfectly natural. The number of sex crimes against adult wards pales in comparison to those against children: In discussing the latter, DOJ was focused on the mine-run offense. (For the same reason, this opinion's descriptions of § 2252(b) often skip any reference to wards. See *supra,* at 965, 966; *infra,* at 975. Count that as a writer's choice to avoid extraneous detail.) The majority cannot offer any similar, simple explanation of why DOJ would have repeatedly referred only to sex crimes against children if the statutory language it was explicating—and proposing to add to another provision—also covered sex crimes against all adults.

*975 Further, the majority objects that the Senate Report's (and DOJ letter's) drafters did "nothing to explain *why* " Congress would have limited § 2252(b)'s state sexual-abuse predicates to those involving children when the provision's federal sexual-abuse predicates (as all agree) are not so confined. *Ante,* at 967 (emphasis in original). But Congress is under no obligation to this Court to justify its choices. (Nor is DOJ obliged to explain them to

Congress itself.) Rather, the duty is on this Court to carry out those decisions, regardless of whether it understands all that lay behind them. The Senate Report (and DOJ letter too) says what it says about § 2252(b)'s meaning, confirming in no uncertain terms the most natural reading of the statutory language. Explanation or no, that is more than sufficient.

And the majority (as it concedes) cannot claim that Congress simply must have wanted § 2252(b)(2)'s federal and state predicates to be the same. See *ante,* at 966 ("[O]ur construction of § 2252(b)(2)'s sexual-abuse predicates does not rely on a general assumption that Congress sought full parity between all of the federal and state predicates"). That is because both § 2252(b)(1) and § 2252(b)(2) contain many federal predicates lacking state matches. Under § 2252(b)(1), for example, a person is subject to a mandatory minimum if he previously violated 18 U.S.C. § 1591, which prohibits "[s]ex trafficking of children or [sex trafficking] by force, fraud, or coercion." But if the prior conviction is under state law, only sex trafficking of children will trigger that minimum; trafficking of adults, even if by force, fraud, or coercion, will not. That mismatch—trafficking of both adults and children on the federal side, trafficking of children alone on the state side—precisely parallels my view of the sexual-abuse predicates at issue here. More generally, ten federal obscenity crimes trigger both § 2252(b)(1)'s and § 2252(b)(2)'s enhanced punishments; but equivalent state crimes do not do so. And five federal prostitution offenses prompt mandatory minimums under those provisions; but no such state offenses do. Noting those disparities, the Government concedes: "[W]hen Congress adds state-law offenses to the lists of predicate offenses triggering child-pornography recidivist enhancements, it sometimes adds state offenses corresponding to only a subset of the federal offenses" previously included. Brief for United States 43. Just so. And this Court ought to enforce that choice.

III

As against the most natural construction of § 2252(b)(2)'s language, plus unusually limpid legislative history, the majority relies on a structural argument. See *ante,* at 963 – 965. The federal sexual-abuse predicates in § 2252(b)(2), the majority begins, are described as crimes "under ... Chapter 109A," and that chapter "criminalizes a range of sexual-abuse offenses involving adults *or* minors." *Ante,* at 963 – 964 (emphasis in original). Once again, the majority cannot say that this fact alone resolves the question presented, given the many times (just discussed) that Congress opted to make federal crimes, but not equivalent state crimes, predicates for § 2252(b)(2)'s mandatory minimums. But *976 the majority claims to see more than that here: The headings of the sections in Chapter 109A, it contends, "mirror precisely the order ... and nearly precisely the words used to describe" the state predicate crimes at issue. *Ante,* at 964. The majority "cannot state with certainty," but hazards a guess that Congress thus used Chapter 109A "as a template for the list of state predicates"—or, otherwise said, that Congress "followed" the "structure and language of Chapter 109A" in defining those state-law offenses. *Ibid.*

But § 2252(b)(2)'s state predicates are not nearly as similar to the federal crimes in Chapter 109A as the majority claims. That Chapter includes the following offenses: "Aggravated sexual abuse," § 2241, "Sexual abuse," § 2242, "Sexual abuse of a minor or ward," § 2243, and "Abusive sexual contact," § 2244. The Chapter thus contains *four* crimes—one more than found in § 2252(b)(2)'s list of state offenses. If the drafters of § 2252(b)(2) meant merely to copy Chapter 109A, why would they have left out one of its crimes? The majority has no explanation.[6] And there is more. Suppose Congress, for whatever hard-to-fathom reason, wanted to replicate only Chapter 109A's first three offenses. It would then have used the same language, referring to "the laws of any State relating to aggravated sexual abuse, sexual abuse, or sexual abuse of a minor or ward." (And had Congress used that language, the phrase "of a minor or ward" would clearly have applied only to the third term, to differentiate it from the otherwise identical second.) But contra the majority, see *ante,* at 964, 965 – 966, that is not what § 2252(b)(2)'s drafters did. Rather than repeating the phrase "sexual abuse," they used the phrase "abusive sexual conduct" in the list's last term—which echoes, if anything, the separate crime of "abusive sexual contact" (included in Chapter 109A's *fourth* offense, as well as in other places in the federal code, see, *e.g.,* 10 U.S.C. § 920(d)). The choice of those different words indicates, yet again, that Congress did not mean, as the majority imagines, to duplicate Chapter 109A's set of offenses.

6 In a footnote, the majority intimates that Chapter 109A contains only three crimes—but that reading is unambiguously wrong. Unlike the fifth through eighth sections of that chapter (which the majority invokes to no purpose), the fourth—again, entitled "[a]busive sexual contact"—sets out an independent substantive offense, criminalizing acts not made illegal in the first three sections. §§ 2244(a)-(c); see also 42 U.S.C. § 16911 (separately listing this offense in identifying who must register as a sex offender). The majority, as noted above, gives no reason why Congress would have ignored that fourth crime had it been using Chapter 109A as a template.

Indeed, even the Government has refused to accept the notion that the federal and state sexual-abuse predicates mirror each other. The Government, to be sure, has argued that it would be "anomalous" if federal, but not state, convictions for sexually abusing adults trigger § 2252(b)(2)'s enhanced penalty. Brief for United States 23. (I have discussed that more modest point above: Anomalous or not, such differences between federal and state predicates are a recurring feature of the statute. See *supra,* at 967 – 968.) But the Government, in both briefing and argument, rejected the idea that Congress wanted the list of state predicates in § 2252(b)(2) to mimic the crimes in Chapter 109A; in other words, it denied that Congress meant for the state and federal offenses to bear the same meaning. See Brief for United States 22, n. 8; Tr. of Oral Arg. 26. Even in the face of sustained questioning from Members of this Court, the Government held fast to that *977 position. See, *e.g.,* Tr. of Oral Arg. 25–26 (Justice ALITO: "[W]hy do you resist the argument that what Congress was doing was picking up basically the definitions of the Federal offenses [in Chapter 109A] that are worded almost identically?" Assistant to the Solicitor General: "[W]e don't think that Congress was trying" to do that). The listed state and federal offenses, the Government made clear, are not intended to be copies.

The majority seems to think that view somehow consistent with its own hypothesis that Chapter 109A served as a "template" for § 2252(b)(2)'s state predicates, *ante,* at 964; in responding to one of Lockhart's arguments, the majority remarks that the state predicates might have a "generic" meaning, distinct from Chapter 109A's, *ante,* at 968. But if that is so, the majority's supposed template is not much of a template after all. The predicate state offenses would "follow" or "parallel" Chapter 109A in a single respect, but not in any others—that is, in including sexual abuse of adults, but not in otherwise defining wrongful sexual conduct (whether concerning adults or children). *Ante,* at 964. The template, one might say, is good for this case and this case only. And the majority has no theory for why that should be so: It offers not the slimmest explanation of how Chapter 109A can resolve today's question but not the many issues courts will face in the future involving the meaning of § 2252(b)(2)'s state predicate offenses. That is because no rationale would make sense. The right and consistent view is that Chapter 109A, like the other federal predicates in § 2252(b)(2), is across-the-board irrelevant in defining that provision's state predicates. Thus, the federal chapter's four differently worded crimes are independent of the three state offenses at issue here—all of which, for the reasons I've given, must "involv[e] a minor or ward."

IV

Suppose, for a moment, that this case is not as clear as I've suggested. Assume there is no way to know whether to apply the last-antecedent or the series-qualifier rule. Imagine, too, that the legislative history is not quite so compelling and the majority's "template" argument not quite so strained. Who, then, should prevail?

This Court has a rule for how to resolve genuine ambiguity in criminal statutes: in favor of the criminal defendant. As the majority puts the point, the rule of lenity insists that courts side with the defendant "when the ordinary canons of statutory construction have revealed no satisfactory construction." *Ante,* at 968 (citing *Callanan v. United States,* 364 U.S. 587, 596, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961)); see also *Bifulco v. United States,* 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) (holding that the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"). At the very least, that principle should tip the scales in Lockhart's favor, because nothing the majority has said shows that the modifying clause in § 2252(b)(2) *unambiguously* applies to only the last term in the preceding series.

But in fact, Lockhart's case is stronger. Consider the following sentence, summarizing various

points made above: "The series-qualifier principle, the legislative history, and the rule of lenity discussed in this opinion all point in the same direction." Now answer the following question: Has only the rule of lenity been discussed in this opinion, or have the series-qualifier principle and the legislative history been discussed as well? Even had you not read the preceding 16–plus pages, you would know the right answer—because of the *978 ordinary way all of us use language. That, in the end, is why Lockhart should win.

Supreme Court of the United States.

Jimcy MCGIRT, Petitioner
v.
OKLAHOMA

|
Argued May 11, 2020
|
Decided July 9, 2020

[GORSUCH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which ALITO and KAVANAUGH, JJ., joined, and in which THOMAS, J., joined, except as to footnote 9. THOMAS, J., filed a dissenting opinion.]

Justice GORSUCH delivered the opinion of the Court.

*2459 On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding "all their land, East of the Mississippi river," the U. S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Treaty With the Creeks (1832). Both parties settled on boundary lines for a new and "permanent home to the whole Creek nation," located in what is now Oklahoma. Treaty With the Creeks (1833). The government further promised that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves." 1832 Treaty.

Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

I

[The Major Crimes Act (MCA) provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." Petitioner Jimcy McGirt was convicted by an Oklahoma state court of three serious sexual offenses. He unsuccessfully argued in state postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation and his crimes took place on the Creek Reservation. He seeks a new trial, which, he contends, must take place in federal court.]

II

Start with what should be obvious: Congress established a reservation for the Creeks. In a series of treaties, Congress not only "solemnly guarantied" the land but also "establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians." 1832 Treaty, Art. XIV, 7 Stat. 368; 1833 Treaty, preamble, 7 Stat. 418. . . .

There is a final set of assurances that bear mention, too. In the Treaty of 1856, Congress promised that "no portion" of the Creek Reservation "shall ever be embraced or included within, or annexed to, any Territory or State." And within their lands, with exceptions, the Creeks were to be "secured in the unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property. So the Creek were promised

not only a "permanent home" that would be *2462 "forever set apart"; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. Under any definition, this was a reservation.

III

A

While there can be no question that Congress established a reservation for the Creek Nation, it's equally clear that Congress has since broken more than a few of its promises to the Tribe. Not least, the land described in the parties' treaties, once undivided and held by the Tribe, is now fractured into pieces. While these pieces were initially distributed to Tribe members, many were sold and now belong to persons unaffiliated with the Nation. So in what sense, if any, can we say that the Creek Reservation persists today?

To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–568, 23 S.Ct. 216, 47 L.Ed. 299 (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). . . .

History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession" or an "unconditional commitment ... to compensate the Indian tribe for its opened land." *Ibid.* Other times, Congress has directed that tribal lands shall be " 'restored to the public domain.' " *Hagen v. Utah*, 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (emphasis deleted). *2463 Likewise, Congress might speak of a reservation as being " 'discontinued,' " " 'abolished,' " or " 'vacated.' " *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). Disestablishment has "never required any particular form of words," *Hagen*, 510 U.S., at 411, 114 S.Ct. 958. But it does require that Congress clearly express its intent to do so, "[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.' " *Nebraska* v. *Parker*, 577 U. S. 481, ——— – ———, 136 S.Ct. 1072, 1079, 194 L.Ed.2d 152 (2016).

B

In an effort to show Congress has done just that with the Creek Reservation, Oklahoma points to events during the so-called "allotment era." Starting in the 1880s, Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members. Some allotment advocates hoped that the policy would create a class of assimilated, landowning, agrarian Native Americans. Others may have hoped that, with lands in individual hands and (eventually) freely alienable, white settlers would have more space of their own.

The Creek were hardly exempt from the pressures of the allotment era. In 1893, Congress charged the Dawes Commission with negotiating changes to the Creek Reservation. Congress identified two goals: Either persuade the Creek to cede territory to the United States, as it had before, or agree to allot its lands to Tribe members. A year later, the Commission reported back that the Tribe "would not, under any circumstances, agree to cede any portion of their lands." At that time, before this Court's decision in *Lone Wolf*, Congress may not have been entirely sure of its power to terminate an established reservation unilaterally. Perhaps for that reason, perhaps for others, the Commission and Congress took this report seriously and turned their attention to allotment rather than cession.

The Commission's work culminated in an allotment agreement with the Tribe in 1901. Creek

Allotment Agreement, ch. 676, 31 Stat. 861. With exceptions for certain pre-existing town sites and other special matters, the Agreement established procedures for allotting 160-acre parcels to individual Tribe members who could not sell, transfer, or otherwise encumber their allotments for a number of years. §§ 3, 7, *id.*, at 862–864 (5 years for any portion, 21 years for the designated "homestead" portion). Tribe members were given deeds for their parcels that "convey[ed] to [them] all right, title, and interest of the Creek Nation." § 23, *id.*, at 867–868. In 1908, Congress relaxed these alienation restrictions in some ways, and even allowed the Secretary of the Interior to waive them. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. One way or the other, individual Tribe members were eventually free to sell their land to Indians and non-Indians alike.

*2464 Missing in all this, however, is a statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. Without doubt, in 1832 the Creek "cede[d]" their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they "cede[d] and convey[ed]" a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment. . . .

C

If allotment by itself won't work, Oklahoma seeks to prove disestablishment by pointing to other ways Congress intruded on the Creek's promised right to self-governance during the allotment era. It turns out there were many. For example, just a few years before the 1901 Creek Allotment Agreement, and perhaps in an effort to pressure the Tribe to the negotiating table, Congress abolished the Creeks' tribal courts and transferred all pending civil and criminal cases to the U. S. Courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. Separately, *2466 the Creek Allotment Agreement provided that tribal ordinances "affecting the lands of the Tribe, or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens thereof " would not be valid until approved by the President of the United States. § 42, 31 Stat. 872.

Plainly, these laws represented serious blows to the Creek. But, just as plainly, they left the Tribe with significant sovereign functions over the lands in question. For example, the Creek Nation retained the power to collect taxes, operate schools, legislate through tribal ordinances, and, soon, oversee the federally mandated allotment process. §§ 39, 40, 42, *id.*, at 871–872; *Buster v. Wright*, 135 F. 947, 949–950, 953–954 (C.A.8 1905). And, in its own way, the congressional incursion on tribal legislative processes only served to prove the power: Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate. Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land. . . .

In the years that followed, Congress continued to adjust its arrangements with the Tribe. . . .

Maybe some of these changes happened for altruistic reasons, maybe some for other reasons. It seems, for example, that at least certain Members of Congress hesitated about disestablishment in 1906 because they feared any reversion of the Creek lands to the public domain would trigger a statutory commitment to hand over portions of these lands to already powerful railroad interests. Many of those who advanced the reorganization efforts of the 1930s may have done so more out of frustration with efforts to assimilate Native Americans than any disaffection with assimilation *2468 as the ultimate goal. But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction.

D

Ultimately, Oklahoma is left to pursue a very different sort of argument. Now, the State points to historical practices and demographics, both around the time of and long after the

enactment of all the relevant legislation. These facts, the State submits, are enough by themselves to prove disestablishment. Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three "steps." It reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State's account, we have so far finished only the first step; two more await.

This is mistaken. When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. *New Prime Inc.* v. *Oliveira*, 586 U. S. ——, ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019). That is the only "step" proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. *Ibid.* But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices *instead of* the laws Congress passed. . . .

To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up ... not create" ambiguity about a statute's original meaning. *Milner v. Department of Navy*, 562 U.S. 562, 574, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011). And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *Solem*, 465 U.S., at 470, 104 S.Ct. 1161 (citing *Celestine*, 215 U.S., at 285, 30 S.Ct. 93); see also *Yankton Sioux*, 522 U.S., at 343, 118 S.Ct. 789 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain") (citation and internal quotation marks omitted).

The dissent charges that we have failed to take account of the "compelling reasons" for considering extratextual evidence *2470 as a matter of course. *Post*, at 2487 – 2488. But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others. None of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights. *Solem*, 465 U.S., at 472, 104 S.Ct. 1161. . . .

*2474 In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law. . . .

VI

In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially

"transform[ative]" effects of a loss today. . . .

In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one. And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any *2482 time. It has no shortage of tools at its disposal.

*

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

The judgment of the Court of Criminal Appeals of Oklahoma is

Reversed.

Chief Justice ROBERTS, with whom Justice ALITO and Justice KAVANAUGH join, and with whom Justice THOMAS joins except as to footnote 9, dissenting.

In 1997, the State of Oklahoma convicted petitioner Jimcy McGirt of molesting, raping, and forcibly sodomizing a four-year-old girl, his wife's granddaughter. McGirt was sentenced to 1,000 years plus life in prison. Today, the Court holds that Oklahoma lacked jurisdiction to prosecute McGirt—on the improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation, on which the State may not prosecute serious crimes committed by Indians like McGirt. Not only does the Court discover a Creek reservation that spans three million acres and includes most of the city of Tulsa, but the Court's reasoning portends that there are four more such reservations in Oklahoma. The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians.

Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.

None of this is warranted. What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation. Congress disestablished any reservation in a series of statutes leading up to Oklahoma statehood at the turn of the 19th century. The Court reaches the opposite conclusion only by disregarding the "well settled" approach required by our precedents. *Nebraska* v. *Parker*, 577 U. S. 481, ——, 136 S.Ct. 1072, 1078, 194 L.Ed.2d 152 (2016).

Under those precedents, we determine whether Congress intended to disestablish a

reservation by examining the relevant Acts of Congress and "all the [surrounding] circumstances," including the "contemporaneous and subsequent understanding of the status of the reservation." *Id.*, at ——, 136 S.Ct., at 1079 (internal quotation marks omitted). Yet the Court declines to consider such understandings here, preferring to examine only individual statutes in isolation.

*2483 Applying the broader inquiry our precedents require, a reservation did not exist when McGirt committed his crimes, so Oklahoma had jurisdiction to prosecute him. I respectfully dissent.

I

. . . . A century of practice confirms that the Five Tribes' prior domains were extinguished. The State has maintained unquestioned jurisdiction for more than 100 years. Tribe members make up less than 10%–15% of the population of their former domain, and until a few years ago the Creek Nation itself acknowledged that it no longer possessed the reservation the Court discovers today. This on-the-ground reality is enshrined throughout the U. S. Code, which repeatedly terms the Five Tribes' prior holdings the "former" Indian reservations in Oklahoma. As the Tribes, the State, and Congress have recognized from the outset, those "reservations were destroyed" when "Oklahoma entered the Union."

II

Much of this important context is missing from the Court's opinion, for the Court restricts itself to viewing each of the statutes enacted by Congress in a vacuum. That approach is wholly inconsistent with our precedents on reservation disestablishment, which require a highly contextual inquiry. Our "touchstone" is congressional "purpose" or "intent." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). To "decipher Congress' intention" in this specialized area, we are instructed to consider three categories of evidence: the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there. *Solem v. Bartlett*, 465 U.S. 463, 470–472, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). The Court resists calling these "steps," because "the only 'step' proper for a court of law" is interpreting the laws enacted by Congress. Any label is fine with us. What matters is that these are categories of evidence that our precedents "direct[ ] us" to examine *in determining* whether the laws enacted by Congress disestablished a reservation. *Hagen v. Utah*, 510 U.S. 399, 410–411, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). Because those precedents are not followed by the Court today, it is necessary to describe several at length.

In *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), a unanimous Court summarized the appropriate methodology. "Congress [must] clearly evince an intent to change boundaries before diminishment will be found." *Id.*, at 470, 104 S.Ct. 1161 (internal quotation marks and alterations omitted). This inquiry first considers the "statutory language used to open the Indian lands," which is the "most probative evidence of congressional intent." *Ibid.* "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Ibid.* But "explicit language of cession and unconditional compensation are not prerequisites" for a *2486 finding of disestablishment. *Id.*, at 471, 104 S.Ct. 1161.

Second, we consider "events surrounding the passage of [an] Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress." *Ibid.* When such materials "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," we will "infer that Congress shared the understanding that its action would diminish the reservation," even in the face of "statutory language that would otherwise suggest reservation boundaries remained unchanged." *Ibid.*

Third, to a "lesser extent," we examine "events that occurred after the passage of [an] Act to decipher Congress' intentions." *Ibid.* "Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with [the areas]." *Ibid.* In addition, "we have recognized that who actually moved onto opened reservation lands is also relevant." *Ibid.* "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Ibid.* This "subsequent demographic history" provides an "additional clue as to what Congress expected would happen." *Id.*, at 471–472, 104 S.Ct. 1161.

Fifteen years later, another unanimous Court described the same methodology more pithily in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct.789, 139 L.Ed.2d 773 (1998). First, the Court reiterated that the "most probative evidence of diminishment is, of course, the statutory language." *Id.*, at 344, 118 S.Ct. 789 (internal quotation marks omitted). The Court continued that it would also consider, second, "the historical context surrounding the passage of the ... Acts," and third, "the subsequent treatment of the area in question and the pattern of settlement there." *Ibid.* (quoting *Hagen*, 510 U.S., at 411, 114 S.Ct. 958).

The Court today treats these precedents as aging relics in need of "clarif[ication]." But these precedents have been clear enough for some time. Just a few Terms ago, the same inquiry was described as "well settled" by the unanimous Court in *Nebraska* v. *Parker*, 577 U. S. 481, ——, 136 S.Ct. 1072, 1078, 194 L.Ed.2d 152 (2016). . . .

Today the Court does not even discuss the governing approach reiterated throughout these precedents. The Court briefly recites the general rule that disestablishment requires clear congressional "intent," but the Court then declines to examine the categories of evidence that our precedents demand we consider. Instead, the Court argues at length that allotment alone is not *2487 enough to disestablish a reservation. Then the Court argues that the "many" "serious blows" dealt by Congress to tribal governance, and the creation of the new State of Oklahoma, are each insufficient for disestablishment. Then the Court emphasizes that "historical practices or current demographics" do not "by themselves" "suffice" to disestablish a reservation.

This is a school of red herrings. No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation. Rather, Oklahoma contends that all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence, demonstrate Congress's intent to disestablish the reservation. "[O]ur traditional approach ...*requires* us" to determine Congress's intent by "examin[ing] *all* the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S., at 412, 114 S.Ct. 958 (emphasis added). Yet the Court refuses to confront the cumulative import of all of Congress's actions here.

The Court instead announces a new approach sharply restricting consideration of contemporaneous and subsequent evidence of congressional intent. The Court states that such "extratextual sources" may be considered in "only" one narrow circumstance: to help " 'clear up' " ambiguity in a particular "statutory term or phrase."

But, if that is the right approach, what have we been doing all these years? Every single one of our disestablishment cases has considered extratextual sources, and in doing so, none has required the identification of ambiguity in a particular term. That is because, while it is well established that Congress's "intent" must be "clear," in this area we have expressly held that the appropriate inquiry does not focus on the statutory text alone.

Today the Court suggests that only the text can satisfy the longstanding requirement that Congress "explicitly indicate[ ]" its intent. The Court reiterates that a reservation persists unless Congress "said otherwise," *ante*, at 2459; if Congress wishes to disestablish a reservation, "it must say so," with the right "language." Our precedents disagree. They

explain that disestablishment can occur "[e]ven in the absence of a clear expression of congressional purpose in the text of [the] Act." *Yankton Sioux Tribe*, 522 U.S., at 351, 118 S.Ct. 789. The "notion" that "express language in an Act is the *only* method by which congressional action may result in disestablishment" is "quite inconsistent" with our precedents. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 588, n. 4, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); see *Solem*, 465 U.S., at 471, 104 S.Ct. 1161 (intent may be discerned from a "widely held, contemporaneous understanding," "notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged"); see also *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973).

. . . . Unless the Court is prepared to overrule these precedents, it should follow them.

III

Applied properly, our precedents demonstrate that Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood.

A

. . . . There are good reasons the statutes here do not include the language the Court looks for, and those reasons have nothing to do with *2490 a failure to disestablish the reservation. Respect for Congress's work requires us to look at what it actually did, not search in vain for what it might have done or did on other occasions.

What Congress actually did here was enact a series of statutes beginning in 1890 and culminating with Oklahoma statehood that (1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation's title to the lands at issue; and (4) incorporated the Creek members into a new political community—the State of Oklahoma. These statutes evince Congress's intent to terminate the reservation and create a new State in its place. . . .

These statutes evince a clear intent to leave the Creek Nation with no communally held land and no meaningful governing authority to exercise over the newly distributed parcels. Contrary to the Court's portrayal, this is not a scenario in which Congress allowed a tribe to "continue to exercise governmental functions over land" that it "no longer own[ed] communally." *Ante*, at 2464. From top to bottom, these statutes, which divested the Tribes and the United States of their interests while displacing tribal governance, "strongly suggest[ ] that Congress meant to divest" the lands of reservation status. *Solem*, 465 U.S., at 470, 104 S.Ct. 1161.

Finally, having stripped the Creek Nation of its laws, its powers of self-governance, and its land, Congress incorporated the Nation's members into a new political community. Congress made "every Indian" in the Oklahoma territory a citizen of the United States in 1901—decades before conferring citizenship on all native born Indians elsewhere in the country. Act of Mar. 3, 1901. In the Oklahoma Enabling Act of 1906—the gateway to statehood—Congress confirmed that members of the Five Tribes would participate in equal measure alongside non-Indians in the choice regarding statehood. The Act gave Indians the right to vote on delegates to a constitutional convention *2493 and ultimately on the state constitution that the delegates proposed. Fifteen members of the Five Tribes were elected as convention delegates, many of them served on significant committees, and a member of the Chickasaw Nation even served as president of the convention.

The Enabling Act also ensured that Indians and non-Indians would be subject to uniform laws and courts. . . .

In sum, in statute after statute, Congress made abundantly clear its intent to disestablish the Creek territory. The Court, for purposes of the disestablishment question before us,

defines the Creek territory as "lands that would lie outside both the legal jurisdiction and geographic boundaries of any State" and on which a tribe was "assured a right to self-government." That territory was eliminated. By establishing uniform laws for Indians and non-Indians alike in the new State of Oklahoma, Congress brought Creek members and the land on which they resided under state jurisdiction. By stripping the Creek Nation of its courts, lawmaking authority, and taxing power, Congress dismantled the tribal government. By extinguishing the Nation's title, Congress erased the geographic boundaries that once defined Creek territory. And, by conferring citizenship on tribe members and giving them a vote in the formation of the State, Congress incorporated them into a new political community. "Under any definition," that was disestablishment. . . .

B

Under our precedents, we next consider the contemporaneous understanding of the statutes enacted by Congress and the subsequent treatment of the lands at issue. The Court, however, declines to consider such evidence because, in the Court's view, the statutes clearly do not disestablish any reservation, and there is no "ambiguity" to "clear up." That is not the approach demanded by our precedent, and, in any event, the Court's argument fails on its own terms here. I find it hard to see how anyone can come away from the statutory texts detailed above with *certainty* that Congress had no intent to disestablish the territorial reservation. At the very least, the statutes leave some ambiguity, and thus "extratextual sources" ought to be consulted.

Turning to such sources, our precedents direct us to "examine all the circumstances" surrounding Congress's actions. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079 (quoting *Hagen*, 510 U.S., at 412, 114 S.Ct. 958). This includes evidence of the "contemporaneous understanding" of the status of the reservation and the "history surrounding the passage" of the relevant Acts. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1080 (internal quotation marks omitted); see *Yankton Sioux Tribe*, 522 U.S., at 351–354, 118 S.Ct. 789; *Solem*, 465 U.S., at 471, 104 S.Ct. 1161. The available evidence overwhelmingly confirms that Congress *2495 eliminated any Creek reservation. That was the purpose identified by Congress, the Dawes Commission, and the Creek Nation itself. And that was the understanding demonstrated by the actions of Oklahoma, the United States, and the Creek. . . .

C

Finally, consider "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S., at 344, 118 S.Ct. 789. This evidence includes the "subsequent understanding of the status of the reservation by members and nonmembers as well as the United States and the [relevant] State," and the "subsequent demographic history" of the area. *Parker*, 577 U. S., at ——, ——, 136 S.Ct., at 1079, 1081; see *Solem*, 465 U.S., at 471, 104 S.Ct. 1161. Each of the indicia from our precedents—subsequent treatment by Congress, the State's unquestioned exercise of jurisdiction, and demographic evidence—confirms that the Creek reservation did not survive statehood. . . .

* * *

As the Creek, the State of Oklahoma, the United States, and our judicial predecessors have long agreed, Congress disestablished any Creek reservation more than 100 years ago. Oklahoma therefore had jurisdiction to prosecute McGirt. I respectfully dissent.

Justice THOMAS, dissenting.

[Omitted]

Supreme Court of the United States.

Gerald Lynn BOSTOCK, Petitioner
v.
CLAYTON COUNTY, GEORGIA;
Altitude Express, Inc., et al., Petitioners
v.
Melissa Zarda and William Allen Moore, Jr., Co-Independent Executors of the Estate of Donald Zarda;
R.G. & G.R. Harris Funeral Homes, Inc., Petitioner
v.
Equal Employment Opportunity Commission, et al.

|
Argued October 8, 2019
|
Decided June 15, 2020

[GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a dissenting opinion.]

Justice GORSUCH delivered the opinion of the Court.

*1737 Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status. . . .

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on

the original meaning of the law they have counted on to settle their rights and obligations.

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining *1739 the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013) (citing *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009); quotation altered). In the language of law, this means that Title VII's "because of " test incorporates the " 'simple' " and "traditional" standard of but-for causation. *Nassar*, 570 U.S. at 346, 360, 133 S.Ct. 2517. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross*, 557 U.S. at 176, 129 S.Ct. 2343. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of " the confluence of multiple factors do not violate the law. Cf. 11 U.S.C. § 525; 16 U.S.C. § 511. Or it could have written "primarily because of " to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. Cf. 22 U.S.C. § 2688. But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at *1740 42 U.S.C. § 2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. § 2000e–2(a)(1).

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of " sex. The statute imposes liability on employers only when they "fail or refuse to hire," "discharge," "or otherwise ... discriminate against" someone because of a statutorily protected characteristic like sex. *Ibid.* The employers acknowledge that they discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: "otherwise ... discriminate against." By virtue of the word *otherwise*, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

At first glance, another interpretation might seem possible. Discrimination sometimes involves "the act, practice, or an instance of discriminating categorically rather than individually." Webster's New Collegiate Dictionary 326 (1975). On that understanding, the statute would require us to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal too. Maybe the law concerns itself simply with ensuring that employers don't treat women generally less favorably than they do men. So how can we tell which sense, individual or group, "discriminate" carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or ... 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*... sex." And the meaning of "individual" was as uncontroversial in 1964 as it is today: "A particular being as distinguished from a class, species, or collection." Webster's New International Dictionary, at 1267. Here, again, Congress could have written the law differently. It might have said that "it shall be an unlawful employment *1741 practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment." It might have said that there should be no "sex discrimination," perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only "sexist policies" against women as a class. But, once again, that is not the law we have.

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires

an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable *1742 and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as

the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title *1743 VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. . . .

III

A

. . . . Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants.

The same holds here. There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex. . . .

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand. This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. But that has no bearing here. “Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.” And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the

statute's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address. But " 'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' " does not demonstrate ambiguity; instead, it simply " 'demonstrates [the] breadth' " of a legislative command. And "it is ultimately the provisions of " those legislative commands "rather than the principal concerns of our legislators by which we are governed." . . .

Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

Justice ALITO, with whom Justice THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on *1755 any of five specified grounds: "race, color, religion, sex, [and] national origin." Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list, and in recent years, bills have included "gender identity" as well. But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H.R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill would add similar prohibitions but contains provisions to protect religious liberty. This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, § 7, cl. 2), Title VII's prohibition of discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H.R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall.

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one

should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually *1756 represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22 (1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964.*

It indisputably did not.

I

A

Title VII, as noted, prohibits discrimination "because of ... sex,", and in 1964, it was as clear as clear could be that this meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth. Determined searching has not found a single dictionary from that time that defined "sex" to mean sexual orientation, gender identity, or "transgender status." (Appendix A to this opinion includes the full definitions of "sex" in the unabridged dictionaries in use in the 1960s.)

In all those dictionaries, the primary definition of "sex" was essentially the same as that in the then-most recent edition of Webster's New International Dictionary 2296 (def. 1) (2d ed. 1953): "[o]ne of the two divisions of organisms formed on the distinction of male and female." See also American Heritage Dictionary 1187 (def. 1(a)) (1969) ("The property or quality by which organisms are classified according to their reproductive functions"); Random House Dictionary of the English Language 1307 (def. 1) (1966) (Random House Dictionary) ("the fact or character of being either male or female"); 9 Oxford English Dictionary 577 (def. 1) (1933) ("Either of the two divisions of organic beings distinguished as male and female respectively").

The Court does not dispute that this is what "sex" means in Title VII . . . . If that is so, it should be perfectly clear that Title VII does not reach discrimination because of sexual orientation or gender identity. If "sex" in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender.

How then does the Court claim to avoid that conclusion? The Court tries to cloud the issue by spending many pages discussing matters that are beside the point. The Court observes that a Title VII plaintiff need not show that "sex" was the sole or primary motive for a challenged employment decision or its sole or primary cause; that Title VII is limited to discrimination with respect to a list of specified actions (such as hiring, firing, etc.); and that Title VII protects individual rights, not group rights.

All that is true, but so what? In cases like those before us, a plaintiff must show that sex was a "motivating factor" in the challenged employment action, so the question we must decide comes down to this: if an individual employee or applicant for employment shows that his or her sexual orientation or gender identity was a "motivating factor" in a hiring or discharge decision, for example, is that enough to establish that the employer discriminated "because of ... sex"? Or, to put the same question in different terms, if an employer takes an employment action solely because of the sexual orientation or gender identity of an employee or applicant, has that employer necessarily discriminated because of biological sex?

The answers to those questions must be no, unless discrimination because of sexual orientation or gender identity inherently constitutes discrimination because of sex. The Court attempts to prove that point, and it argues, not merely that the terms of Title VII *can* be interpreted that way but that they *cannot reasonably be interpreted any other way*.

According to the Court, the text is unambiguous.

The arrogance of this argument is breathtaking. As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. But the Court apparently thinks that this was because the Members were not "smart enough to realize" what its language means. The Court seemingly has the same opinion about our colleagues on the Courts of Appeals, because until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex. And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law.Day in *1758 and day out, the Commission enforced Title VII but did not grasp what discrimination "because of ... sex" unambiguously means.

The Court's argument is not only arrogant, it is wrong. It fails on its own terms. "Sex," "sexual orientation," and "gender identity" are different concepts, as the Court concedes. And neither "sexual orientation" nor "gender identity" is tied to either of the two biological sexes. Both men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes. And individuals who are born with the genes and organs of either biological sex may identify with a different gender.

Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. In fact, at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays *1759 or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were "homosexual."

At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing the biological sex of any job applicants. Her candid answer was that this would "not" be sex discrimination. And she was right.

The attorney's concession was necessary, but it is fatal to the Court's interpretation, for if an employer discriminates against individual applicants or employees without even knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex.An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge. And if an employer does not violate Title VII by discriminating on the basis of sexual orientation or gender identity without knowing the sex of the affected individuals, there is no reason why the same employer could not lawfully implement the same policy even if it knows the sex of these individuals. If an employer takes an adverse employment action for a perfectly legitimate reason—for example, because an employee stole company property—that action is not converted into sex discrimination simply because the employer knows the employee's sex. As explained, a disparate treatment case requires proof of intent—*i.e.,* that the employee's sex motivated the firing. In short, what this example shows is that discrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex, and for that reason, the Court's chief argument collapses.

Trying to escape the consequences of the attorney's concession, the Court offers its own hypothetical:

> "Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would

> we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not."

How this hypothetical proves the Court's point is a mystery. A person who checked that box would presumably be black, Catholic, or both, and refusing to hire an applicant because of race or religion is prohibited by Title VII. Rejecting applicants who checked a box indicating that they are homosexual is entirely different because it is impossible to tell from that answer whether an applicant is male or female.

The Court follows this strange hypothetical with an even stranger argument. The Court argues that an applicant could not answer the question whether he or she is homosexual without knowing something about sex. If the applicant was unfamiliar with the term "homosexual," the applicant would have to look it up or ask what the term means. And because this applicant would have to take into account his or her sex and that of the persons to whom he or *1760 she is sexually attracted to answer the question, it follows, the Court reasons, that an employer could not reject this applicant without taking the applicant's sex into account.

This is illogical. Just because an applicant cannot say whether he or she is homosexual without knowing his or her own sex and that of the persons to whom the applicant is attracted, it does not follow that an employer cannot reject an applicant based on homosexuality without knowing the applicant's sex.

While the Court's imagined application form proves nothing, another hypothetical case offered by the Court is telling. But what it proves is not what the Court thinks. The Court posits:

> "Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman."

This example disproves the Court's argument because it is perfectly clear that the employer's motivation in firing the female employee had nothing to do with that employee's sex. The employer presumably knew that this employee was a woman before she was invited to the fateful party. Yet the employer, far from holding her biological sex against her, rated her a "model employee." At the party, the employer learned something new, her sexual orientation, and it was this new information that motivated her discharge. So this is another example showing that discrimination because of sexual orientation does not inherently involve discrimination because of sex.

In addition to the failed argument just discussed, the Court makes two other arguments, more or less in passing. The first of these is essentially that sexual orientation and gender identity are closely related to sex. The Court argues that sexual orientation and gender identity are "inextricably bound up with sex," and that discrimination on the basis of sexual orientation or gender identity involves the application of "sex-based rules."

It is curious to see this argument in an opinion that purports to apply the purest and highest form of textualism because the argument effectively amends the statutory text. Title VII prohibits discrimination because of *sex itself,* not everything that is related to, based on, or defined with reference to, "sex." Many things are related to sex. Think of all the nouns other than "orientation" that are commonly modified by the adjective "sexual." Some examples yielded by a quick computer search are "sexual harassment," "sexual assault," "sexual violence," "sexual intercourse," and "sexual content."

Does the Court really think that Title VII prohibits discrimination on all these grounds? Is it unlawful for an employer to refuse to hire an employee with a record of sexual harassment in prior jobs? Or a record of sexual assault or violence?

To be fair, the Court does not claim that Title VII prohibits discrimination because of *everything* that is related to sex. The Court draws a distinction between things that are "inextricably" related and those that are related in "some vague sense." Apparently the Court would graft onto Title VII some arbitrary line separating the things that are related closely enough and those that are not. And it would do this in the name of high textualism. An additional argument made in passing also fights the text of Title VII and the policy it reflects. The Court proclaims that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." That is the policy view of many people in 2020, and perhaps Congress would have amended Title VII to implement it if this Court had not intervened. But that is not the policy embodied in Title VII in its current form. Title VII prohibits discrimination based on five specified grounds, and neither sexual orientation nor gender identity is on the list. As long as an employer does not discriminate based on one of the listed grounds, the employer is free to decide for itself which characteristics are "relevant to [its] employment decisions." By proclaiming that sexual orientation and gender identity are "not relevant to employment decisions," the Court updates Title VII to reflect what it regards as 2020 values.

The Court's remaining argument is based on a hypothetical that the Court finds instructive. In this hypothetical, an employer has two employees who are "attracted to men," and "*to the employer's mind*" the two employees are "materially identical" except that one is a man and the other is a woman. The Court reasons that if the employer fires the man but not the woman, the employer is necessarily motivated by the man's biological sex. After all, if two employees are identical in every respect but sex, and the employer *1762 fires only one, what other reason could there be?

The problem with this argument is that the Court loads the dice. That is so because in the mind of an employer who does not want to employ individuals who are attracted to members of the same sex, these two employees are not materially identical in every respect but sex. On the contrary, they differ in another way that the employer thinks is quite material. And until Title VII is amended to add sexual orientation as a prohibited ground, this is a view that an employer is permitted to implement. As noted, other than prohibiting discrimination on any of five specified grounds, "race, color, religion, sex, [and] national origin." Title VII allows employers to decide whether two employees are "materially identical." Even idiosyncratic criteria are permitted; if an employer thinks that Scorpios make bad employees, the employer can refuse to hire Scorpios. Such a policy would be unfair and foolish, but under Title VII, it is permitted. And until Title VII is amended, so is a policy against employing gays, lesbians, or transgender individuals.

Once this is recognized, what we have in the Court's hypothetical case are two employees who differ in *two* ways—sex and sexual orientation—and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both. We cannot infer with any certainty, as the hypothetical is apparently meant to suggest, that the employer was motivated even in part by sex. The Court harps on the fact that under Title VII a prohibited ground need not be the sole motivation for an adverse employment action, but its example does not show that sex necessarily played *any* part in the employer's thinking.

The Court tries to avoid this inescapable conclusion by arguing that sex is really the only difference between the two employees. This is so, the Court maintains, because both employees "are attracted to men." Of course, the employer would couch its objection to the man differently. It would say that its objection was his sexual orientation. So this may appear to leave us with a battle of labels. If the employer's objection to the male employee is characterized as attraction to men, it seems that he is just like the woman in all respects except sex and that the employer's disparate treatment must be based on that one difference. On the other hand, if the employer's objection is sexual orientation or homosexuality, the two employees differ in two respects, and it cannot be inferred that the disparate treatment was due even in part to sex.

The Court insists that its label is the right one, and that presumably is why it makes such a point of arguing that an employer cannot escape liability under Title VII by giving sex

discrimination some other name. That is certainly true, but so is the opposite. Something that is *not* sex discrimination cannot be converted into sex discrimination by slapping on that label. So the Court cannot prove its point simply by labeling the employer's objection as "attract[ion] to men." Rather, the Court needs to show that its label is the correct one.

And a labeling standoff would not help the Court because that would mean that the bare text of Title VII does not unambiguously show that its interpretation is right. The Court would have no justification for its stubborn refusal to look any further.

*1763 As it turns out, however, there is no standoff. It can easily be shown that the employer's real objection is not "attract[ion] to men" but homosexual orientation.

In an effort to prove its point, the Court carefully includes in its example just two employees, a homosexual man and a heterosexual woman, but suppose we add two more individuals, a woman who is attracted to women and a man who is attracted to women. (A large employer will likely have applicants and employees who fall into all four categories, and a small employer can potentially have all four as well.) We now have the four exemplars listed below, with the discharged employees crossed out:

~~Man attracted to men~~

Woman attracted to men

~~Woman attracted to women~~

Man attracted to women

The discharged employees have one thing in common. It is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex—in a word, sexual orientation. And that, we can infer, is the employer's real motive.

In sum, the Court's textual arguments fail on their own terms. The Court tries to prove that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," but as has been shown, it is entirely possible for an employer to do just that. "[H]omosexuality and transgender status are distinct concepts from sex," and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court's arguments are squarely contrary to the statutory text.

But even if the words of Title VII did not definitively refute the Court's interpretation, that would not justify the Court's refusal to consider alternative interpretations. The Court's excuse for ignoring everything other than the bare statutory text is that the text is unambiguous and therefore no one can reasonably interpret the text in any way other than the Court does. Unless the Court has met that high standard, it has no justification for its blinkered approach. And to say that the Court's interpretation is the only possible reading is indefensible. . . .

II

A

So far, I have not looked beyond dictionary definitions of "sex," but textualists like Justice Scalia do not confine their inquiry to the scrutiny of dictionaries. Dictionary definitions are valuable because they are evidence of what people at the time of a statute's enactment would have understood its words to mean. *Ibid.* But they are not the only source of relevant evidence, and what matters in the end is the answer to the question that the evidence is gathered to resolve: How would the terms of a statute have been understood by ordinary people at the time of enactment?

Justice Scalia was perfectly clear on this point. The words of a law, he insisted, "mean *what they conveyed to reasonable people at the time*." Reading Law, at 16 (emphasis added). . . .

[W]hen textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time.

For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex. To get a picture of this, we may imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval. What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity?

B

The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination because of "sex" was discrimination because of a person's biological sex, not sexual orientation or gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.

1

In 1964, the concept of prohibiting discrimination "because of sex" was no novelty. *1768 It was a familiar and well-understood concept, and what it meant was equal treatment for men and women.

Long before Title VII was adopted, many pioneering state and federal laws had used language substantively indistinguishable from Title VII's critical phrase, "discrimination because of sex." . . . In short, the concept of discrimination "because of," "on account of," or "on the basis of" sex was well understood. It was part of the campaign for equality that had been waged by women's rights advocates for more than a century, and what it meant was equal treatment for men and women.

2

Discrimination "because of sex" was not understood as having anything to do with discrimination because of sexual orientation or transgender status. Any such notion would have clashed in spectacular fashion with the societal norms of the day.

For most 21st-century Americans, it is painful to be reminded of the way our society once treated gays and lesbians, but any honest effort to understand what the terms of Title VII were understood to mean when enacted must take into account the societal norms of that time. And the plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment. . . .

To its credit, our society has now come to recognize the injustice of past practices, and this recognition provides the impetus to "update" Title VII. But that is not our job. Our duty is to understand what the terms of Title VII were understood to mean when enacted, and in doing so, we must take into account the societal norms of that time. We must therefore ask *1772 whether ordinary Americans in 1964 would have thought that discrimination because

of "sex" carried some exotic meaning under which private-sector employers would be prohibited from engaging in a practice that represented the official policy of the Federal Government with respect to its own employees. We must ask whether Americans at that time would have thought that Title VII banned discrimination against an employee for engaging in conduct that Congress had made a felony and a ground for civil commitment.

The questions answer themselves. Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute's terms were understood to mean at that time. To paraphrase something Justice Scalia once wrote, "our job is not to scavenge the world of English usage to discover whether there is any possible meaning" of discrimination because of sex that might be broad enough to encompass discrimination because of sexual orientation or gender identity. Without strong evidence to the contrary (and there is none here), our job is to ascertain and apply the "*ordinary* meaning" of the statute. And in 1964, ordinary Americans most certainly would not have understood Title VII to ban discrimination because of sexual orientation or gender identity. . . .

C

While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of "transgender status" or "gender identity," terms that would have left people at the time scratching their heads. The term "transgender" is said to have been coined " 'in the early 1970s,' "and the term "gender identity," now understood to mean "[a]n internal sense of being male, female or something else,"apparently first appeared in an academic article in 1964. Certainly, neither term was in common parlance; indeed, dictionaries of the time *1773 still primarily defined the word "gender" by reference to grammatical classifications.

While it is likely true that there have always been individuals who experience what is now termed "gender dysphoria," *i.e.*, "[d]iscomfort or distress related to an incongruence between an individual's gender identity and the gender assigned at birth," the current understanding of the concept postdates the enactment of Title VII. . . .

The first widely publicized sex reassignment surgeries in the United States were not performed until 1966, and the great majority of physicians surveyed in 1969 thought that an individual who sought sex reassignment surgery was either " 'severely neurotic' " or " 'psychotic.' "

It defies belief to suggest that the public meaning of discrimination because of sex in 1964 encompassed discrimination on the basis of a concept that was essentially unknown to the public at that time. . . .

III

A

Because the opinion of the Court flies a textualist flag, I have taken pains to show that it cannot be defended on textualist grounds. But even if the Court's textualist argument were stronger, that would not explain today's decision. Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of "congressional intent," including legislative history.

So, why in these cases are congressional intent and the legislative history of Title VII totally ignored? Any assessment of congressional intent or legislative history seriously undermines the Court's interpretation. . . .

C

. . . . The Court observes that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms," but it has no qualms about disregarding over 50 years of uniform judicial interpretation of Title VII's plain text. Rather, the Court makes the jaw-dropping statement that its decision exemplifies "judicial humility." Is it humble to maintain, not only that Congress did not understand the terms it enacted in 1964, but that all the Circuit Judges on all the pre-2017 cases could not see what the phrase discrimination "because of sex" really means? If today's decision is humble, it is sobering to imagine what the Court might do if it decided to be bold.

IV

What the Court has done today—interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. The briefs in these cases have called to our attention the potential effects that the Court's reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court dismisses questions about "bathrooms, locker rooms, or anything else of the kind." And it declines to say anything about other statutes whose terms mirror Title VII's.

The Court's brusque refusal to consider the consequences of its reasoning is irresponsible. If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at least some of them. In addition, Congress might have crafted special rules for some of the relevant statutes. But by intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex, the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution. Before issuing today's radical decision, the Court should have given some thought to where its decision would lead.

As the briefing in these cases has warned, the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty.
. . .

Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning.

* * *

The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many *1784 Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law *is*.

The Court itself recognizes this:

> "The place to make new legislation ... lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us."

It is easy to utter such words. If only the Court would live by them.

I respectfully dissent.

Justice KAVANAUGH, dissenting.

Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of" an individual's "race, color, religion, sex, or national origin." The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court. . . .

I

Title VII makes it unlawful for employers to discriminate because of "race, color, religion, sex, or national origin." As enacted in 1964, Title VII did not prohibit other forms of employment discrimination, such as age discrimination, disability discrimination, or sexual orientation discrimination.

Over time, Congress has enacted new employment discrimination laws. . . .

Because judges interpret the law as written, not as they might wish it were written, the first 10 U.S. Courts of Appeals to consider whether Title VII prohibits sexual orientation discrimination all said no. Some 30 federal judges considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.

But in the last few years, a new theory has emerged. To end-run the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes, the plaintiffs here (and, recently, two Courts of Appeals) have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all. Instead, the theory goes, discrimination because of sexual orientation always qualifies as discrimination because of sex: When a gay man is fired because he is gay, he is fired because he is attracted to men, even though a similarly situated woman would not be fired just because she is attracted to men. According to this theory, it follows that the man has been fired, at least as a literal matter, because of his sex.

Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach.

For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. But to prevail in this case with their literalist approach, the plaintiffs must *also* establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or alternatively, the plaintiffs must establish that the ordinary meaning of "discriminate *1825 because of sex"—not just the literal meaning—encompasses sexual orientation discrimination. The plaintiffs fall short on both counts.

First, courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase. . . .

Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability. A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning. . . .

Next is a critical point of emphasis in this case. The difference between literal and ordinary meaning becomes especially important when—as in this case—judges consider *phrases* in statutes. (Recall that the shorthand version of the phrase at issue here is "discriminate because of sex.") Courts must heed the ordinary meaning of the *phrase as a whole*, not just the meaning of the words in the phrase. That is because a phrase may have a more precise or confined meaning than the literal meaning of the individual words in the phrase. Examples abound. An "American flag" could literally encompass a flag made in America, but in common parlance it denotes the Stars and Stripes. A "three-pointer" could literally include a field goal in football, but in common parlance, it is a shot from behind the arc in basketball. A "cold war" could literally mean any wintertime war, but in common parlance it signifies a conflict short of open warfare. A "washing machine" could literally refer to any machine used for washing any item, but in everyday speech it means a machine for washing clothes. . . .

Justice Scalia explained the extraordinary importance of hewing to the ordinary meaning of a phrase: "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: 'a sterile literalism ... loses sight of the forest for the trees.' The full body of a text contains implications that can alter the literal meaning of individual words." A. Scalia & B. Garner, Reading Law 356 (2012) . . . .

If the usual evidence indicates that a statutory phrase bears an ordinary meaning different from the literal strung-together definitions of the individual words in the phrase, we may not ignore or gloss over that discrepancy. "Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the 'plain meaning' of the statute leads to a particular result. No theory of interpretation, including textualism itself, is premised on such an approach." 883 F.3d 100, 144, n. 7 (CA2 2018) (Lynch, J., dissenting).[4]

4 Another longstanding canon of statutory interpretation—the absurdity canon—similarly reflects the law's focus on ordinary meaning rather than literal meaning. That canon tells courts to avoid construing a statute in a way that would lead to absurd consequences. The absurdity canon, properly understood, is "an implementation of (rather than ... an exception to) the ordinary meaning rule." W. Eskridge, Interpreting Law 72 (2016). "What the rule of absurdity seeks to do is what all rules of interpretation seek to do: *make sense* of the text." A. Scalia & B. Garner, Reading Law 235 (2012).

In other words, this Court's precedents and longstanding principles of statutory interpretation teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today mistakenly does. To reiterate Justice Scalia's caution, that approach misses the forest for the trees.

*1828 A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability. For phrases as well as terms, the "linchpin of statutory interpretation is *ordinary meaning*, for that is going to be most accessible to the citizenry desirous of following the law *and* to the legislators and their staffs drafting the legal terms of the plans launched by statutes *and* to the administrators and judges implementing the statutory plan."

Bottom line: Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

Second, in light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in this case boils down to the ordinary meaning of the phrase "discriminate because of sex." Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.

On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today. . . .

Importantly, an overwhelming body of federal law reflects and reinforces the ordinary meaning and demonstrates that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. Since enacting Title VII in 1964, Congress has *never* treated sexual orientation discrimination the same as, or as a form of, sex discrimination. Instead, Congress has consistently treated sex discrimination and sexual orientation discrimination as legally distinct categories of discrimination.

Many federal statutes prohibit sex discrimination, and many federal statutes also prohibit sexual orientation discrimination. But those sexual orientation statutes expressly prohibit sexual orientation discrimination in addition to expressly prohibiting sex discrimination. *Every single one.* To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition to sex discrimination, Congress explicitly refers to sexual orientation discrimination.

That longstanding and widespread congressional practice matters. When interpreting statutes, as the Court has often said, we "usually presume differences in language" convey "differences in meaning." *Wisconsin Central*, 585 U.S., at ——,138S.Ct., at 2071 (internal quotation marks omitted). When Congress chooses distinct phrases to accomplish distinct purposes, and does so over and over again for decades, we may not lightly toss aside all of Congress's careful handiwork. As Justice Scalia explained for the Court, "it is not our function" to "treat alike subjects that different Congresses have chosen to treat differently." *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 101, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991); see *id.*, at 92, 111 S.Ct. 1138. . . .

In short, an extensive body of federal law both reflects and reinforces the widespread understanding that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. . . .

To tie it all together, the plaintiffs have only two routes to succeed here. Either they can say that literal meaning overrides ordinary meaning when the two conflict. Or they can say that the ordinary meaning of the phrase "discriminate because of sex" encompasses sexual orientation discrimination. But the first flouts long-settled principles of statutory interpretation. And the second contradicts the widespread ordinary use of the English language in America.

II

. . . . I have the greatest, and unyielding, respect for my colleagues and for their good faith. But when this Court usurps the role of Congress, as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference. The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome.

* * *

In judicially rewriting Title VII, the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand. . . . Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictate—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law. Under the Constitution and laws of the United States, this Court is the wrong body to change American law in that

way. . . . And the implications of this Court's usurpation of *1837 the legislative process will likely reverberate in unpredictable ways for years to come. . . .

Under the Constitution's separation of powers, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the Court's judgment.